

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DARCY PHIPPS,

Claimant,

v.

TRINITY TRAILER MFC, INC.,

Employer,

and

WESCO INSURANCE COMPANY,

Surety,
Defendants.

IC 2017-031418

IC 2017-029896

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed March 11, 2019

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on August 23, 2018. Claimant, Darcy Phipps, was present in person and represented by Daniel J. Luker, of Boise. Defendant Employer, Trinity Trailer MFC, Inc. (Trinity), and Defendant Surety, Wesco Insurance Company, were represented by Susan R. Veltman, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on December 18, 2018. The undersigned Commissioners are in general agreement with the outcome proposed by the Referee, but issue their own findings of fact, conclusions of law and order, in order to elaborate on causation and TTD issues.

ISSUES

The issues to be decided are:

1. Whether Claimant's work accidents of July 25 and October 2, 2017, caused the need for his cervical surgery in May 2018.
2. Claimant's entitlement to temporary disability benefits.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant alleges he suffered accidents causing cervical injury on July 25, 2017, and October 2, 2017, while working for Trinity. He asserts entitlement to medical benefits for his resulting cervical injury and surgery and temporary disability benefits during his recovery.

Defendants observe that Claimant has an extensive history of prior cervical pathology and surgery, question his credibility, and maintain that his work at Trinity did not cause his need for medical treatment. Defendants further note that Claimant's employment was terminated for cause unrelated to his industrial accidents and therefore deny his entitlement to temporary disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Joint Exhibits 1 through 36, admitted at hearing.
3. Claimant's testimony taken at hearing.
4. The post-hearing deposition testimony of Kenneth Little, M.D., taken by Claimant on September 7, 2018.

5. The post-hearing deposition testimony of Michael V. Hajjar, M.D., taken by Defendants on September 26, 2018.

All outstanding objections are overruled and motions to strike are denied.

FINDINGS OF FACT

1. Claimant was born in 1969 and is right-handed. He was 49 years old and had resided in Idaho for approximately 36 years at the time of the hearing.

2. Trinity is a semitrailer manufacturing enterprise that manufactures and repairs self-unloading semitrailers for use generally in the agricultural industry.

3. **Background.** Claimant came to Idaho at the age of 11. He left school in the eighth grade to work to help support his family. He took his GED at the age of 16. Thereafter he worked in welding, trailer repair, trailer hitch installation, and masonry. He became a journeyman mason.

4. Claimant injured his low back and on February 15, 2006, neurosurgeon Keith Little, M.D., performed bilateral L4-5 and L5-S1 hemilaminectomies and microdiscectomies. Dr. Little did not recommend fusion because of Claimant's young age. Claimant improved post-surgery but subsequently fell and thereafter experienced increased back and leg pain.

5. In 2006, Claimant was convicted of issuing a check without funds to get his dog out of a kennel. He was incarcerated for a time and subsequently released.

6. On September 25, 2007, Claimant applied for Social Security disability benefits alleging he became disabled February 13, 2006.

7. On May 1, 2008, Dr. Little performed a thoracic spinal cord stimulator placement to manage Claimant's ongoing low back pain. The spinal cord stimulator was successful and largely eliminated Claimant's back pain. He increased his activity level only to discover later

that he had worsened his back condition by engaging in overly demanding physical activities because he could not perceive back pain while the stimulator was operating.

8. On October 20, 2008, Claimant was found eligible for Social Security disability benefits with disability onset as of February 13, 2006.

9. Claimant suffered persisting cervical pain with radicular symptoms “for a long time” and on July 13, 2009, Dr. Little performed C4-C7 anterior cervical discectomy and fusion. Transcript, p. 50, ll. 24-25.

10. Claimant’s low back pain worsened and on November 16, 2009, Dr. Little performed L4-S1 decompression and fusion.

11. On July 21, 2010, Dr. Little examined Claimant and recorded that he had “dramatically improved,” had no neurologic symptoms, and was off all prescription pain medications. Exhibit 3, p. 28.

