

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUSTIN M. BARTLETT,

Claimant,

v.

KNIFE RIVER CORPORATION, Employer,
and LIBERTY INSURANCE
CORPORATION, Surety,

and

TITANIUM EXCAVATION, L.L.C.,
Employer, and IDAHO STATE INSURANCE
FUND, Surety,

Defendants.

IC 2017-026840

IC 2018-021618

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

Filed October 18, 2019

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise on January 15, 2019. Matthew Vook represented Claimant, Justin M. Bartlett (“Claimant”), who was present in person. Judith Atkinson represented Defendants, Knife River Corporation, Employer (“Knife River”), and Liberty Insurance Corporation, Surety (“Liberty”). Scott R. Hall represented Defendants, Titanium Excavation, L.L.C., Employer (“Titanium”), and Idaho State Insurance Fund, Surety (SIF). The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on August 26, 2019. The undersigned Commissioners have chosen not to adopt the Referee’s recommendation and hereby issue their own findings of fact, conclusions of law, and order.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

ISSUES

The issues to be decided by the Commission as the result of the hearing are as follows:

1. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care; and
 - b. Temporary partial and/or temporary total disability benefits; and
2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an industrial accident while working for Knife River on August 3, 2016 when driving a front-end loader; he injured his lumbar spine. He further alleges that he subsequently sustained three additional aggravations of his back injury while in the employment of Knife River through 2017.

Claimant became employed with Titanium in or about March 2018. He alleges that on June 7, 2018 he suffered another industrial accident that aggravated his back condition while working for Titanium.

Claimant acknowledges the existence of pre-existing conditions in his back that contribute to the necessity of lumbar fusion surgery. Nevertheless, he contends that the industrial accidents permanently accelerated or exacerbated these conditions sufficiently to be industrially-related, pursuant to *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978) and *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983). Thus, Claimant asserts that the injuries in question are compensable and that the proposed surgery at L4,5 should be a covered workers' compensation benefit.

In addition to coverage of lumbar fusion surgery, Claimant seeks temporary disability benefits since June 7, 2018, when Dr. Montalbano provided work restrictions.

Finally, Claimant alleges that he is entitled to attorney fees for unreasonable denial of benefits by Knife River and Liberty pursuant to Idaho Code § 72-804 because they allegedly did not provide Dr. Hajjar, their IME physician, with all the necessary information to develop a fully-informed opinion. Claimant thus argues that it was unreasonable for Knife River and Liberty to rely upon Dr. Hajjar's opinion in denying benefits.

Arguing that Claimant's pre-existing, congenital back condition predisposed him to the need for lumbar surgery, Knife River and Liberty deny that any of the alleged incidents that occurred while Claimant was in Knife River's employment permanent aggravated or accelerated those conditions. They rely upon the opinion of Dr. Hajjar for their position that Claimant reached MMI when Dr. Frizzell declared him medically stable in an IME, thus they deny liability for medical benefits or temporary disability benefits thereafter. They further allege that they relied reasonably on medical evidence in terminating medical and temporary disability benefits to Claimant, thus they are not liable for attorney fees.

Admitting that Claimant has a documented medical need for lumbar fusion surgery relating to pre-existing conditions, Titanium and SIF deny that the accident of June 6, 2018 had any role in permanently exacerbating or accelerating Claimant's congenital lumbar spine condition. Titanium and SIF argue that Claimant's condition is related to Claimant's first accident with Knife River and his preexisting pars defect. After taking Claimant's deposition, Titanium and SIF granted Claimant medical coverage and temporary disability benefits. Thus, although they aver that they are not liable for benefits, they reasonably provided them on an interim basis. Finally, Titanium and SIF argue that they are entitled to reimbursement from Knife River and Liberty for the benefits they have paid to Claimant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant admitted at hearing;
2. Testimony of Caleb Gentry admitted at hearing;
3. Joint Exhibits A through CC,¹ admitted at the hearing;
4. Affidavit of R. David Bauer, M.D. (stipulated in lieu of deposition); and
5. The post-hearing deposition transcripts of the following medical experts:
 - a. Paul J. Montalbano, M.D.; and
 - b. Michael V. Hajjar, M.D.

EVIDENTIARY RULINGS

All unresolved evidentiary objections from the hearing or post-hearing depositions are overruled, with the exception of the objection that counsel for Knife River and Liberty stated at page 28, lines 8-9, of Dr. Montalbano's deposition, which is sustained. Dr. Montalbano's answer at page 28, lines 12-13, is stricken, as the answer is speculative and his opinion stated therein was not previously disclosed prior to the Rule X deadline.

FINDINGS OF FACT

1. **Claimant's Background and Education.** Claimant was born on January 24, 1988 and was 30 years old at the time of hearing. Tr., 19:9-14. At the time of hearing, he resided in Emmett, Idaho and had done so for seven years. *Id.* at 15-19. He was unmarried, having been divorced approximately two years before the hearing. *Id.* at 20-23. He had two children, and he shared joint custody for them with his former wife. *Id.* at 20:2-8.

¹ The admitted exhibits include the pre-hearing deposition transcript of Claimant as Exhibit T.

2. Claimant grew up in John Day, Oregon, where he attended Grant Union High School. Tr., 11-21. He graduated from high school in 2006. *Id.* at 22-25.

3. Claimant did not attend any post-secondary education following high school. *Id.* at 21:1-3.

4. Prior to any of the alleged industrial injuries occurring, Claimant had a history of being involved in physically strenuous and active pastimes and hobbies, including, but not limited to, working out, weightlifting, hunting, fishing, camping, and hiking. *Id.* at 88:1-12.

5. **Prior Work History.** Claimant's first job after high school was with the Forest Service as a firefighter, a heavy duty job. *Id.* at 21:11-19. He next went to work for Les Schwab Tire Center in Bend, Oregon, where he worked in the warehouse loading tires and other products for shipment to stores. This position included heavy lifting. *Id.* at 21:20-22:19. Claimant then worked as a skidder operator for Cherry Valley Logging in the state of Washington near Seattle. This position generally did not involve heavy lifting. *Id.* at 22:20-23:9. Claimant's next job was as a pipe layer with Owyhee Construction in Twin Falls, Idaho. This job involved heavy lifting. *Id.* at 23:10-24:2. Claimant then returned to his hometown of John Day, Oregon, as a utility worker with Canyon City. *Id.* at 24:5-15.

6. **Subject Employment.** Thereafter, Claimant worked for Knife River, based in Boise, first as a general laborer/pipe layer and then as an equipment operator. He began work at Knife River in or about 2011 and continued until 2017. He next worked for Titanium, also based in Boise, briefly for a few months in 2018, also as an equipment operator. *Id.* at 24:16-25:14.

7. Claimant's position as an equipment operator at Knife River involved operating/driving various kinds of construction equipment, including an excavator, a skidsteer, and a front-end loader. He also had occasion to drive road haul trucks and dump trucks and to

operate rollers, depending upon the construction project. His main equipment operation was that of a front-end loader associated with a pipe crew. Tr., 27:13-21.

8. Claimant described his typical workday operating a front-end loader with a crew for Knife River in pertinent part as follows:

So, once you get to a job initially you – as a loader operator you’re in charge of getting the job laid out with all the materials. Like you would control all your trucks coming in and out with material for the job. You would like put out all the pipe and all the stuff you needed out for the day. You would haul off material, load trucks in and out all day. I mean you were constantly busy in that loader. You were in the loader and out [of] the loader trying to help with what was going on on the ground. You were second in command, basically, to the foreman.

Id. at 27:25-28:10.

9. Claimant’s start date at Titanium was March 26, 2018. *Id.* at 74:15-16. At Titanium, Claimant was an excavator operator, a “back hoe guy.” He worked in the laying of water line and his main task was to compact the ditch, using the back hoe, after the laying of the water pipe. “So, once you dig it up, you put all your pipe and all your material in, you’re the guy behind everyone running the machine compacting the ditch to make it pack – like compaction.” *Id.* at 74:21-75:2. This job did not ordinarily require a lot of heavy lifting or physical work. *Id.* at 75:5-8.

10. After the industrial accident at Titanium on June 7, 2018, Claimant did not work for Titanium again. *Id.* at 84:25-85:2.

11. After leaving Titanium, Claimant was not employed in any capacity through the date of the hearing. *Id.* at 25:15-17.

