

JASON WELLS, Claimant,

v.

SWIFT TRANSPORTATION, Employer,

and

ACE AMERICAN INSURANCE CO., Surety, Defendants.

No. IC 2016-004292

Idaho Workers Compensation

Before the Industrial Commission of the State of Idaho

October 23, 2019

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Thomas P. Baskin, Chairman.

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 Lewiston on December 3, 2019. Claimant, Jason Wells, was present in person and represented by Michael Kessinger of Lewiston and Todd Richardson of Clarkston, Washington. Defendant Employer, Swift Transportation (Swift) and Defendant Surety, Ace American Insurance Co., were represented by Emma Wilson and Susan Veltman, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken, and briefs were later submitted. The matter came under advisement on June 19, 2020.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to temporary disability benefits; and
2. Claimant's entitlement to an award of attorney fees.

CONTENTIONS OF THE PARTIES

Claimant, Jason Wells, was present in person and represented by Michael Kessinger of Lewiston and Todd Richardson of Clarkston, Washington. Defendant Employer, Swift Transportation (Swift) and Defendant Surety, Ace American Insurance Co., were represented by Emma Wilson and Susan Veltman, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken, and briefs were later submitted. The matter came under advisement on June 19, 2020.

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Claimant suffered an industrial accident on February 5, 2016, when he struggled to raise and later lower unusually stiff landing gear on a trailer while working for Swift and thereafter noted lower abdominal and left groin pain. Defendants accepted the claim and paid for initial medical treatment and approximately two months of temporary disability benefits. All parties now acknowledge that the industrial accident caused a left inguinal hernia, although it was diagnosed early on as simply a muscle strain. Claimant subsequently underwent a total left hip replacement for a pre-existing left hip condition. Thereafter, he was examined by several physicians as directed by Defendants, but his hernia was not accurately diagnosed and surgically repaired until January 14, 2019. Claimant requests temporary disability benefits from the date of his accident until he was released following his hernia repair. He also requests attorney fees for Defendants'

continuing denial of additional temporary disability benefits. Defendants maintain that all temporary disability benefits owed have been paid and that Claimant is not entitled to additional temporary disability benefits, especially during recovery from his non-industrial total hip arthroplasty.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. The testimony of Claimant, Jason Wells, and Surety's adjuster, Anthony Ragone, taken at hearing.
3. Claimant's Exhibits A-C, admitted at the hearing.
4. Defendants' Exhibits 1-13,15-22, and 24, admitted at the hearing; and Defendants' Exhibit 23 which is hereby admitted.
5. The post-hearing deposition testimony of Nancy Collins, Ph.D., taken by Defendants on February 11, 2020.

All outstanding objections are overruled and motions to strike are denied. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Background. Claimant was born in 1979. He was 40 years old and resided in Lewiston at the time of the hearing. He is six feet tall and right-handed. At all relevant times since 2013, he has weighed between approximately 330 and 380 pounds.
2. Claimant attended school through the sixth grade and later obtained a GED.
3. On July 12, 1991, at the age of 12, Claimant was seriously injured in a head on motor vehicle collision in which he sustained a left hip fracture and dislocation. His left hip was plated and surgically rebuilt. He underwent multiple surgeries, spent seven weeks in a body cast in the hospital, and continued in follow-up for two years thereafter. He relearned to walk, but could no longer run, and required several years before he could again ride a bicycle. Thereafter Claimant necessarily modified his activities. He had recurring hip pain which he managed with medications.
4. In 2003, Claimant completed a commercial truck driving training course and then commenced working for Swift as an over the road driver. His duties included driving, securing loads, putting chains on, training students to drive and complete paperwork, performing safety inspections, and keeping logbooks. He drove principally in the west and Pacific Northwest. His job duties required prolonged sitting. His duties typically did not require loading or unloading, although he sometimes assisted with unloading trailers. He earned approximately \$4,500 per month and worked from 65 to 70 hours per week. He received medical, dental, 401k, and vacation benefits. He enjoyed driving.
5. Claimant experienced general pain throughout his left hip for which he took hydrocodone when he was not driving. He avoided taking hydrocodone within 10 hours of going on duty to drive.
6. In 2012, Claimant presented with left hip pain and was examined by Jeremy Ostermiller, PA-C, at Lewiston Orthopaedic Associates, who reviewed radiographs and noted severe left hip degeneration, avascular necrosis of the left femoral head, leg length discrepancy, and mild degenerative rotation of the lumbar spine. Left hip replacement was recommended and Claimant indicated he would think about it. Exhibit 3, p. 2. He continued working and managing his left hip pain with medication.
7. In 2013, Claimant presented with left hip pain and was examined by orthopedic surgeon Marvin Kym, M.D., at Lewiston Orthopaedic Associates, who reviewed radiographs and recommended total left hip arthroplasty. Claimant again indicated he would think about it. Claimant later testified that Dr. Kym: "had said that it was coming. ... I mean, he would have done it then, but I—knowing that you can only have a certain amount of them and they only last a certain amount of time in your life, I kind of wanted to prolong it as long as I could. So that's why I didn't do it...." Transcript, p. 45, 11. 11-16. Claimant continued working and managing his left hip pain with medication.
8. Industrial accident. On February 5, 2016, Claimant was at work cranking up the landing gear of a trailer. The landing gear was very stiff and required all his weight and effort to raise. After arriving at the drop site, Claimant had to "wrestle" the landing gear to lower it. On returning from dropping the trailer, Claimant could not get comfortable in the truck seat. He experienced increasing discomfort in his