12. In approximately 2013, Claimant returned to work. He began working for Cobalt Truck Equipment where he installed tool cabinets in truck beds and placed truck beds on trucks. He testified his back was not a problem. Claimant next worked for Goodyear Tire where his duties included oil changes, flat tire repairs, and balancing and installing tires. He was later promoted to working on engines. Claimant’s back became problematic while working at Goodyear Tire and he noted sciatic pain from his buttock to his right big toe. He was treated by Marvin Alviso, M.D., with muscle relaxers and pain medication, including hydrocodone, and was thereby able to continue working.

13. On July 4, 2014, Claimant underwent a cervical CT scan that was read by radiologist Nicolas Lazzaro, M.D., to show: “C3-4: Facet and uncovertebral joint arthropathy. Mild bilateral neural foraminal stenosis. Spinal canal appears patent. 2. Intact anterior

fusion hardware C4-C7. There appears to be incomplete osseous fusions C4-C5 and C6-C7. 3. Multilevel mild-to-moderate degenerative changes as described above.” Exhibit 7, pp. 3-4.

14. In 2016, Claimant worked for a temporary employment agency that placed him with Trinity. After approximately four months, in July 2016, Trinity hired Claimant directly. His duties required inspecting all semitrailer operating systems including brakes, ABS, hydraulic, and air systems, repairing suspensions, and welding frame cracks. He lifted 50 pounds regularly and was up and down ladders both inside and outside the trailers. He used 3/8th-inch to full one-inch impact wrenches as well as plasma cutters, welders, and torches. He worked regularly in awkward positions to access hydraulic control systems and other items on trailers.

15. On April 25, 2017, Claimant presented to Andrew Marsh, M.D., for pain management. Dr. Marsh recorded Claimant’s complaints of cervical, lumbar, and right leg pain and continued him on hydrocodone.

16. On July 7, 2017, Claimant presented again to Dr. Marsh who recorded Claimant’s lumbar and lower extremity pain with positive right straight leg raise testing, and cervical pain. Dr. Marsh observed Claimant suffered from chronic pain syndrome and “feels he is getting progressively worse.” Exhibit 8, p. 3. Dr. Marsh did not record any cervical radicular symptoms at that time.

17. On July 24, 2017, Trinity sent Claimant to Quincy, Washington to update five semitrailers previously delivered. As to each trailer he was to remove a battery powered landing leg (for return to the supplier), install a manual landing leg, and install a ladder and catwalk on the front. Claimant was allotted one day to drive to Quincy, three days to complete all work on the five trailers, and one day to drive back to Boise. The trailers were exposed to the sun in a

gravel parking lot made of crushed black lava rock that absorbed the heat of the sunshine. Claimant estimated the daytime temperature to be approximately 100 degrees.

18. **Industrial accidents and treatment.** On July 25, 2017, Claimant welded brackets and ramps into place in preparation to install a catwalk on a semitrailer in Quincy. He wore a dark hood while welding. Claimant drilled bolt holes by pulling down on the catwalk with his left arm while pushing up with the drill in his right hand. He was using a dull drill bit thus requiring more force to complete the drilling. He testified that when he was drilling “I just got that pinch in my neck” and began experiencing sharp burning shoulder and neck pain. Transcript, p. 42, ll. 15-16. Claimant worked with the pain the next two days. He avoided drilling in the precise position that had started his neck and shoulder symptoms and was able to complete the installations on all of the trailers in spite of his neck and shoulder pain.

19. The 100-degree temperatures continued and by the conclusion of the trailer work on Thursday July 27, 2017, Claimant felt very sick. Upon returning to Boise he was nauseated and vomiting and believed he had heat stroke from working in the sun. He also believed he had a pulled muscle and applied ice packs to his shoulder. Claimant told his supervisor, Jared, that he was sick, that he had got really sick in Quincy and needed to go home for the rest of the day. Claimant did not then report his shoulder or neck pain to his supervisor.