12. **Prior Medical Issues.** Before working for Knife River in 2011, Claimant did not have medical problems with his back that required him to seek medical attention. *Id.* at 18-22. Furthermore, he did not have any specific low back pain, or radicular pain down either leg,

before working for Knife River, or prior to the first incident in 2016 while working for Knife River. Tr., 25:23-26:13.

13. Medical documents in the record do not show that Claimant received treatment for his lower back prior to the industrial accidents. The most serious medical issue for which Claimant received treatment prior to his workers' compensation claims was treatment at St. Luke's Magic Valley Regional Medical Center for a stab wound that he suffered in Twin Falls in or about January 2011. The treatment for the stabbing injury did not involve or implicate Claimant's lower back and he fully recovered from the incident. Ex. G; Ex. T:16 (60:6-61:18).

14. **Industrial Accidents and Related Events.** *Knife River Incidents.* On August 3, 2016, Claimant was on a construction project for Knife River in North Dakota. He was performing his customary duties as a front-end loader operator. He was carrying two 48 inch RCP reinforced concrete pipes on the front loader. His route took him two miles with the pipes and then returning, empty, to retrieve more pipes. The loader had a maximum speed of 21 miles per hour. Claimant was trying to work as fast as possible and thus was driving the loader as fast as possible. There was a sharp bend on a corner on the route after which Claimant encountered a deep rut in the clay roadbed left by heavy equipment. Claimant hit the rut with his loader and the forks and the pipe jammed into the ground, meanwhile the back end of the loader came up in the air and then slammed back to the ground. During the incident, Claimant lifted up from his seat, hit the roof of the loader with his head (while wearing his hard hat) and then slammed back down again on the seat. (The seat was insulated with an air cushion that was partially deflated at the time because it was defective.) He continued to operate the front-end loader to move the pipe to the unloading station, but halfway there he began to feel pain in his back and an inability almost to push the pedals on the front-end loader. Within an hour of the incident he could barely move

and had difficulty getting out of the front-end loader. He was feeling “really bad leg pain, back pain.” He then notified his supervisor Jason that he had hurt his back. Tr., 31:14-37:11; Ex. T:5 (Claimant Dep.) (15:10-17:7).

15. Claimant did not seek medical treatment following the incident on August 3, 2016, nor did his supervisor or anyone else associated with Knife River instruct him to do so. Thereafter he was off work for a couple of weeks due to the regular work schedule; the job in North Dakota was finished. Claimant returned home and resumed work in downtown Boise, where Knife River was constructing a water line, a couple of weeks later. Claimant resumed his regular duties as a front-end loader operator, but this particular job was small so he was also required to work more on the ground laying pipe and shoveling. Tr., 37:19-38:21. Claimant recalled that after three weeks the pain subsided somewhat, and he was slowly able to walk better. Ex. V:7 (L. 275-281) (Claimant Interview).

16. A few months after returning to work, in or about November 2016, Claimant sustained an aggravation of his back condition. He was four feet deep in a ditch shoveling. In the midst of performing this task, he stopped and felt his back seize up and he was unable to move. He reported the incident to his supervisor, Jason, who in turn reported the matter to a safety coordinator, Gary. They advised Claimant to take a week off from work to recover. He did not seek medical attention nor did he receive any advice to do so. His wife picked him up from work because he could not drive. Tr., 39:2-40:18; Ex. V:8-10 (L. 291-374).

17. Claimant ended up staying home three to four weeks from work, during which time Knife River continued to pay his wages. He recalled that Knife River paid him “just 40 hours a week to stay home.” Tr., 42:11-43:16.

18. Claimant sought treatment on his own for his back pain on December 16, 2016 at Emmett Family Medicine, where PA Joseph Petrie examined him. Claimant complained of a “knot in back” that had been ongoing for four weeks and that had started after shoveling at work. The pain radiated from his lower back down into his left leg behind the knee. Mr. Petrie prescribed Prednisone, Tizanidine, Tramadol, and Acetaminophen and restricted Claimant from lifting over 10 pounds, no repetitive movements through the spine, and no prolonged standing or sitting for two to four weeks. Claimant recalled that Mr. Petrie discussed obtaining an MRI, but did not follow through on that plan. Ex. H:1-5; Tr., 40:13-42:10.

19. Claimant recalled that he returned to work approximately four to five weeks after the November 2016 incident. His back was “feeling just a little bit better.” He resumed working with his previous supervisor, Jason, at a construction site in Eagle in or about January 2017.² He worked as front-end loader operator on this job, his normal position, moving manholes, pipe, and dirt. Tr., 43:17-45:12.

20. Sometime “in the spring” of 2017, or a “little after spring,” Claimant and a coworker were cleaning out a manhole cover that was filled with dirt. This operation required them to lower a bucket 25 feet into the hole, fill it with dirt, and return it to the surface to dispose of it. On this occasion, Claimant was on the surface lowering and raising the bucket. In the course of lifting the bucket, which weighed approximately 100 pounds when filled, approximately 20 times. Claimant was bent over the entire time during this process. Once they got the manhole almost completely cleaned out, he tried to stand up but “couldn’t even move. My back was like – it was like I was paralyzed. I couldn’t walk.” *Id.* at 45:14-47:23.

² Claimant demonstrated an imprecise ability to recall specific dates and times frames throughout the hearing. Resuming work four to five weeks after the November incident would have put him, at the latest, at returning to work in late December 2016, yet he also testified that he resumed work in January 2017.

21. Claimant informed his supervisor Jason that his “back was messed up” and he “couldn’t walk again.” Jason sent Claimant home and Claimant was off work again for a few weeks to a month. He did not seek medical attention or see a doctor. Tr., 48:24-49:25.

22. Although they did not send him to a doctor, the construction superintendant bought Claimant a back brace to wear while at work when he returned to the job. *Id.* at 50:16-23.

23. When Claimant returned to work it was in the position of top hand on a crew working in Kuna, Idaho. Tr., 50:1-15; 51:8-24. Claimant’s back had never stopped hurting after the third incident. Sometime in late summer close to Labor Day, he went to pick up a piece of concrete pipe to move it and “it just like basically dropped me down.” He couldn’t move; his back was seized up and he couldn’t put pressure on his legs. He stayed in the same spot for the rest of his shift. *Id.* at 52:12-19.

24. Claimant informed his supervisors that he had reinjured himself. This time they told him to seek medical help. His wife picked him up from work and drove him to St. Luke’s Regional Medical Center in Meridian. *Id.* at 54:3-55:17.

25. *Titanium Incident.* On June 7, 2018, Claimant was working for Titanium at a work site in Kuna, Idaho. On this occasion, Claimant stepped off of an excavator machine to help a coworker, who was the pipe layer, in the ditch. Claimant was walking down the ramp into the ditch and as he was beginning to bend over to help his coworker, his back seized up and Claimant could not walk. *Id.* at 78:1-18.

26. When Claimant tried to stand up, he felt “instant pain” shooting down his legs from his lower back. He could not stand up straight and remained hunched over. *Id.* at 80:5-11. Claimant’s coworkers finished his tasks for him after he told him that he had injured his back, while he stood by. *Id.* at 80:23-81:4. After the shift finished, Claimant called his supervisor, told

him that he had injured his back, and needed medical help. His supervisor told Claimant to obtain medical assistance. Tr., 81:13-16.

27. **Medical Care and Subsequent Events.** After Claimant's fourth incident at Knife River in September 2017, he received medical evaluation and treatment at the emergency room of St. Luke's Regional Medical Center in Meridian on September 11, 2017. Ex. T:18 (66:12-19). Justin C. Haymaker, M.D., noted that Claimant had originally injured his back a year ago while working in North Dakota, "and the pain never completely went away." The low back pain had worsened again a week prior. Claimant's pain, sharp and stabbing, was worse on the lower right side and radiated down his right leg. Dr. Haymaker further noted that Claimant "has suffered multiple injuries to his lower back ... of the last year or 2. They always tender [sic] around the lower lumbar spine and into the SI joints. Sometimes radiating into the buttocks or legs." Dr. Haymaker stated that he would refer Claimant to "Workmen's Comp" to "consider further imaging versus physical therapy." X-rays showed mild degenerative changes in the lower back. Dr. Haymaker planned to order an MRI. Claimant received medications including Hydrocodone. Ex. I:7-13.