midsection on the left side. By the next day his pain had increased. His prior left hip pain was generally posterior, this pain was in his front lower abdomen and left groin. Claimant promptly reported the incident and his symptoms to Swift. He has not worked since.

9. Medical treatment. On February 7, 2016, Claimant presented to Todd Carpenter, NP-C, who ordered an ultrasound. On February 9, 2016, Claimant underwent a limited pelvic ultrasound of the left inguinal region which revealed findings consistent with an inguinal hernia. Claimant was given a 10-pound lifting restriction and referred to surgeon Gary Thorne, M.D.

10. On March 15, 2016, Claimant was examined by Dr Thorne who was unable to palpate a hernia. He ordered a pelvic CT. On March 30, 2016, Dr. Thorne recorded:

Patient was referred to me for an left inguinal hernia but I could not palpate it on exam. CT of pelvis did not show hernia but revealed significant degenerative changes of left hip. I believe he has sustained a left groin muscle strain but also has significant symptoms from left hip arthritis and may eventually required [sic] hip replacement.....Pt. has seen Dr. Kym before and I encouraged him to see him again.

Exhibit 4, p. 7. Dr. Thorne subsequently released Claimant to work without restrictions.

11. Defendants accepted the claim and paid temporary disability benefits from February 7 through April 25, 2016. On or about May 19, 2016, Surety issued to Claimant a Notice of Claim Status declaring his left hip condition was nonindustrial and advising him:

Diagnostic studies were inconclusive as to whether you sustained a left inguinal hernia and medical records show your injury is limited to a left groin strain. Because the evidence fails to establish that your need for medical treatment is the result of a work-related accident no further benefits will be paid at this time.

Exhibit 8, p. 2.

12. Claimant's symptoms persisted and he applied for Social Security disability in May 2016 after his workers' compensation benefits were terminated. His application was initially denied.

13. On June 7, 2016, Claimant underwent a DOT physical. The medical examiner, Theresa Smith, recorded abnormalities and determined Claimant did not meet required standards due to his left hip pain, decreased mobility, and concerns with potential sleep apnea. Claimant believed his failure to meet required standards was due to mobility limitations resulting from his hernia. At hearing he testified:

Q. And did they give you any reason other than suspected sleep apnea that they didn't give you a —

A. The doctor that did it, she was aware of the previous hernia diagnosis. She didn't really look for one, but when I tried to squat down and do some of the bending over and everything, it was ~ it hurt too bad period so she didn't — she wouldn't pass me because of that.

Q. If the DOT paperwork reflects that you were not able to get ~ to pass the evaluation based on your left hip and sleep apnea, would you agree with that?

A. No, because I had had several previous medical cards with my left hip.

Transcript, p. 43, 11. 9-20.

14. With continuing left groin and hip pain, and consistent with Dr. Thome's encouragement, on July 20, 2016, Claimant presented to Dr. Kym for treatment. Dr. Kym noted that Claimant reported a work injury on February 5, 2016 and "was initially told he had a hernia but the general surgeon did not agree with this but told him he had pulled a muscle." Exhibit 11, p. 1. Dr. Kym, having reviewed Claimant's radiographs, recommended total left hip arthroplasty.