20. When Claimant returned to work approximately three days later, he had continued neck pain and “I talked to Jared about it, explained to him, yeah, I think I pulled something in my neck really bad.” Transcript, p. 46, l. 25 through p. 47, l. 2. Claimant asked his supervisor for a week off of work to try to resolve his neck pain. After the week off, Claimant was required to obtain a doctor’s note before Trinity allowed him to return to work. After obtaining a doctor’s note he returned to work for approximately one week, but his neck pain worsened.

21. On August 21, 2017, Claimant worked until the soreness “got to the point where I just was unable to carry on” and told Jared that he thought “it’s worse than a pulled muscle.” Transcript, p, 48, ll. 15-19. Jared sent Claimant to the emergency room where he was examined by Nancy Tate, PA, who recorded: “He presents [to] the emergency department today with complaint of neck pain and left arm weakness. His acute exacerbation of neck pain started 3 weeks ago while on his job as a semi-trailer repair specialist. He was pushing upward on a metal object while forcefully moving machinery down at the same time when he experienced abrupt onset severe pain in his neck, lower C-spine.” Exhibit 10, p. 3. She recorded Claimant was “obviously in pain” with “decreased sensory L upper extremity with 2/5 strength in grip strength, wrist and elbow flexion/extension.” Cervical CT scan without contrast taken on August 21, 2017, read by Kimball L. Christianson, M.D., revealed “left foraminal disc protrusion at C3-C4 resulting in a severe left lateral recess and left neural foraminal stenosis.” Exhibit 10, pp. 3, 18-19. Claimant was diagnosed with cervical radiculopathy and referred to neurosurgeon Kenneth Little, M.D.

22. On August 23, 2017, Claimant presented to Dr. Little’s office where Elizabeth McDowell, PA-C, recorded:

This patient presents with report of worsening neck pain after lifting injury or leaning forward at the same time while standing on a ladder. He currently reports neck pain into the left lateral aspect extending into the top of his left shoulder and sometimes into his tricep. He reported numbness and tingling along the left top of his shoulder. He reports weakness into his left arm.

....

CT of the cervical spine without contrast was performed at St. Alphonsus on August 21, 2017. At C3-C4, there is left foraminal disk protrusion resulting in severe left lateral recess and left foraminal stenosis.

Exhibit 14, pp. 1, 3.

23. Claimant was treated with anti-inflammatory medications and physical therapy. He was placed on light duty work for several weeks. Trinity assisted Claimant with paperwork for FMLA and provided light duty work which Claimant performed.

24. On October 2, 2017, Claimant returned to full-duty work at Trinity. He began working with a buffer—an eight-inch grinder with a sanding belt—buffing off thick plastic welds in a trailer. He later testified:

A. I was buffing below ... on my knees ... when the weld—I believe it caught in between the two pieces of plastic, the one coming down and the floor. I think it caught in that seam and the torque on these things were pretty—pretty healthy. If they got away from you you got some troubles. This one caught it just kind of ran up—you know, kind of this direction, which reinjured inside me.

Q. So, you say ran up. What did it actually physically do?

A. It—it caught on the plastic and I call it—we call it ran up. It just kind of—with that much torque it just kind of takes off up the side of the trailer and go with it.

Transcript, p. 57, l. 21 through p. 58, l. 10. Claimant testified he experienced immediate left shoulder and neck pain and also pain and numbness on the left side of his face. His symptoms were similar to those he noted in July but more severe. He also noted left arm throbbing and left hand weakness. Claimant immediately reported the incident to his supervisor and thereafter reported to occupational medicine and was encouraged to follow up with Dr. Little. A breathalyzer test administered that day revealed an alcohol concentration of 0.06%—in violation of Trinity’s drug policy. Trinity terminated Claimant’s employment for violation of its drug policy.

25. On November 6, 2017, Claimant presented to Dr. Little’s office who recorded: “He reports returning to work on light duty and did well until he was returned to full duty. He

states he was working on a grinder and it jerked his neck and he felt immediate pain and increased left arm symptoms.” Exhibit 14, p. 5.