28. Claimant received a referral from St. Luke's Occupational Health Services to Paul Montalbano, M.D., an orthopedic surgeon, on September 15, 2017. *Id.* at 17. The narrative history for the referral noted that Claimant had chronic "low back pain with compression injury from going over a hard bump while driving a tractor." The MRI ordered by Dr. Haymaker showed mild lower lumbar degenerative changes and disc disease with stenosis at L4-L5 and L5-S1. In addition, a chronic L5 pars defects was present. *Id.* at 18-20.

29. Claimant first saw Dr. Montalbano for a neurosurgical consultation on October 4, 2017. Ex. T:19 (70:7-10); Ex. K:4. Dr. Montalbano noted the August 3, 2016 incident that began

Claimant's troubles when he was driving a front-end loader and that he had been off work intermittently since then. He also noted that Claimant first went to the emergency room "a few months ago" for evaluation, had been off work for a month now, but his pain was better. Ex. K:4. Claimant reported 6 to 9 out of 10 on the pain scale, with the pain as a constant, dull ache and that he was unable to sleep at night due to the pain. *Id.* A review of the MRI scan of the lumbar spine on September 12, 2017 "demonstrates severe central canal stenosis secondary to a central disc extrusion. He also has evidence of a bilateral L5 pars defects and a resultant superimposed upon facet incompetence that results in a grade I anterolisthesis at this level." Dr. Montalbano remarked that Claimant "has significant issues in terms of his lumbar spine. He has developmental defects at L5-S1 with associated instability and severe central canal stenosis at the level of L4-5. Surgery should be the last resort given his age. He is neurologically intact. My intent is to treat him with conservative measures." Claimant had the diagnoses of "lumbar region spondylosis with neurogenic claudication, lumbar region spondylosis with radiculopathy, lumbrosacral region spondylosis, lumbrosacral spondylolisthesis, nontrauma, lumbar region and lumbrosacral region disc displacement, disc degeneration and disc with radiculopathy." Ex. K:5. Dr. Montalbano released Claimant to return to work on sedentary/light duty with lumbar restrictions (no repetitive stooping, bending or twisting) and no lifting in excess of ten pounds. *Id.* at 6.

30. Claimant followed up with Dr. Montalbano on October 25, 2017. Dr. Montalbano noted that Claimant would continue with conservative measures, including physical therapy. He confirmed the same work restrictions for Claimant. *Id.* at 7-8.

31. At a November 7, 2017 follow-up consultation, Dr. Montalbano declared that Claimant "has failed conservative measures. Surgery would include an L4-S1 decompression,

fusion and instrumentation, with restoration of his sagittal plane balance.” Claimant consented to surgical treatment. Ex. K:9.1. Meanwhile, Dr. Montalbano continued Claimant’s previous work restrictions. *Id.* at 10.

32. On November 29, 2017, Dr. Montalbano faxed a request for surgery approval for Claimant and approval of electrophysiological studies of his lower extremities to an adjuster at Liberty. Ex. K:11-13. He noted that Claimant has “significant lumbar pathology.” K:13. After examining Claimant, Dr. Montalbano restricted him completely from working due to the progression of his pain, which had escalated since the last visit. *Id.* at 13-14.

33. On December 19, 2017, Claimant consulted with Dr. Montalbano again. Dr. Montalbano noted that the electrophysiological studies of Claimant’s lower extremities were normal. Dr. Montalbano continued to recommend surgery based upon his assessment of the etiology of Claimant’s symptoms, instability at the L5-S1 level and severe to moderate canal stenosis at the level of L4-S1. *Id.* at 15.

34. Claimant underwent an independent medical examination (“IME”) with R. Tyler Frizzell, M.D., a neurosurgeon, on January 8, 2018. Ex. O:2. Dr. Frizzell took Claimant’s relevant medical history, including all of the work-related incidents in the employment of Knife River. He noted that Claimant had six weeks of physical therapy and had been treating with Dr. Montalbano, who recommended surgery. Claimant was not working at the time. *Id.* at 2-3.

35. At the time of Dr. Frizzell’s examination, Claimant’s pain was in the 3-4 range on a 10 scale. He had no radicular symptoms at this time. *Id.* at 3.

36. Dr. Frizzell reviewed all prior relevant medical records. *Id.* at 3-5. He also reviewed surveillance video of Claimant at a gymnasium taken in early December 2018. *Id.* at 6. Claimant was working out again and bench pressing up to 150 pounds. Tr., 93:10-16.

37. Dr. Frizzell diagnosed the work accident as follows: “Lumbar strain, lumbar radiculopathy – resolved; herniated lumbar disc L4-5; L5-S1 spondylolisthesis.” He described Claimant’s current condition as lumbago, related to the work incident. He stated that Claimant’s treatment to date had been necessary and reasonable and appropriate. Dr. Frizzell did not believe Claimant required further treatment related to the work incident. Nevertheless, he diagnosed Claimant with a significant pre-existing/degenerative condition, as follows: pre-existing spondylolisthesis, L5-S1, asymptomatic prior to the 2016 work accident. Dr. Frizzell opined that Claimant could work with the following permanent restrictions: 50 pounds occasional lifting and 25 pounds frequent lifting; Claimant should avoid constant bending. Dr. Frizzell determined that Claimant was at maximum medical improvement (MMI). He anticipated that Claimant would have permanent partial impairment from the work accident but did not specify an impairment rating. Ex. O:6-8.

38. At a January 10, 2018 consultation, Dr. Montalbano noted that Claimant had undergone an IME with Dr. Frizzell. Dr. Montalbano noted that Claimant was unsure whether his case required surgical intervention. Dr. Montalbano looked forward to Dr. Frizzell’s IME report for further input. Ex. K:16.

39. Claimant returned to Dr. Montalbano on January 24, 2018 for further evaluation, following Dr. Frizzell’s IME. At this time, Dr. Montalbano did not recommend surgical intervention, noting that Claimant had improved with conservative measures. There was no evidence of persistent lumbar radiculopathy. Dr. Montalbano recommended a lumbar brace for support. Claimant was to return to his gym exercise program. Dr. Montalbano hoped that Claimant would be able to return to full time, gainful employment. *Id.* at 18.

40. On February 1, 2018, Dr. Frizzell issued an addendum to his IME report after receiving a request for an impairment rating from Liberty. Dr. Frizzell assessed a 7% impairment of the whole person for Claimant's intervertebral disc herniation at a single level, related to the work accident. Additionally, Claimant's congenital condition of spondylolisthesis would be an additional 7% whole person impairment ("WPI"), however since the spondylolisthesis is a pre-existing condition, his impairment relating to the industrial injury would be limited to 7% WPI. Claimant's permanent restrictions were due to the industrial injury. Ex. O:10-11.

41. On February 14, 2018, Dr. Montalbano wrote to Liberty's adjuster to state that he had reviewed Dr. Frizzell's IME and was in "complete agreement" with it. Ex. K:19.

42. At a follow-up appointment on February 28, 2018, Dr. Montalbano noted that he would not recommend any further treatment/follow-up. He released Claimant to full duty work, despite his prior agreement with Dr. Frizzell's work restrictions. *Id.* at 20-21.

43. Following the incident at Titanium on June 7, 2018, Claimant sought treatment and evaluation by Charles Washington III, M.D., at St. Luke's Regional Medical Center in Meridian. He reported that he had a history of back pain and "today while at work he was getting off an excavator when his pain worsened, prompting him to the ED. The discomfort is constant and radiates to his left foot." Currently, his symptoms were moderate in severity. An MRI ordered for Claimant noted in the report that there was no significant change in the moderate degenerative disc and joint disease, "most severe at L4-5 where there is moderate central disc extrusion causing mild central canal stenosis and right greater than left neuroforaminal narrowing." The MRI report also noted that Claimant's bilateral L5 spondylosis was stable. Claimant received pain medication prescriptions, including Oxycodone. Claimant received instructions to follow-up with his primary care provider. Ex. I:25-32.