15. On September 12, 2016, Dr. Kym performed a total left hip arthroplasty. In follow-up on October 26, 2016, Dr. Kym noted "given the severity of disease preoperatively, Jason can easily need 6 months of rehab and gait training" Exhibit 11, p. 10. On December 8, 2016, Dr. Kym examined Claimant and recorded: "Jason continues to rehab his left hip. We know that this will be a very long prolonged process given his years of muscular and joint dysfunction and other extremity problems secondary to his pelvis deformity." Dr. Kym noted Claimant had good hip range of motion, well-healed surgical wound, good prosthesis position, and would follow-up on a yearly basis. Exhibit 11, p. 12.

16. In January 2017, Swift terminated Claimant's employment because his FMLA was exhausted and he had not returned to work.

17. Claimant applied for work at sporting goods and auto part stores after he was let go by Swift. He applied at North 40 Outfitters, Auto Zone, O'Reilly Auto Parts, and others but found no employment.

18. On February 7, 2017, Lloyd Fraizer, PT, performed a physical therapy evaluation and recorded Claimant's report that "He is unable to return back to work due to his persistent limitations..... He is also unable to return back to his job that he had before surgery as a truck driver." Exhibit 10, p. 116. Fraizer then recorded several complaints regarding Claimant's back, left hip, and lower extremities.

19. On February 20, 2017, Claimant presented with continuing left groin and testicular pain to his primary care provider, John Rudolph, D.O., who referred Claimant to a pain clinic.

20. On March 2, 2017, Claimant filed his pro se Complaint herein alleging continuing symptoms, including left groin and testicular pain, and requesting further benefits.

21. On April 3, 2017, Claimant presented to Lyndal Stoutin, M.D., who performed a lumbar injection and discogram and recommended a lumbar discectomy. Defendants denied the request for a discectomy and scheduled Claimant for an IME.

22. On June 21, 2017, Defendants deposed Claimant. He testified regarding the impact of his ongoing left groin pain on his activities, including the use of his Razor ATV:

I actually had to sell mine because I couldn't even climb in it anymore without hurting my leg and everything. And then not having an income, I couldn't make the payments anymore either. We tried going out on it once last summer and I couldn't even get in the driver's seat because of the way—as high as it is and then trying to stretch to get in the driver seat, it pulled too much on the groin. I got in the passenger seat and my girlfriend drove and I could only tolerate about 10 minutes of trail riding in it and then it hurt too bad.

Exhibit 15, p. 15 (Claimant Deposition, p. 59, 11. 13-23).

23. On October 3, 2017, Spencer Greendyke, M.D., examined Claimant at Defendants' request. Dr. Greendyke diagnosed persistent intermittent left-sided groin and scrotal pain and opined Claimant sustained a left L1-2 disc herniation in his February 5, 2016 industrial accident and had not reached maximum medical improvement. He assigned temporary lifting restrictions of 25 pounds and referred Claimant to spine surgeon Gregory Dietrich, M.D. Exhibit 16, pp. 11, 14.

24. In October 2017, Claimant's renewed application for Social Security Disability benefits was ultimately approved after a disability hearing.

25. On November 7, 2017, Surety issued to Claimant a Notice of Claim Status stating: "Dr. Greendyke assigned you temporary work restrictions, but you are currently off work due to your non-industrial left hip condition. Consequently, the evidence does not establish that you have sustained a decrease in your wage earning capacity as a result of your industrial injury. Therefore, temporary disability benefits (TPD/TTD) are not owed at this time." Exhibit 8, p. 4. Insofar as the record reveals, Surety provided no medical documentation, pursuant to Idaho Code § 72-806, supporting its assertion that Claimant was off work due to his left hip condition.

26. Dr. Dietrich declined the referral and on February 8, 2018, neurosurgeon Jeffrey Larson, M.D., examined Claimant at Defendants' request. Dr. Larson subsequently reviewed a February 19, 2018 MRI and on March 27, 2018, administered a diagnostic selective lumbar nerve root block that did not provide Claimant "any relief of his groin or anterior thigh symptoms." Dr. Larson concluded Claimant's left groin pain was "not coming from his spine" and that he "has findings that need further attention." Exhibit 18, p. 11. On June 30, 2018, Dr. Larson confirmed Claimant needed referral to a hernia specialist. Exhibit 18, p. 13.