26. On April 2, 2018, Claimant underwent another cervical CT scan which showed:

C3-4: Mild diffuse bulge/ridge mildly indents the thecal sac. Small left and minimal right uncinata osteophytes are unchanged with encroachment on the left lateral recess and indenting the thecal sac. There is a slight increase in moderate right and mild to moderate left bony foraminal narrowing with additional high density curvilinear area along the left intraforaminal disc margin that may represent intraforaminal disc extrusion. Mild canal narrowing.

Exhibit 14, p. 14.

27. On May 10, 2018, Dr. Little performed a C3-C4 anterior cervical decompression and fusion.

28. **Condition at the time of hearing.** At the time of hearing on August 23, 2018, Claimant continued to recuperate post-cervical surgery. He testified that he continued to experience some cervical, shoulder, and left arm symptoms; however, his radicular pain and facial and neck pain had noticeably improved and he was starting to regain strength in his left arm. He was hopeful he would continue to improve post-surgery.

29. **Credibility.** Defendants note Claimant’s prior incarceration and longstanding alcohol use, and question his veracity and motives. However, having observed Claimant at hearing, and carefully compared his testimony with other evidence in the record, the Referee found that Claimant is a credible witness. The Commission finds no reason to disturb the Referee’s findings and observations on Claimant’s presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

30. 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).

31. **Causation.** The principal issue is whether the condition for which Claimant seeks benefits was caused by the industrial accident. Defendants admitted in their Answers that Claimant suffered incidents at work on July 25, 2017, and on October 2, 2017. However, Defendants vigorously dispute that either or both of these accidents caused the personal injury for which Claimant sought treatment, including cervical surgery on May 10, 2018. Claimant maintains that his July 25, and October 2, 2017 accidents caused C3-4 disc protrusion resulting in his need for cervical surgery.

32. Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an “employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease.” Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus claims for medical treatment must be supported by medical evidence establishing causation. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show

a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). A pre-existing disease or infirmity of the employee does not preclude a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

33. In the present case two physicians have opined regarding the causation of Claimant's cervical and upper extremity complaints prompting his 2018 cervical surgery. Their opinions are examined below.

34. Dr. Hajjar. Dr. Hajjar is a board certified neurosurgeon. He examined Claimant, reviewed his medical records, and opined his work accidents did not cause his need for cervical surgery. At the time of his deposition, Dr. Hajjar did not recall the specific work accident Claimant sustained but recalled it was not a severe or high impact mechanism of injury. Dr. Hajjar opined that no injury occurred to Claimant's spine in July or October 2017, and that his cervical condition was the result of degenerative processes.

35. Dr. Hajjar acknowledged that the only pre-accident note referencing cervical radicular pain is from nurse practitioner, Cory Huffine, on April 25, 2017, who recorded complaints of radicular pain. Dr. Hajjar acknowledged that reference in his report to an August 21, 2007 emergency room note about right sided neck pain was a typographical error and actually referred to an August 21, 2017 emergency room note about left sided neck pain. Hajjar Deposition, pp. 20-21.

36. Dr. Hajjar noted that Claimant suffered pre-existing degeneration of the cervical spine which led to his 2009 C4-7 fusion. He then explained:

When patients get a surgery like that, one of the downsides of the surgery is that they can develop accelerated wear and tear, spondylosis, arthritis at the levels adjacent to and usually above this surgery because of the lever effect that the fusion places on that adjacent segment. And it leads to quicker wear and tear.

And in my opinion, as has been stated in this report, the findings at C3-4 are much more likely related to that wear and tear and degeneration over a course of years versus any specific event, trauma, accident or any other condition.

Hajjar Deposition, p. 13, l. 21 through p. 14, l. 6.

37. Dr. Hajjar reviewed the actual 2017 and 2018 cervical scans and testified:

Q. (by Ms. Veltman) And if the medical records reflect that Dr. Little concluded that the CT findings were more acute and recent than would be explained by gradual progression of degenerative changes alone, do you agree or disagree [with] that conclusion?

A. I disagree with that statement. The scan that was referenced in 2018 is a similar but more detailed study than other scans that were performed in the prior year or years and simply demonstrated an ongoing progression of the same disease without any new or acute findings.

Hajjar Deposition, p. 14, l. 24 through p. 15, l. 9.