44. Claimant followed up with Dr. Montalbano on the following day, June 8, 2018. He reported the circumstances of the incident that occurred at Titanium the previous day. Dr. Montalbano noted that Claimant had been seen at St. Luke's and that an MRI taken showed no change. Ex K:23. Dr. Montalbano also noted Claimant reported "three episodes of exacerbation of his symptomatology" since he last saw Dr. Montalbano in February. *Id.*

45. On June 13, 2018, Dr. Montalbano noted that Claimant reported that he "stepped out of his vehicle at work with acute exacerbation of his symptomatology." The MRI taken in the emergency room showed no interval changes. Dr. Montalbano did relate the symptoms to Claimant's findings at L4-5, which were unchanged and "related to his prior injury superimposed upon a degenerative condition." He started Claimant on a new course of physical therapy and prescribed various medications for him, while recommending that he return to light duty four hours per day with a 20 pound lifting restriction. Dr. Montalbano noted in pertinent part as follows: "It is not surprising given his degree of instability as well as canal/foraminal stenosis that he [Claimant] has acute exacerbation of his above symptomatology. I do relate this not to a new injury but to his original injury due to a lack of any change on his MRI scan or x-rays." *Id.* at 25.

46. On July 26, 2018, Dr. Montalbano noted that Claimant's work-related injury of June 7, 2018 "relates to his original injury where he experienced disc injury as well as the conversion of an asymptomatic spondylolisthesis to a symptomatic spondylolisthesis. I am sure that both of the incidents that are work-related will be responsible in terms of apportionment. The majority of the responsibility would fall on the original work injury of August 3, 2016." *Id.* at 28.

47. On October 10, 2018, Dr. Montalbano wrote to SIF in pertinent part as follows:

- Claimant experienced an exacerbation on June 6, 2018;

- Surgical intervention would include an L4-L5 decompression, fusion and instrumentation, not related to degenerative condition but is related to both work-related events;
- Claimant is not back to baseline with regard to either injury and continues to be highly symptomatic;
- His restrictions include light duty, four hours per day, lumbar restrictions, and a 20 pound lifting restriction;
- His current work restrictions are the result of both work related injuries of 8/3/2016 as well as 6/7/2018.
- Claimant carries the diagnosis of lumbrosacral spondylolisthesis, nontrauma, lumbrosacral spondylosis, lumbar region and lumbrosacral region spondylosis with radiculopathy, lumbar region disc displacement, disc degeneration and disc with radiculopathy.

K:33.

48. Dr. Montalbano evaluated Claimant for a final visit on November 7, 2018. He continued to recommend surgery for Claimant as previously noted. Claimant also carried the same diagnosis as before. *Id.* at 35.

49. Due to continued questions of liability and causation that they had, Liberty scheduled Claimant for another IME with Michael Hajjar, M.D., on October 19, 2018. (Dr. Frizzell was unavailable.) Dr. Hajjar is a neurosurgeon. He performed a standard physical examination of Claimant, took a medical history, and reviewed all relevant medical records. Dr. Hajjar also reviewed Claimant's deposition. Next, Dr. Hajjar reviewed Claimant's MRI and other imaging. Ex. P:1-6.

50. Dr. Hajjar assessed that the work incident of June 7, 2018 was irrelevant to the progress of Claimant's condition. He noted in pertinent part as follows: "The symptoms may have been aggravated on that date, but based upon radiographic studies before and after this event, the severity of his radiographic findings, the findings were unchanged on radiographic studies before and after this event, it is much more likely than not that the work issue is a very

minor issue and the claimant has many of these in his history, had nothing to do with ... his current need for surgery.” *Id.* at 6.

51. Dr. Hajjar agreed that Claimant needed surgery as set forth by Dr. Montalbano, however he disagreed that the need for surgery “has anything to do with any specific work event.” Dr. Hajjar opined that Claimant’s underlying pathology was “clearly and unequivocally pre-existing.” None of the industrial events precipitated the need for surgery. Ex. P:6-7.

52. Dr. Hajjar was unsurprised by Claimant’s participating in weight lifting while he worked for Titanium, including bench pressing 150 pounds, which exceeded his lifting restriction from Dr. Frizzell. Claimant presented as a very physically fit young man. This signified that Claimant had reached MMI as Dr. Frizzell had found. *Id.* at 7.

53. Dr. Hajjar concluded his report by noting as follows: “The claimant was able to continue gainful employment to a significant degree up until June 2018 when the underlying spinal condition that he had his whole life has made it to the point that he is now requiring surgery. I clearly agree with Dr. Montalbano’s assessment to perform surgery, but as I have stated before, none of this should be considered related to an industrial event or specific Workmens’ Compensation event.” *Id.* at 8.

54. Claimant scheduled an IME with James H. Bates, M.D., a physiatrist, on December 4, 2018. Ex. Q. Dr. Bates took a medical history of Claimant, conducted a physical examination, and conducted a records review of relevant medical records. *Id.* at 2-11. He then answered a series of questions posed by Claimant. *Id.* at 12.

55. Dr. Bates diagnosed Claimant with “back pain and lumbar radiculopathy, directly related to the industrial accidents. Mr. Bartlett had spondylolisthesis at grade 1 and spondylosis,

which existed prior to his industrial injuries. But, on a more probable than not basis, these conditions became symptomatic as a result of his industrial injuries.” *Id.* at 12.

56. Dr. Bates concurred with the opinion of Dr. Montalbano as stated on July 26, 2018. Claimant’s current condition was related to his original injury, where he experienced disc injury, as well as conversion of previously asymptomatic spondylolisthesis to a symptomatic condition. Both injuries would be responsible with the majority of the apportionment attributable to the injury of August 3, 2016. As a result of the June 7, 2018 accident, Claimant did not experience any radiographic changes based upon a follow-up MRI and X-rays, nevertheless he did experience an exacerbation of his symptomatology. Dr. Bates disagreed with Dr. Hajjar that all spondylolisthesis becomes symptomatic, but that it is common that an asymptomatic individual becomes symptomatic after experiencing an injury. “That the x-ray and MRI imaging findings, the majority of the time, cannot be attributed to the injury, but the symptomatology can.” Ex. Q:12-13.

57. Dr. Bates further opined that Claimant was not currently medically stable and required the L4-L5 surgery as recommended by Dr. Montalbano and Dr. Hajjar. *Id.* at 13. He agreed with the temporary work restrictions prescribed by Dr. Montalbano. *Id.* If Claimant is unable to obtain medical treatment, Dr. Bates would make those restrictions permanent. *Id.* at 14.

58. Dr. Bates declined to assign a permanent impairment rating to Claimant because he was not medically stable. *Id.* If Claimant is unable to obtain surgical treatment, Dr. Bates would assign him a 13% WPI, with 7% attributable to the August 3, 2016 injury and 6% attributable to the June 7, 2018 injury. *Id.* at 14.

59. Dr. Bates opined that the medical treatment Claimant had received to date was reasonable and necessary. *Id.*

60. On December 12, 2018, R. David Bauer, M.D., an orthopedic surgeon, conducted an IME of Claimant, as requested by Titanium and SIF. Ex. AA.

61. Dr. Bauer conducted a thorough records review of all relevant medical records pertaining to Claimant, took his medical history, and conducted an orthopedic examination. Ex. AA:2-17.

62. As a result of his review and examination, Dr. Bauer diagnosed that Claimant had no objective change or harm to his body as a result of the incident on June 7, 2018. *Id.* at 17. He further diagnosed that Claimant had pre-existing spondylolisthesis that predated either accident, and was neither permanently accelerated nor aggravated by either accident. *Id.*

63. Dr. Bauer's specific diagnosis for Claimant was as follows: "Mr. Bartlett has a degenerative condition. He has a congenital spondylosis and spondylolisthesis that have led to premature degeneration at the L4-5 and L5-S1 level." *Id.*

64. Dr. Bauer stated that none of the medical conditions were caused by the industrial injuries because they were all pre-existing. At most, Claimant had a soft-tissue strain/contusion when he was injured in 2016. There was no material aggravation or exacerbation of his underlying conditions or the structure of Claimant's back. The 2018 incident, where Claimant's pain increased, also did not aggravate any of the structural conditions. *Id.* at 18.

65. While Claimant may be a candidate for back surgery, Dr. Bauer does not attribute any of the need for that potential surgery to either of his industrial incidents. *Id.* The need for surgery is "totally unrelated to any work event." *Id.* at 19. Because of a mismatch between the objective findings and the severe pain and symptom exaggeration that Dr. Bauer attributes to Claimant, "surgery should be approached very cautiously." *Id.* at 18.