27. On August 24, 2018, Michael Ludwig, M.D., examined Claimant at Defendants' request. Dr. Ludwig opined Claimant suffered an industrially related "Left reducible inguinal hernia. Physical examination on 2/7/16 suggested a hernia defect, and ultrasound at the time confirmed the diagnosis. His current examination does not reveal an incarcerated hernia, but symptoms persist and are typical and customary for this diagnosis." Exhibit 19, p. 9. Dr. Ludwig found Claimant had not reached maximum medical improvement from his February 5, 2016 industrial injury and recommended repeat left inguinal ultrasound with Valsalva. He restricted Claimant to lifting no more than 20 pounds occasionally until the ultrasound was performed.

28. On December 20, 2018, Claimant underwent the recommended ultrasound which evidenced left inguinal hernia increased with Valsalva. Exhibit 19, p. 12.

29. On December 27, 2018, Adam Bell, D.O., examined Claimant and confirmed that the December 20,

2018 ultrasound documented left inguinal hernia with Valsalva.

30. On January 14, 2019, Dr. Bell performed left inguinal herniorrhaphy. Defendants paid for the surgery. On January 25, 2019, Surety issued to Claimant a Notice of Claim Status indicating "Your TTD benefits will begin on 1/14/19 due to surgery." Exhibit 8, p. 5. Dr. Bell released Claimant from care on February 8, 2019.

31. Defendants paid temporary disability benefits for the period from January 14 through March 10, 2019. Exhibit 21, p. 1.

32. On March 22, 2019, Dr. Ludwig found Claimant had reached maximum medical improvement and had no permanent restrictions and no impairment due to his industrial accident. Exhibit 19, pp. 16-17.

33. On March 26, 2019, Defendants issued to Claimant a Notice of Claim Status modifying his temporary disability benefits and indicating: "You were paid TTD over this period from 01/14/2019-2/24/2019. Payments should not have been made over the period of 02/07/2019-02/24/2019, therefore there is an overpayment on your claim file of \$1,819.03. Please send payment in this amount to the address listed below." Exhibit 8, p. 6.

34. On October 30, 2019, Defendants retained vocational expert Nancy Collins, Ph.D., to assess employment opportunities in the general labor market "that would have been available to Mr. Wells between March 31th [sic] 2016 and January 13th, 2019." Exhibit 23, p. 1. On November 21, 2019, Dr. Collins provided her assessment to Defendants that suitable work was available in Claimant's labor market during the period in question.

35. Credibility. Having observed both Claimant and Surety's adjuster Anthony Ragone at hearing and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

36. 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).

37. Temporary disability benefits. The first issue is whether Claimant is entitled to additional temporary disability benefits due to the industrial accident. Disability for the purpose of determining temporary disability income benefits, is a decrease in wage-earning capacity due to injury or occupational disease. Idaho Code § 72-408 provides that "Income benefits for total and partial disability during the period of recovery ... shall be paid to the disabled employee" Claimant bears the initial burden of presenting 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). Entitlement to time loss benefits comes with statutory constraints specified by Idaho Code § 72-403. "[I]njured workers who receive total or partial temporary disability income benefits during a period of recovery have an obligation to seek or accept suitable employment consistent with their restrictions. Employer bears the burden of proving that an injured worker has failed to satisfy this statutory obligation." *Soderling v. West Ada School District*, 2020 WL 1957678, at 11 (Idaho Ind. Com. Mar. 19, 2020)

38. In the present case the parties' dispute focuses mainly on Claimant's period of recovery, the cause of his temporary decreased earning capacity, and Dr. Collins' vocational opinion.

39. *Period of recovery.* Claimant asserts he was in a period of recovery and, pursuant to Idaho Code § 72-408, is entitled to temporary disability benefits from the date of his February 5, 2016 industrial accident until released after hernia surgery on February 8, 2019. Defendants argue Claimant was not in a period of recovery after Dr. Thome's release until Claimant's hernia surgery.

40. Although Dr. Thome's evaluation of Claimant in March 2016 was thorough, subsequent events have established his conclusion that Claimant suffered no hernia was mistaken; Claimant in fact suffered a reducible left inguinal hernia.

41. Claimant's left groin and testicular symptoms recurred from the date of his February 2016 accident until his 2019 herniorrhaphy. NP-C Carpenter suspected a left inguinal hernia on February 7, 2016: "Hernia: possible bulging on the left inguinal region with stomach flexion that reduces easily and quickly." Exhibit 2, p. 62. Claimant's February 9, 2016 pelvic ultrasound was read by Dallen Ashby, M.D., to reveal "mobile tissue in this region which increases with Valsalva maneuver, consistent with inguinal hernia. IMPRESSION: left inguinal hernia." Exhibit 2, p. 67. A 10-pound lifting restriction was imposed. Although

Dr. Thorne did not diagnose the hernia and the CT scan he ordered did not reveal such, Claimant's left groin symptoms recurred regularly thereafter.