38. Dr. Little. Dr. Little is a board certified neurosurgeon and Claimant's treating surgeon who has performed two lumbar and two cervical surgeries on Claimant.

39. Dr. Little testified that he always looks at the actual films of the imaging scan because:

I have more knowledge of the patient's symptoms and more knowledge of what might be relevant on an imaging study than the radiologist has. They're simply looking at the imaging study and just describing what they see, some of which may seem clinically relevant, but if they don't know the patient's symptoms precisely, they can't say for sure. And there are subtle findings ... on imaging studies ... that may escape the radiologist's awareness. But because I know what the patient's symptoms are, and I know what nerve roots are likely to be involved, I typically pay more attention to those areas.

Little Deposition, p. 27, l. 19 through p. 28, l. 7.

40. On July 4, 2014, Claimant underwent a cervical CT scan that was read by radiologist Nicolas Lazzaro, M.D., to show: “C3-4: Facet and uncovertebral joint arthropathy. Mild bilateral neural foraminal stenosis. Spinal canal appears patent. 2. Intact anterior fusion hardware C4-C7. There appears to be incomplete osseous fusions C4-C5 and C6-C7. 3. Multilevel mild-to-moderate degenerative changes as described above.” Exhibit 7, pp. 3-4.

41. After reviewing Claimant’s July 2014 cervical CT scan report, Dr. Little testified:

A. So at C3-4 the radiologist commented there’s facet and uncovertebral joint arthropathy, meaning he had arthritis and some degenerative change there. Mild bilateral neural foraminal stenosis and the spinal canal appears patent.

Q. So what does that mean by “patent”?

A. It means open without impingement on any of the neurologic structures.

Little Deposition, p. 21, l. 24 through p. 22, l. 6.

42. Having then compared Claimant’s August 21, 2017 and April 2, 2018, cervical scans, Dr. Little testified:

So at C3-4—he had left C3-4 foraminal stenosis, and it looked to me, comparing his prior CAT scan to the one from March, there’s progression of the foraminal stenosis and there, to my review, appeared to be, you know, the high-density curvilinear area along the left intraforaminal disc margin that may represent intraforaminal disc extrusion. So it could represent that it had become incrementally worse since—the pathoanatomy will become incrementally worse compared to the CAT scan done prior.

Little Deposition, p. 28, ll. 16-25.

43. Dr. Little opined regarding the cause of cervical stenosis: “Q. ... In this particular case, what did you conclude was the cause of that stenosis? A. A disc protrusion.”

Little Deposition, p. 19, ll. 21-23.

44. Dr. Little testified Claimant’s symptoms and CT scan confirmed his conclusions:

[W]e had him improved, after he had been in to see me, with the steroids, the anti-inflammatory, physical therapy, and that he had gone back to work. And then

with that incident with the grinder, where it jerked his arm, symptoms came back again. So, clinically, it was important because his pain started up. But as far as an explanation for it, it appeared on his CAT scan, though it did actually get worse anatomically as well. So the two went together, the pattern of his symptoms and the worsening in the CAT scan.

Little Deposition, p. 29, ll. 5-14.

45. Dr. Little testified that he focused on the change of Claimant's symptoms: "And what had changed was left-sided neck pain and some arm pain as well. But looking to see what's changed since the last imaging study I had, C3-4 appeared to be worse, which is why I called out, with the attention I did in that note, as to the radiologist, and so his attributing—his flareup and pain to that being the source of his symptoms." Little Deposition, p. 22, ll. 15-21.

46. Dr. Little testified that correlating symptoms with imaging studies is most relevant in determining the intervention necessary. He testified:

"So in terms of when the findings at C3-4, visible later, became relevant, in my mind, it was with that ladder incident. So when precisely did that imaging finding occur, in my mind, is somewhat unimportant, because it's really the symptoms that drive whether or not it's a problem; it's the symptoms that drive what interventions you need to do to help that person. It's the symptoms that drive their ability to function, not the imaging findings. The imaging findings just help you understand it."