66. Because the need for surgery is totally unrelated to any work event, Dr. Bauer opined that Claimant was stable from the work-related incident of June 7, 2018. *Id.* at 19. Although Claimant remains symptomatic, this is not due to any industrial event. Ex. AA:19. Claimant has not sustained any additional impairment as a result of the June 7, 2018 injury, and there are no work restrictions attributable to that incident. *Id.*

67. Dr. Bauer provided the following explanation for the development of the congenital condition that Claimant has: “Spondylosis and spondylolisthesis are conditions that are present in childhood and these conditions behave as any other degenerative condition in adults ... If there is a physiologic cause of pain patients with spondylolisthesis it would be the degeneration of the disc, and not due to the spondylolisthesis itself.” *Id.* at 20.

68. **Medical Expert Deposition Testimony.** *Paul J. Montalbano, M.D.* Claimant took the deposition of Dr. Montalbano on March 13, 2019. Dr. Montalbano is licensed to practice medicine in Idaho. Montalbano Dep., 6:20-22. His specialty is neurosurgery. *Id.* at 7:5-7. He performs spinal surgery. *Id.* at 8.

69. Dr. Montalbano has testified in past Industrial Commission proceedings and his qualifications are well known to the Commission.

70. Dr. Montalbano saw Claimant as a patient for the first time on October 4, 2017; Liberty referred Claimant for treatment. *Id.* at 7:11-22. After reviewing Claimant’s MRI, Dr. Montalbano diagnosed Claimant as follows: “And what he had was congenital or developmental defects in his back at L5 called pars defects. And this resulted in instability or a Grade 1 anterolisthesis. And it also demonstrated a disc herniation at L4-5 causing spinal canal stenosis at the level of L4-5.” *Id.* at 9:16-21.

71. Because Claimant's symptoms were "on and off" and "tolerable," Dr. Montalbano initially recommended conservative treatment with medications and PT. *Id.* at 9:24-10:6.

72. Dr. Montalbano opined that Claimant's work accident at Knife River caused the symptoms that Claimant was describing on October 4, 2017. Montalbano Dep., 10:22-11:1.

73. Claimant continued on conservative measures until an office consultation with Dr. Montalbano on November 7, 2017. *Id.* at 11:22-12:1. At this consultation Dr. Montalbano determined that Claimant had failed conservative measures – "physical therapy wasn't helping, his pain was getting worse" – and his medications appeared to provide "no significant benefit." *Id.* at 12:4-7. Dr. Montalbano then recommended surgery, to include L4 to S1 decompression, fusion, and instrumentation. *Id.* at 7-10. Dr. Montalbano requested approval for the surgery from the Surety. *Id.* at 13:4-11.

74. Dr. Montalbano evaluated Claimant in office consultations again on November 29, 2017 and December 19, 2017. He was still recommending a surgical solution to Claimant's problems during these visits. *Id.* at 13:15-14:10. This changed on January 24, 2018, at which time Dr. Montalbano found that Claimant had improved sufficiently that surgery was no longer necessary. Claimant "was getting better" and "overall, his symptoms were improved." Dr. Montalbano recommended that Claimant return to his daily gym routine. *Id.* at 15:10-16:2.

75. On February 14, 2018, Dr. Montalbano advised Liberty in a letter that he agreed with Dr. Frizzell's IME. *Id.* at 16:10-17. He agreed with Dr. Frizzell's treatment recommendations, to include conservative measures, and with his diagnosis of "lumbago or lumbar strain, as well as disc herniation at L4-5, and spondylolisthesis, which predated the injury, but it was an asymptomatic condition that became symptomatic." *Id.* at 17:11-14.

76. At a February 28, 2018 consultation, Dr. Montalbano determined that Claimant had reached MMI because Claimant “did quite well with conservative measures, he was neurologically intact, he had a normal exam, and it was my opinion that he reached medical stability, and he be returned to work without restrictions.” Montalbano Dep., 17:23-18:1.

77. Dr. Montalbano stated that it was “very much plausible” to conclude that someone with Claimant’s congenital, pre-existing condition such as the pars defect could remain asymptomatic prior to August 3, 2016 (the date of the first work injury). *Id.* at 18:22-19:7.

78. Dr. Montalbano’s goal for when he prescribed surgery was to take away or reduce Claimant’s pain, therefore when Claimant’s pain reduced on its own through conservative measures, the necessity for surgery at that time became moot. *Id.* at 19:8-16.

79. After Claimant’s workplace incident at Titanium on June 7, 2016, Dr. Montalbano evaluated Claimant again in an office consultation. Claimant explained the onset of pain during the incident. *Id.* at 20:9-25.

80. On June 13, 2018, Dr. Montalbano saw Claimant again. He recommended conservative treatment and re-enrolled him in PT while prescribing various medications including Flexiril. For work restrictions he limited Claimant to a four hour day at light duty, including lumbar restrictions and a 20 pound weight limit. *Id.* at 22:2-14. Dr. Montalbano noted that Claimant had an “acute exacerbation of his ... symptomatology. I do relate this not to a new injury but to his original injury, due to a lack of change on his MRI scan or x-rays.” *Id.* at 22:18-21.

81. In response to an inquiry from Liberty regarding causation, Dr. Montalbano responded in a letter dated June 29, 2018. He summarized his findings at deposition as follows: “So given the fact that his MRI and x-rays after the second reported injury were unchanged, it

appears that, at most, Mr. Bartlett experienced a lumbar strain as to that second injury of 6-7-2018 ... He had significant pathology, which predates that that second injury, which he was symptomatic from. And it wouldn't be surprising that he would experience intermittent episodes related to that pathology from his original injury of 8-3-2016." Montalbano Dep., 23:18-24:1.

82. Dr. Montalbano saw Claimant again on October 10, 2018. His symptoms remained unchanged. Dr. Montalbano continued to recommend surgery, the same procedure he had recommended in 2017. *Id.* at 24:15-25.

83. Claimant consulted with Dr. Montalbano again for the final time on November 7, 2018. There was no change in his condition and Dr. Montalbano continued to recommend surgery to address his condition. *Id.* at 25:1-15.

84. Dr. Montalbano related any further treatment of Claimant to both of the industrial injuries, as follows: "It is my opinion that they're related to both, but the majority of the responsibility would fall back on the original injury of 2016." *Id.* at 26:9-15. He explained that Claimant was completely asymptomatic prior to the original work-related injury of 2016. "It was only after that incident that he experienced symptoms of back pain and leg pain." *Id.* at 26:20-23. Dr. Montalbano noted further as follows: "Clearly, he irritated his back at both injuries, but the first injury he was clearly asymptomatic prior to." *Id.* at 27:12-20. In Dr. Montalbano's opinion, "the majority of responsibility should fall on the first injury." *Id.* at 27:23-24.

85. *Michael V. Hajjar, M.D.* The Defendants took the deposition of Dr. Hajjar on April 26, 2019. Hajjar Dep., 2:1-5. Dr. Hajjar is a neurosurgeon who practiced medicine for 16 years prior to the deposition. *Id.* at 5:13-14. He graduated from Georgetown Medical School in 1996. *Id.* at 14-15. He received neurosurgical training at the University of South Florida in Tampa between 1996 and 2003 and has been practicing in Boise since. *Id.* at 16-18.

86. Dr. Hajjar has testified in Industrial Commission cases on many occasions. He is qualified to provide testimony in this matter.

87. Dr. Hajjar saw Claimant on October 19, 2018 for an IME. Hajjar Dep., 5:19-25.

88. Dr. Hajjar reviewed all relevant medical records as well as imaging records and reports regarding Claimant's case. *Id.* at 6:3-14.

89. After reviewing the MRI scan of September 12, 2017, Dr. Hajjar diagnosed Claimant with a problem at the base of his spine, a pars defect anterolisthesis, as well as disc bulges at the lowest two discs, including L4-5 and L5-S1, and narrowing canals for both the nerve and spinal canals. *Id.* at 8:14-22.

90. When asked whether either of the work accidents caused any of the pathology Dr. Hajjar saw on the MRI, he replied as follows: "None of the pathology seen on this scan, or any of the scans, was from any work event or any traumatic event. The joint issues caused by the pars defect is a developmental issue ... caused by the way the bones put themselves together when we are one, two, or three years old. That will lead to the joints at that level to become incompetent, and other issues at the base of the spine." *Id.* at 9:6-15. Dr. Hajjar explained further that "all of this is chronic and longstanding, not related to any specific event in one's adult life." *Id.* at 17-18.