42. Claimant's June 7, 2016, DOT physical recorded abnormalities including: "Abdomen tender from L hip to groin." Exhibit 24, p. 37. At hearing Claimant described the difficulty he experienced during the DOT physical:

Q. (by Mr. Kessinger) I'm looking at this DOT paperwork, Exhibit 24, [pages] 38, and 37. The reason listed for not meeting the standards was left hip pain. Had your left hip pain changed from your prior medical card to this physical?

A. No. That's why I don't understand why it was on there.

Q. It lists decreased mobility. Was your mobility affected at all by your hernia?

A. Yeah. I couldn't squat down, bend over, kneel down. That would have limited my mobility on stuff.

Q. You indicated you couldn't do the physical maneuvers the doctor wanted you to perform at the physical?

A. Not without pain.

Q. What maneuvers were those?

A. They have you do like a deep knee bend, I guess they call it, where you basically squat down and bend over, touch your toes, kneel down. I think that's about it for—

Q. What happened when she asked you to do a deep knee bend?

A. I was able to do it, but it hurt. The way you go down for it, it pulled on the groin and everything it caused pain.

Q. What kind of pain do [sic] you feel when you did a deep knee bend?

A. Like sharp, stabbing pain, basically right at the beltline on the front side of the abdomen, all the way down into the testicle.

Q. What kind of pain did you feel in your testicle?

A. Squeezing. Depending on how I bent or how I moved, if I bent over and tried to touch my toes it felt like somebody was stabbing it with a pencil.

Transcript, p. 49,1. 8, through p. 50, 1. 16.

43. When Claimant presented on July 20, 2016, Dr. Kym noted: "Patient feels quite strongly that the pain he sustained in February is different from the chronic hip pain he has had over the years." Exhibit 11, p. 1. Following hip surgery, Claimant complained to Dr. Rudolph of continuing left groin and testicular pain in February 2017.

44. At his deposition on June 21, 2017, Claimant described his continuing left groin and testicular pain:

Q. (by Ms. Wilson) As you sit here today, can you describe for me what symptoms you are having that you relate to the incident at Swift?

A. Well, sitting here in the position I'm sitting in, I can feel, like, a little mild twinge down through my groin. It's not really throbbing or anything right now but if I twist or turn this way, it gets stronger. Lying flat on my back in bed, I can only do that for a few seconds before it actually starts throbbing all the way down into my testicle. If I bend over to pick something up off the floor, I get a sharp, shooting pain down through there. If I stand and stretch—like, stretch my arms up above my head or something and try to stretch my back out, I get sharp pains down through the groin and the upper part of the leg. If I cough or heaven forbid I sneeze—a sneeze will about kill me and I get it down through the groin and the upper portion of the leg.

Exhibit 15, p. 13 (Claimant Deposition, page 50,1. 13 through p. 51,1. 6).

45. Claimant reported recurring left groin and testicular pain to Dr. Greendyke in October 2017, to Dr. Larson in February 2018, and to Dr. Ludwig in August 2018 who aptly summarized the history of Claimant's complaints:

Mr. Wells' presentation has been complex. Due to his morbid obesity and prior trauma to the hip and pelvis, examination findings have been inconsistent. What has been consistent is his localization of pain to the left inguinal crease and radiation to the left testicle..... Objective findings of a reducible hernia were noted on initial ultrasound, and this diagnosis would be consistent with his suspected mechanism of injury and distribution of symptoms.

Exhibit 19, p. 10. Dr. Ludwig assessed a reducible left inguinal hernia, found Claimant had not reached maximum medical improvement from his 2016 industrial injury, recommended repeat left inguinal ultrasound with Valsalva, and restricted Claimant to lifting no more than 20 pounds occasionally. The repeat ultrasound led to surgery by Dr. Bell in January 2019 which confirmed and repaired Claimant's hernia. Within two weeks of the surgical repair, Claimant noted "an amazing difference" as his left groin and testicular pain resolved. Transcript, p. 39, 1. 2.