Little Deposition, p. 23, ll. 10-12. While this statement may leave some doubt as to whether Dr. Little believes the ladder incident caused the anatomic change seen on the 2017 CT, other portions of Dr. Little's testimony make it clear that he believes that the additional injury identified at C3-C4 is causally related to one or both of the subject claims. Little Deposition, p. 34, ll. 4-14; p. 28, ll. 14 through p. 29, ll. 14, ; p. 30, ll. 23 through p. 31, ll. 24; p. 39, ll. 10-15; p. 42, ll. 24 through p. 43, ll. 12.

47. Dr. Little explained that the precise word describing Claimant's incident with the grinder on October 2, 2017 was not significant:

Q. (by Mr. Luker) So at the beginning of Ms. Veltman's cross here, she asked you about the word in your report regarding the grinding, a jerking motion. And you'd given a response about how that kind of helps to inform about the particular time. Does the work "jerking" itself, was that significant or is the incident significant?

A. I have trouble finding a distinction between the two things.

Q. Okay.

A. It seem to me, based on his description of what happened, that he wasn't just exerting himself in a smooth predictable way, there was a sudden jolt which—which his body wasn't prepared for that seemed to be the causing onset of his symptoms. And so that, in my mind, very well could explain why the disc got worse, why the symptoms came back.

Q. So if Darcy didn't use the word "jerk" in describing the event, but continued to talk about something unexpected, like the machine getting away from him or running away from him, those would be consistent?

A. Yeah. Yes.

Little Deposition, p. 40, ll. 3-24.

48. Dr. Little concluded it was Claimant's "work that created the circumstances that led to surgery." Little Deposition, p. 31, ll. 18-19.

49. Weighing the expert medical opinions. Dr. Little and radiologist Kimball Christensen, M.D., both opined the C3-4 disc protrusion identified on the August 21, 2017 cervical CT caused severe stenosis. When questioned about his report, Dr. Hajjar agreed that his "summation doesn't include any discussion or reference of a disk protrusion" at C3-4. Hajjar Deposition, p. 23, ll. 11-13. Dr. Hajjar further agreed that he diagnosed C3-4 spondylosis—which he defined as arthritis of the spine—and offered no discussion of cervical disk protrusion. Hajjar Deposition, p. 27, ll. 21-23.

50. In his report, Dr. Hajjar opined that many barriers would preclude a good surgical outcome and that in the best circumstances it was debatable whether or not surgery would help

Claimant. However, when presented with Claimant's report of improvement after his 2018 cervical fusion, Dr. Hajjar acknowledged that resolution of at least some of Claimant's pre-surgical radicular symptoms and arm weakness indicated a successful surgery. Hajjar Deposition, pp. 31-32.

51. Dr. Hajjar testified regarding the causation analysis summarized in his report as follows:

Q. (by Mr. Luker) So, it says from a causation standpoint this cause would be much more likely to be work related if the original condition treated in the last decade included the C4-C7 surgery where it's from an occupational injury.

So, I guess I'm a little confused about this statement in the middle of a paragraph trying to decide whether the July 2017 and October 2017 events caused the need for the surgery. And I guess I'm trying to figure that out.

A. The reason for that statement is something that is evaluated often in claims that end up leading to a specific surgery like Mr. Phipps underwent about a decade ago, when people undergo those surgeries they have at some point in the future the risk for accelerated wear and tear at the adjacent segment.

What I was saying with that statement was that if Mr. Phipps is fine for eight years and then shows up eight years later with arthritis at C3-4 that he didn't otherwise have, you would attribute it from a Work Comp standpoint to the original 2008 injury. And that additional treatment that Dr. Little would be providing now would be related to the 2008 or 2009 trauma.

This is a debatable thing in the Work Comp arena. And it's something that I've spent some time researching, including having discussions with multiple attorneys and others on both sides of these cases. And my conclusion mainly from surety terms is that, yeah, that is still on the Work Comp event even though the patient was fine for years and the new pathology is ten years later.

And so, that's why I'm making that statement is that in my opinion the current cervical spondylosis is the cause of the current treatment. That spondylosis was started and accelerated by an event that started ten years ago, including the surgery. But that surgery was not related to Work Comp.