91. Dr. Hajjar concurs that Claimant was medically stable and able to return to work without restrictions when Dr. Montalbano released him on February 28, 2018. *Id.* at 10:2-7. Claimant was "structurally no different pre and post accident. His symptoms ... had seemed to improve, and he was back at baseline." *Id.* at 11-14.

92. Dr. Hajjar did not believe that Claimant's accident at Knife River exacerbated or accelerated his underlying congenial conditions, as follows: "I do not believe that any events

from 2016, or other event accelerated Mr. Bartlett's need for treatment in any way." Hajjar Dep., 10:24-25:1.

93. Dr. Hajjar opined that "based upon the severity of Mr. Bartlett's version of this developmental condition ... it would be likely that he, at some point in the future, based on when his symptoms warranted, [would] need the surgery that has been outlined." *Id.* at 11:9-14.

94. Dr. Hajjar also reviewed an MRI dated in June 2018. Based upon that review, he did not see any significant change between the two MRIs. He also believed that the MRIs reflected pathology that preexisted any work incident in August 2016. *Id.* at 13:10-22.

95. As to the work accident of June 7, 2018, Dr. Hajjar opined that it was a temporary aggravation or exacerbation of the underlying back conditions. *Id.* at 13:19-14:1. When asked to explain this opinion, Dr. Hajjar stated that Claimant "had a know condition that likely would lead him to symptoms, as well as potentially treatment, including surgery. Any, or no additional event in his life could lead to more symptoms occurring." *Id.* at 14:4-8. "The pars defect is the underlying condition that makes the bones unstable. Everything else related back to that condition leads to nerve compression, back pain, and ultimately the need for surgery." *Id.* at 15-18.

96. Dr. Hajjar stated that the "entire surgery that has been outlined [by Dr. Montalbano], and I agree with that plan, would be to address the longstanding underlying structural condition at the base of Mr. Bartlett's spine." *Id.* at 15:16-19.

97. Upon cross examination, Dr. Hajjar stated his understanding of the mechanism of injury in the 2016 accident that Claimant "was working with heavy machinery and injured his back. But from a mechanism and severity standpoint, I have a hard time with injuries that are reported over a year from the injury." *Id.* at 19:7-10. When questioned further, Dr. Hajjar stated

as follows: “I don’t have any great details, other than he was working with machinery, and that’s what my note reflects.” Hajjar Dep., 20:3-5.

98. Dr. Hajjar agreed that a condition of pars defect/spondylolisthesis can be asymptomatic. *Id.* at 22:7-8. Nevertheless, he ordinarily would not provide a surgical intervention to a patient with this condition who was asymptomatic. “The reason that people tend to sign up for surgery is the severity of their symptoms.” *Id.* at 16-21. He thus agreed that the symptoms in most cases would be the reason for performing surgery. *Id.* at 23:10-15.

99. With regard to the herniated discs identified on both MRIs, Dr. Hajjar opined that they were not true herniated discs but rather bulging discs caused by the stresses of the underlying pathology/mechanical issue, the pars defect/spondylolisthesis. He believed that these bulging discs were causing some of Claimant’s symptoms. *Id.* at 24:12-22. The curvature of Claimant’s spine, caused by the underlying joint issue, is “what’s leading up to all that. And that also leads to the need for treatment.” *Id.* at 25:3-6. And, while the underlying pathology is the cause for the need for treatment, if Claimant isn’t experiencing any symptoms, he would not need the treatment (surgery). *Id.* at 26:15-22.

100. According to Dr. Hajjar, most people with the underlying congenital condition of a pars defect/spondylolisthesis, once they become symptomatic for the first time, thereafter will have periodic episodes of being symptomatic that wax and wane. *Id.* at 28:17-24. It all relates back to the pre-existing conditions, Dr. Hajjar agreed. *Id.* at 29:2-10.

101. Dr. Hajjar further agreed with the assessment that because Claimant suffers from a pre-existing condition, “he’s going to have various events along the way.” Nevertheless, those events are all irrelevant to the fact of his underlying condition, which is the true cause of his need for surgery. *Id.* at 30:4-10.

102. Counsel for Claimant confronted Dr. Hajjar with the following scenario:

Q. Okay. If the event [first accident in 2016] was more than simply an uncomfortable seat going up and down, such as being shot into the air, and hitting your head on the roof of a vehicle, and coming back down and pressing down the weight of a front-end loader, a 40,000 pound front-end loader, would that change your opinion at all?

A. Well, then I would refer to another opinion that I stated, where if there were a major problem, I would expect medical records related to the work up of the major trauma to have occurred at the time of the trauma, not a year after ... if there was trauma, like you had just mentioned, typically that is evaluated and treated medically much differently than occurred in this case.

Hajjar Dep., 36:13-37:2.

103. If the first incident involved severe trauma, Dr. Hajjar would have expected Claimant to seek medical treatment sooner rather than a year later, despite the fact that his supervisors told him to take a couple of weeks off and rest. "I would expect them, in 2016, '17, '18, '19 to seek treatment in the United States of America." *Id.* at 37:13-23.

104. Dr. Hajjar concluded the deposition with the following summary statement:

There is a longstanding developmental issue, common condition that often needs surgery, that is the cause of this patient's problem and symptoms. And in my opinion, based on all of this record, that condition by itself, and not an exacerbation of that condition, was the cause of the patient's ongoing symptoms, and the cause of the need for treatment. And none of these events, other than the fact that they are on the timeline, have any material factor in this evolution, including the need for surgery.

Id. at 38:17-39:1.

105. *Affidavit of R. David Bauer, M.D.* Dr. Bauer is an orthopedic surgeon with post-residency fellowship level training in spine surgery. He practices medicine in Garland, Texas and is licensed to practice medicine in Texas. As of the date of his affidavit, he was a member of the Texas Medical Board Expert Panel. He received his medical degree from Columbia University in 1983 and completed his orthopedic residency in 1998 at the New York Medical Center, Bellevue

Hospital, in New York City. He has held various academic appointments and practice surgical medicine actively for over 28 years. Bauer Affid., Ex. A.

106. Dr. Bauer has previously testified in Commission proceedings and is qualified to testify in this matter.

107. In lieu of deposing him, the parties stipulated to allowing Dr. Bauer to submit an affidavit stating in pertinent part as follows; “I am in substantial agreement with the opinions expressed by Dr. Michael V. Hajjar in his deposition transcript of April 26, 2019, which are consistent with my IME report of December 12, 2018, and I hereby reaffirm my opinions as outlined in my December 12, 2018 IME report.” *Id.* at 2.

108. **Claimant’s Condition at Hearing.** Claimant had not worked out at the gym since he was still employed at Titanium. Tr., 119:11-13. He tried working out on a treadmill several months prior to the hearing, but “it wasn’t good,” it hurt too much. He had gained 20 pounds since leaving Titanium’s employment. *Id.* at 14 -19.

109. Claimant continued to have pain down both legs to the date of the hearing. *Id.* at 130:12-14. Claimant also experienced pain in his lower back that felt like a “knot” on his left side. Pain down his left leg is more significant than his right leg. It hurt to stand up and sit down. *Id.* at 133:17-134:1.

110. Claimant recalled that the pain he experiences affected “everything” he does. It hurt to get up and walk in the kitchen. He could not play with his kids like he used to do. It hurt even to drive his vehicle. *Id.* at 134:2-6.

111. Claimant did not believe he would be qualified to perform any gainful employment due to his limitations from pain. *Id.* at 134:7-10.

112. **Testimony of Caleb Gentry.** Mr. Gentry was an employee of Titanium when Claimant was employed there. Tr., 147:1-7. He was acquainted with Claimant. *Id.*

113. Mr. Gentry testified concerning Exhibit CC:6, an email memorandum he sent to Melissa Marshall, the controller of Titanium, on June 20, 2018. It stated in pertinent part as follows: “On June 11, 2018 I spoke with Justin about his pre-existing back injury that happened while working at Knife River. The pain from that injury came back while at home and [he] needed to see a doctor.” *Id.*; Tr., 143:15-24. Mr. Gentry did not recall Claimant informing him that he had an injury while working at Titanium. *Id.* at 144:3-6.