46. The clear weight of evidence including the opinions of NP-C Carpenter, Drs. Ludwig and Bell, and the surgical findings of Dr. Bell on January 14, 2019, establish that Dr. Thome's conclusion that Claimant suffered no hernia in February 2016 was mistaken. Dr. Bell affirmed that surgery was required for Claimant to recover from his hernia. Exhibit C, p. 6. The 10-pound lifting restriction initially imposed by NP-C Carpenter, who first accurately diagnosed Claimant's hernia, and the 20-pound lifting restriction imposed by Dr. Ludwig, who also accurately identified Claimant's true condition contrast starkly with Dr. Thome's release to work. The intervening time between these restrictions, each based upon an accurate diagnosis of Claimant's true condition, is bridged by Dr. Bell's undisputed opinion that Claimant's left inguinal hernia required surgical repair to resolve. NP-C Carpenter correctly diagnosed Claimant's left inguinal hernia and imposed a 10-pound lifting restriction until he saw a surgeon, implicitly based upon the reasonable expectation that the surgeon would accurately diagnose and treat Claimant's hernia. However, Dr. Thorne did not accurately diagnose or treat Claimant's hernia. It was not until August 2018, that a surgeon, Dr. Ludwig, accurately diagnosed Claimant's reducible left inguinal hernia. NP-C Carpenter's restrictions should not be deemed to have lapsed because of Dr. Thome's missed diagnosis, but rather to have continued until superseded by Dr. Ludwig's restrictions resulting from his accurate diagnosis. Until surgical repair, Claimant's lifting capacity continued to be restricted.

47. Dr. Thome's release of Claimant to work without restrictions was premised upon an opinion that subsequent events have irrefutably shown was erroneous and merits no weight. Defendants have acknowledged that Claimant's February 5, 2016 accident caused his left inguinal hernia. Claimant's hernia persisted until it was surgically repaired by Dr. Bell. Defendants paid for the surgical repair. The clear weight of the evidence establishes that Claimant was in a period of recovery from the time of his industrial accident until his release after hernia surgery.

48. At hearing, Surety's adjuster testified:

Q. (by Mr. Kessinger) You would agree that Jason was in his period of recovery from February 5th, 2016, until released by Dr. Bell in February of 2019?

A. He had a letter of recovery, yeah.

Q. You would agree that based on Dr. Ludwig's medical opinion, Dr. Thorne missed the hernia diagnosis?

A. Yeah, the hernia diagnosis was missed.

Transcript, p. 84,1. 23 through p. 85,1. 4.

49. The missed diagnosis spawned a chain of consequences. The symptoms of Claimant's unresolved hernia contributed to his self-perceived disability prompting him to apply for Social Security Disability in May 2016 because he accepted Dr. Thome's conclusion that he had no hernia and his increased symptoms were due to his left hip. Claimant's Social Security Disability application materials attributed his limitations to his left hip condition; however, all unknowingly confounding his left hip symptoms with the symptoms of his unresolved left inguinal hernia. At the time of Claimant's Social Security application, he mistakenly believed all his physical limitations were due to his degenerative left hip condition because Dr. Thorne had so advised him. The symptoms of Claimant's unresolved hernia contributed to his physical limitations recorded by the DOT examiner in June 2016 which prompted the examiner to find him ineligible for a DOT card. Claimant understood this would preclude him from driving for Swift. The symptoms of Claimant's unresolved hernia contributed to his pain and physical limitations prompting him to pursue total hip replacement by Dr. Kym in September 2016, as encouraged by Dr. Thorne. The symptoms of Claimant's unresolved hernia contributed to his delayed recovery from his total hip replacement by hindering his rehabilitation in physical therapy sessions that "would aggravate the pain through the groin." Exhibit 15, pp. 12, 16 (Claimant Deposition, p. 48, 1. 9, p. 61,11. 12-17). Finally, Claimant's three-year period of recovery from his industrial hernia is a consequence of the missed diagnosis.

50. In *Miller v. Gem State Paper and Supply, Inc.*, 2007 WL 1904498 (Idaho Ind. Com. Mar. 26, 2007), Miller suffered an industrial back injury which caused a bacterial strep infection that became life-threatening. Necessary treatment was delayed by an initial misdiagnosis. One medical expert opined that if Miller's infection had been accurately diagnosed sooner, he might not have needed such extensive critical care. The Commission noted its previous adoption of the compensable consequences doctrine and observed: "This is a valid ... assertion; but misdiagnosis, too, falls under the aegis of compensable consequences." *Miller*, 2007 WL 1904498 at 10.