Hajjar Deposition, p. 29, l. 12 through p. 30, l. 21.

52. Therefore, had the 2009 surgery resulted from a compensable accident, Claimant's current difficulties, which Dr. Hajjar attributes to the 2009 surgery, would be a compensable component of such remote claim. However, this analysis fails to consider whether the subject accidents, or either of them, caused some additional injury to Claimant's cervical spine.

53. Dr. Hajjar may well be correct that Claimant's 2009 C4-7 fusion accelerated the wear on his C3-4 disc and made him more vulnerable to C3-4 disc herniation. However, "An employer takes an employee as it finds him or her; a pre-existing infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

54. It is undisputed that Claimant had chronic cervical symptoms after his 2009 C4-7 fusion. However, he had returned to rigorous full-time work and was functioning at a high level before July 25, 2017. He suffered an abrupt and dramatic worsening of cervical symptoms, including new facial and radicular cervical symptoms immediately after his July 25 and October 2, 2017 work accidents. Medical records of Claimant's grip strength and other upper extremity strength and reflex testing corroborate his reports of this abrupt functional decline after his work accidents.

55. Dr. Hajjar's opinion virtually ignores the C3-4 disc extrusion documented on Claimant's August 21, 2017 cervical CT scan. In contrast, Dr. Little's opinion is well explained, consistent with the evidence as a whole, and thus persuasive.

56. Claimant has proven his 2017 industrial accidents caused C3-4 cervical injuries and his need for reasonable medical care therefore, including 2018 cervical surgery by Dr. Little.

57. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

However, an injured worker otherwise entitled to temporary disability benefits may lose such benefits if he refuses suitable work or is unable to return to work for the employer due to the termination of his employment for cause, rather than for any limitation from his industrial injury.

Idaho Code § 72-403, Griffin v. Extreme RV, 2008 WL 5426353 (Dec. 5, 2008), Smith v. Champion Building Products, 1994 IIC 1511 (Dec. 14, 1994).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 18

58. In the present case, Claimant requests temporary disability benefits commencing October 2, 2017, and continuing during his time of recovery from his 2018 cervical surgery. Defendants counter that even if Claimant's need for his 2018 cervical surgery was related to his industrial accidents; he was terminated by Trinity on October 2, 2017, for his violation of Trinity's drug policy and thus is not entitled to temporary disability benefits.

59. The record establishes that Claimant's employment with Trinity was terminated and that Trinity had justification to terminate his employment for cause not related to his industrial accidents; specifically, because his blood alcohol level on October 2, 2017, was 0.06%, in violation of Trinity's drug policy. However, on October 2, 2017, Jacob Kammer, M.D., recommended a no work capacity. Exhibit 12, p. 3. Dr. Little later indicated that due to Claimant's medical condition he would be prevented from returning to employment for 12 months or more from the time of his October 2, 2017 industrial accident. Exhibit 14, p. 9. Thus Claimant was still within the period of recovery from his industrial accidents and unable to work for Trinity or any other potential employer because, as of the date of hearing, he had not been released to work in any capacity by Dr. Little, his treating surgeon.

60. Claimant has proven he is entitled to total temporary disability benefits from October 2, 2017, through the date of hearing and continuing until those benefits may be curtailed per *Maleug, supra*, or Claimant reaches medical stability.

CONCLUSIONS OF LAW

1. Claimant has proven his 2017 industrial accidents caused C3-4 cervical injuries and his need for reasonable medical care therefore, including 2018 cervical surgery by Dr. Little.

2. Claimant has proven he is entitled to total temporary disability benefits from October 2, 2017, through the date of hearing and continuing until those benefits may be curtailed per *Maleug, supra*, or Claimant reaches medical stability.

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

DATED this ___11TH___ day of ___March___, 2019.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
Aaron White, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11TH day of March , 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DANIEL J LUKER
2537 W STATE STREET SUITE 130
BOISE ID 83702

SUSAN R VELTMAN
1703 W HILL ROAD
BOISE ID 83702

_____/s/_____