114. **Claimant’s Credibility.** Claimant testified credibly at hearing. Nevertheless, he had significant difficulty in recalling specific dates or placing events in a reliable time/date context. Where’s Claimant’s recollection regarding dates and times varies from the record, the record is more reliable. The Commission finds no reason to disturb the Referee’s findings and observations on Claimant’s presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

115. 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 that the law 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).

116. **Compensability; Causation.** Claimant bears the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 734, 653 P.2d 455, 455 (1982). There must be

medical testimony supporting the claim for compensation to a reasonable degree of medical probability; a claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973).

117. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

118. 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). As the Idaho Supreme Court observed in pertinent part as follows in *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983): "The fact that [claimant's] spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him." 105 Idaho at 104, 666 P.2d at 631. Similarly, in *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), the Court held that aggravation, exacerbation, or acceleration of a pre-existing condition caused by a compensable accident is compensable. 126 Idaho at 132, 879 P.2d at 595.

119. All of the medical authorities in this case agree that Claimant suffers from an L5-S1 pars defect/spondylolisthesis and an L4-L5 disc herniation or bulge. All physicians also agree on the potential need for surgery, either presently or in the future. Where the medical authorities disagree, however, is on the issue of causation/permanent aggravation. Dr. Frizzell completed an IME, and opined Claimant experienced an aggravation of his pre-existing condition and disc herniation, rating Claimant at 7% for his work-related disc herniation and 7% for his pre-existing condition. Dr. Montalbano, Claimant's treating physician, opined that Claimant's industrial accidents contributed to the permanent aggravation of his underlying congenital condition, the first accident more so than the second. Dr. Bates also joined Dr. Montalbano in this opinion, however he did not undergo a deposition and therefore did not testify in this matter. Dr. Hajjar, an IME physician hired by Knife River/Liberty, disagreed with Dr. Montalbano and testified that neither industrial accident had a role in permanently aggravating or accelerating Claimant's underlying and pre-existing condition. Dr. Bauer, who did not testify by deposition, nevertheless submitted a stipulated, sworn affidavit in which he stated his complete agreement with Dr. Hajjar's opinion on causation and reaffirmed his own, identical opinion stated in his IME.

120. The weight of the evidence supports Drs. Montalbano's opinion that Claimant experienced an aggravation of his preexisting condition on August 3, 2016; he experienced waxing and waning of his symptoms thereafter and never returned to baseline after this first accident.

121. Claimant did not require any medical treatment for his low back prior to his August 3, 2016 industrial accident or experience any symptoms implicating his low back. Claimant was extremely physically active prior to this accident, in both his occupations and hobbies, as discussed *supra*.

122. Both Drs. Hajjar and Montalbano agree that Claimant's symptoms will wax and wane until he receives surgery. However, this waxing and waning of symptoms did not begin until after Claimant's first accident on August 3, 2016. Claimant's course of treatment reflects he would experience an exacerbation, would rest or treat his injury, and then return back to work, until his last accident at Titanium. Despite Drs. Frizzell and Montalbano declaring Claimant at MMI in the winter of 2016-2017, Claimant testified he was never pain free and that he had to modify his work-out routine to accommodate his back pain. Cl. Dep., 72:16-17; 42:20-43:6. Further, there is evidence Claimant continued to experience exacerbations after Drs. Montalbano and Frizzell declared him at MMI: when he returned after his June 8, 2018 accident, he reported "three episodes of exacerbation of his symptomatology" since he last saw Dr. Montalbano. Ex K:23. Also, Claimant's MMI status appears to be more related to his need for surgery and pain complaints than that Claimant was "cured;" Claimant obviously still had a congenital defect that was now occasionally symptomatic, whereas previously it had been asymptomatic. Lastly, notwithstanding that Dr. Montalbano released Claimant without restrictions, Defendant's IME doctor, Dr. Frizzell, opined Claimant had accident related restrictions and impairment. The more persuasive evidence does not reflect that Claimant ever returned to baseline, i.e. the pain-free, very active status he had prior to August 3, 2016, despite his multiple returns to work.

123. Dr. Hajjar's opinion regarding the first accident is flawed. Dr. Hajjar agreed that Claimant's pars defect can be asymptomatic and that once it becomes symptomatic, the symptoms are the reason for the surgery. Hajjar Dep., 23:6-15. However, Dr. Hajjar's explanation for how Claimant became symptomatic when he was previously asymptomatic is that he never was asymptomatic, but had always been "compensating" for his congenital defect.

Id. at 23:15-24:7. This is contrary to Claimant's testimony where he testified he had no previous back issues.

124. Dr. Hajjar did not have a good understanding of the nature of the first accident and the forces involved; in his report, he described Claimant's mechanism of injury while working for Knife River as "an uncomfortable seat" which bounced up and down. This minimizes the accident as described by Claimant. Dr. Hajjar found it significant that the "event itself was not reported as an industrial injury for over a year after the event. Based on this by itself, it indicates far more likely than not that there was no significant event that occurred in August 2016..." Ex. P:6-7. However, Claimant explained at hearing that he did report the injury to his supervisor and records reflect he sought treatment in December. Dr. Hajjar's reliance on an inaccurate timeline in reaching his conclusions renders his opinions regarding the first accident less persuasive.

125. Having determined the Knife River accident is responsible for permanently aggravating Claimant's pre-existing low back condition, the Commission must next address the more difficult question of whether the Titanium accident caused further permanent injury to Claimant's low back. The strongest evidence of record that the Titanium accident did not cause Claimant additional injury is the comparison of the June 2018 MRI with the previous September 2017 MRI; comparison of the studies showed no interval change in Claimant's lumbar spine abnormalities. Of the physicians who have speculated on the significance of the 2018 accident, only Dr. Montalbano evaluated Claimant before and after that accident. In understanding the significance of the 2018 accident, his observations and opinions are of particular interest.

126. Dr. Montalbano saw Claimant the day after the June 7, 2018 accident. Dr. Montalbano noted the lack of interval change in the pre-injury and post-injury MRI studies. He

noted Claimant's sudden onset of symptoms on June 7, 2018 as well as Claimant's history of three episodes of exacerbation between February 28, 2018 and June 8, 2018, not including his June 8, 2018 accident. Montalbano Dep., 27:11-15. Dr. Montalbano did not comment on the significance of the June 7, 2018 accident until his June 13, 2018 letter to Liberty. In that letter, he opined that the June 7, 2018 accident was not implicated in explaining Claimant's presentation:

In the emergency room he underwent an MRI scan that demonstrates no interval change. In terms of the etiology of his symptomatology, I do relate this to his findings at the level of L4-5 and L5-S1, which are unchanged and related to his prior injury superimposed upon a degenerative condition.

...

It is not surprising given his degree of instability as well as canal/foraminal stenosis that he has acute exacerbation of his above symptomatology. I do relate this not to a new injury but to his original injury due to a lack of any change on his MRI scan or x-rays.

Ex K:25. Dr. Montalbano expressed essentially the same opinion in his June 29, 2018 letter to Liberty:

His newest MRI and x-ray have been compared to his old study and there is no interval change.

At most, Mr. Bartlett experienced a lumbar strain as this relates to his injury on June 7, 2018. His current symptomatology is based on the acute exacerbation of his underlying pathology from L4-S1 and not related to the work-related injury of June 7, 2018. Of note, given the severity of nerve root compression and instability at L4-S1, it is not surprising that he would experience intermittent episodes of exacerbation from his original work-related injury of 8-3-2016.

Id. at 27. However, by letter dated July 26, 2018, Dr. Montalbano first expressed the view, a view to which he still adheres, that the accident of June 7, 2018 did permanently contribute to Claimant's current lumbar spine condition:

I have reviewed your correspondence dated 06/29/2018. As this relates to Mr. Bartlett's work related injury of 06/07/2018, although he did not experience any radiographic change he did experience an exacerbation of his symptomatology. This is related to his original injury where he experienced disk injury as well as

the conversation of an asymptomatic spondylolisthesis to symptomatic spondylolisthesis. I am sure both of the incidents that are work related will be responsible in terms of apportionment. The majority of the responsibility would fall on the original work related injury of 08/03/2016.