51. Defendants herein had a duty to continue to investigate and not rely upon a medical opinion subsequently shown to be erroneous. "As events occur to reveal, in hindsight, that errors have occurred in denying all or part of a claim, Defendants have a duty to correct those errors. *Farrar v. Adcco, Inc.*, 2008 IIC 0556 (2008)." *Zielinski v. U.S. Crisis, Inc.*, 2011 WL 2199791 at 5 (Idaho Ind. Com. May 16, 2011).

52. Claimant has proven he was in a period of recovery from the date of his February 5, 2016 industrial accident until after his hernia surgery and February 8, 2019 release.

53. *Decreased wage earning capacity*. Defendants argue that no temporary disability benefits are due because between March 30, 2016, and January 14, 2019, Claimant's decreased wage earning capacity was caused by his preexisting left hip condition for which he underwent total left hip arthroplasty.^[1]

54. Idaho Code § 72-102(11) indicates that an injured worker's decrease in wage earning capacity must be due to an industrial injury to require payment of temporary disability benefits. It provides:

"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 in section 72-430, Idaho Code.

55. Defendants cite *Hanson v. UPS*, 2016 WL 6884638 (Idaho Ind. Com. Aug. 29, 2016), to support their assertion that no temporary disability benefits are due when Claimant was disabled from work by his total left hip arthroplasty because his decreased earning capacity was not due to his industrial accident.

56. The Commission issued two decisions in *Hanson*. After a hearing in 2013, the Commission issued its first decision on May 14, 2014, finding Hanson permanently totally disabled under the 100% method. In 2016 the Commission conducted another hearing and addressed, among other issues, whether Hanson was entitled to temporary disability benefits during her recovery from surgery in March 2015, until she reached maximum medical improvement in September 2015. Defendants maintained the Commission's 2014 decision, finding Hanson 100% permanently disabled prior to her surgery, precluded her receipt of temporary disability benefits during her recovery from surgery.

57. The Commission's second decision in *Hanson* observed that the fundamental purpose of the disability statutes was to compensate a worker for wage loss during a temporary disability from work and that Idaho Code § 72-102(11) and § 72-408 read together required a wage loss for a claimant to recover temporary disability benefits. Observing that temporary disability benefits would not compensate Hanson for actual lost wages because she last participated in the workforce approximately three years prior to her surgery, the Commission stated:

Claimant had no actual wage earning capacity that suffered a decrease under Idaho Code § 72-102(11) during her period of recovery from surgery from March 2 until September 11, 2015. As a result, she is ineligible for temporary disability benefits.

Furthermore, Claimant was not temporarily unable to return to the duties of her employment with Employer or any other job because of her surgical recovery from her industrial knee condition. Rather, she was already legally incapacitated from working because of the nonindustrial factors identified in the Commission's previous decision that concluded she was 100% disabled.

Hanson, 2016 WL 6884638, at 21.

58. Defendants herein argue from *Hanson* that there is no decreased earning capacity if the worker can no longer return to work and assert that Claimant was unable to return to work due to his nonindustrial hip condition.

59. The circumstances of *Hanson* differ markedly from the present case. Most simply and significantly, the Commission found Hanson 100% totally permanently disabled more than a year before the surgery for which she sought temporary disability benefits. In contrast, Claimant herein was not found 100% totally permanently disabled by the Commission prior to his hernia. Nevertheless, Defendants assert that Claimant is not entitled to additional temporary disability benefits because he suffered no decrease in earning

capacity from his hernia, rather he was disabled by his left hip arthroplasty. Defendants argue Claimant stopped working before any restrictions were imposed by Drs. Greendyke or Ludwig. However, as noted above, during Claimant's period of recovery from February 5, 2016, until February 8, 2019, his lifting capacity was effectively restricted. It is noteworthy that Claimant was unable to work after his February 2016 industrial accident for a full seven months before his September 2016 total left hip arthroplasty.

60. Claimant argues that whether during part of his period of recovery from his hernia he may also have undergone nonindustrial total hip arthroplasty does not preclude him from receiving temporary disability benefits. He maintains in essence: "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate a workers' compensation claim." *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 33, 43 P.3d 788, 792 (2002). Even a worker with a preexisting degenerative hip condition for which he may elect surgical treatment as encouraged by the surgeon Defendants chose to treat his industrial injury.