Id. at 28. In his letter to Karen Larsen of October 10, 2018, Dr. Montalbano explained that while there was no interval change in the aforementioned MRI studies, these findings must be correlated with the fact that (by history) Claimant was doing reasonably well before the accident of June 7, 2018 in terms of symptomatology but had not, as of October 10, 2018, returned to his pre-injury baseline. He confirmed this thought process in his March 13, 2019 deposition. He assigns some responsibility for Claimant's current condition to the accident of June 7, 2018 because Claimant never returned to his pre-injury level of symptomatology following that accident. Montalbano Dep., 26:16-28:3; 43:4-11; 50:7-51:17. The injury he suffered on June 7, 2018 evidently proved more significant than a mere lumbar strain. *Id.* at 23:15-24:1.

127. The difficulty with Dr. Montalbano's conclusion concerning the significance of the June 7, 2018 accident lies in reconciling it with his unambiguous testimony that there is no interval change between the pre-injury and post-injury MRI, i.e., there is no evidence of structural change when comparing the two studies:

Q: [By Mr. Hall] As I understand it, then, in June of 2018 when he has the event at Titanium he refers to you as getting off his excavator, that really was an aggravation, it was not a structural change to his back itself; is that correct?

A: It was not a structural change, correct.

Q: In other words, his MRI taken the day of or the day after the June injury, that MRI mirrored the MRI back in 2017; is that correct?

A: Correct.

Q: There was no structural change with regard to the disc, with regard to the spondylosis, the spondylolisthesis, or the pars defect?

A: Correct.

...

Q: So he had additional IMEs, initially Dr. Frizzell. I'm going to set that one aside. After the June incident, 2018, he sees, Dr. Hajjar, Dr. Bauer, Dr. Bates, all for independent medical examinations, and has this other MRI. Each of those doctors reviewing those MRIs also say that between the first MRI in the fall of 2017 and the June 2018 MRI there were no structural changes, the disc remained the same, the spondylosis remained the same, the pars defect remained the same, and those two MRIs mirrored each other? That was your understanding correct?

A: Correct. Yes.

Q: So your opinion with regard to how they viewed the MRI is not necessarily different?

A: Correct.

Q: So the need for surgery, really, is based upon the condition that existed in 2017 when he had the original MRI; is that true?

A: You have to include his symptoms. So I would never operate on somebody without symptoms that correlate with that MRI scan. The fact that he had that MRI scan and he was symptomatic from it, then I would do surgery.

Q: That's why you recommended surgery initially in the fall of 2017, he was having symptoms, you found that conservative treatment was not helpful and, therefore, recommended surgery?

A: Correct.

Id. at 45:18-46:6; 47:5-48:8.

128. From this testimony, Dr. Montalbano may be saying that notwithstanding the MRI comparison, Claimant must have suffered additional injury to his lumbosacral spine as a consequence of the June 7, 2018 accident because Claimant's symptoms did not return to baseline following that accident. Though not expressly stated in his testimony, the argument would be that the existence of a permanent increase in symptoms must implicate some change in Claimant's physical condition, albeit a change that is too subtle to be captured in a comparison of the pre-injury and post-injury MRIs. However, this conclusion is not implicit in Dr.

Montalbano's testimony, and the Commission is unwilling to infer that this is Dr. Montalbano's opinion; it is not clear that the persistence of Claimant's symptoms following the June 7, 2018 accident proves the existence of a permanent physical injury referable to that accident. At least, we do not find sufficient support for this proposition in Dr. Montalbano's testimony. The Commission must be cautious about what is and is not an appropriate inference from the medical evidence of record. *Mazzone v. Texas Roadhouse*, 154 Idaho 750, 302 P.3d 718 (2013). In order to satisfy his obligation of proving the occurrence of a compensable accident/injury, Claimant must prove that he suffered an "injury" arising from the accident of June 7, 2018. As set forth at Idaho Code § 72-102(18)(c), "injury" includes only an injury which results in "violence to the physical structure of the body." Pain alone is not compensable because it does not prove violence to the physical structure of the body. *Bush v. Bonners Ferry School Dist., No. 101*, 102 Idaho 620, 636 P.2d 175 (1981). Therefore, although Dr. Montalbano's opinion on causation has shifted over time, the reason for this change appears to derive from the fact that the hoped-for resolution of symptoms following the June 7, 2018 accident did not occur. This is not sufficient to prove damage to the physical structure of Claimant's body.

129. Similar to Dr. Montalbano, Dr. Hajjar endorsed the proposition that a comparison of the two MRIs showed no significant change; he also opined that the second accident at Titanium was a temporary aggravation or exacerbation of Claimant's underlying condition. Hajjar Dep., 13:13-18; 13:23-14:2. Dr. Hajjar testified: "regarding what would flare-up this underlying condition, which is any up and down spine loading activity, which is getting down from a truck height, getting into a ditch, bouncing up and down in a car seat, anything like that loads the spine, and would be expected to flare-up symptoms." *Id.* at 36:1-6. Claimant's last accident is variously described as jumping out of a truck and/or walking down an incline, exactly

in line with what Dr. Hajjar predicts would flare-up Claimant's condition. Taken as a whole, Dr. Hajjar's opinion does lend support to the proposition that the Titanium accident was a "flare-up," or temporary exacerbation, and not a separate injury requiring apportionment.

130. **Medical Benefits** An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may extend to merely palliative care thereafter, depending upon the totality of circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 929, 303 P.3d 604, 615 (2013).

131. It is for the physician, not the Commission, to decide whether medical treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 722, 779 P.2d 395, 397 (1989). What constitutes reasonable medical care is to be determined by a totality of the circumstances approach. *Chavez v. Stokes*, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015).

132. All of the medical authorities agree that Claimant's pars defect/spondylolisthesis condition and disc herniation require surgery and agree on the outlines of that surgery. In line with the above conclusions, Claimant is entitled to the surgery proposed by Dr. Montalbano to fix his pars defect and disc herniation.

133. **Temporary Disability Benefits.** Disability, for purposes of determining total or partial temporary disability income benefits, means 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 § 72-102(11). Temporary partial and total disability entitlement is evaluated according to statute. Idaho Code § 72-408. It is payable throughout the period of recovery to the date of

maximum medical improvement. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

134. Titanium/SIF request reimbursement from Knife River/Liberty for the TTDs they paid during the pendency of this action. Titanium/SIF did not seek an order from the Commission establishing interim responsibility for payment of benefits pending final resolution of the matter as anticipated under Idaho Code § 72-313. Even so, *Brooks v. Standard Fire Insurance Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990), recognizes that Titanium/SIF may nevertheless pursue a claim for reimbursement against Knife River/Liberty for benefits paid by Titanium/SIF that are more properly the responsibility of Knife River. Knife River/Liberty is obligated to reimburse Titanium/SIF for the benefits paid by Titanium/SIF that were the responsibility of Knife River. Knife River/Liberty shall be liable for ongoing TTDs until Claimant reaches medical stability or the requirements of Idaho Code § 72-403 are satisfied.

135. **Attorney Fees.** Claimant has requested attorney's fees pursuant to Idaho Code § 72-804, which reads 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.

136. Claimant makes no claim for attorney's fees against Titanium/SIF. Claimant argues Knife River/Liberty acted unreasonably by not providing Dr. Hajjar all the necessary reports and records, and then in relying upon his opinion to suspend further benefits to Claimant.

Defendants did eventually provide Dr. Hajjar with all the necessary records, and he issued a clarifying report and two additional erratum sheets. See Ex. Q. While Dr. Hajjar's opinion is ultimately found unpersuasive in this decision, his opinion was not so unreasonable that Defendants are liable for attorney's fees.

CONCLUSIONS OF LAW AND ORDER

1. The accident of August 3, 2016 permanently accelerated or aggravated Claimant's underlying and pre-existing condition of a pars defect/spondylolisthesis.
2. Knife River/Liberty is liable for the proposed surgery to correct Claimant's condition of a pars defect/spondylolisthesis.
3. Pursuant to *Brooks v. Standard Fire Insurance Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990), Knife River/Liberty is obligated to reimbursement Titanium/SIF for the benefits they paid to Claimant.
4. Claimant is entitled to temporary disability benefits from Knife River/Liberty until he reaches medical stability or the requirements of Idaho Code § 72-403 are met.
5. Claimant is not entitled to attorney fees.
6. Pursuant to Idaho Code § 72-718, this matter is final and conclusive as to all matters adjudicated.

DATED this 18th day of October, 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 __18th__ day of __October__, 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:

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