61. All parties cite *Maluea v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), where a college student, who worked during the summer months and planned to return to college in the fall, sustained an industrial accident in August, underwent surgical treatment, returned to college, and sought temporary disability benefits as the healing process continued through the following June. The Court observed:

Based on these facts, the employer/surety argue that albeit Malueg was still undergoing the healing process, disability benefits are intended to compensate only for actual wage losses, Malueg voluntarily left the work force, and hence has suffered no wage loss. Malueg, on the other hand, argues that his eligibility for disability benefits is a medical fact question.

I.C. §72-102(8) provides:

(8) "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 in section 72-430, Idaho Code.

It is beyond question here that by reason of an industrial accident Malueg suffered physical impairment which would have prevented employment at least until December 1983. Hence, he suffered a decrease in wage earning capacity and thus a disability. The fact that he enrolled in college rather than sitting at home during the healing process is, we deem, of no relevance.

Malueg, 111 Idaho at 790-91, 727 P.2d at 1218-19.

62. One pertinent lesson from *Malueg* is that, absent a showing that suitable work is available, an injured worker's choice to pursue a course that may render him unavailable for work is of no relevance if he is still in a period of recovery and suffering a decreased wage earning capacity due to his work related condition. Indeed, an injured worker in a period of recovery may elect to retire from the work force and still receive temporary disability benefits where he has sustained a decrease in wage earning capacity due to his industrial accident and his decision to retire was hastened by the industrial accident. *Hackman v. CHS, Inc.*, 2018 WL 4253861 (Idaho Ind. Com. Aug. 13, 2018).

63. In the present case, contrary to Defendants' efforts to distinguish *Malueg*, Claimant was in a period of recovery even after his release by Dr. Thorne, having suffered a hernia which restricted his activities and prevented his usual work until surgically repaired. Claimant, while still in a period of recovery from his hernia, voluntarily left the work force to undergo total hip replacement. Claimant continued with an unrepaired hernia from his industrial accident throughout his recovery from left hip arthroplasty and beyond. The fact that Claimant elected to undergo left hip arthroplasty during this period was due at least in part to the missed diagnosis and specific encouragement of Dr. Thorne, whom Defendants selected, and Claimant trusted to treat his industrial injury, and is of no consequence.

64. Defendants' liability for temporary disability benefits continued during Claimant's total hip arthroplasty because he was still in a period of recovery and his wage earning capacity was decreased by his industrial hernia.

65. *Dr. Collins' opinion*. Defendants argue that no temporary disability benefits are due when evidence is presented that Claimant has been medically released for light work and "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*. Ill. Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986). Defendants assert that the testimony and vocational assessment of Dr. Nancy Collins establishes there was suitable work available to Claimant at all relevant times and precludes an award of temporary disability benefits. Claimant argues Idaho Code § 72-403 and *Roberts v. Portapros, LLC*, IC 2019-008048 (October 11, 2019), support his request for benefits.

66. Idaho Code § 72-403 provides:

Penalty for malingering—Denial of compensation. If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

67. In *Roberts* the claimant sustained an industrial accident, was subsequently terminated for cause, and sought temporary disability benefits. The Commission examined Idaho Code § 72-408 observing:

entitlement to Idaho Code § 72-408 benefits should be assumed until it is demonstrated, by one who opposes the payment of such benefits, that the conditions which warrant curtailment of payment exist, i.e., until it has been demonstrated that the injured worker has, in fact, failed to satisfy his obligation to seek or accept work consistent with his physical abilities.

Therefore, an employer may justifiably curtail the payment of time loss benefits in two scenarios: first, if the employer can demonstrate that the injured worker has altogether refused, or failed without good reason, to seek work consistent with his restrictions and abilities, time loss benefits may be denied. Second, should someone offer or secure for claimant a job consistent with his restrictions, and which he is otherwise capable of performing, or should claimant, himself, procure such suitable employment, and then refuse, unreasonably fail, or neglect to perform such work, claimant shall not be entitled to time loss benefits during the period of such refusal.

Roberts, IC 2019-008048 at 12-13.

68. The Commission then scrutinized both *Malueg* and Idaho Code §72-403 observing:

However, under Idaho Code § 72-403, where an employee is physically capable of some work, benefits may be curtailed where employer demonstrates, not that work consistent with claimant's restrictions is available, but rather that employee has refused or unreasonably failed to take affirmative action necessary to obtain suitable work.....

.... Under neither *Malueg*, nor Idaho Code § 72-403, is it sufficient to merely show that work consistent with Claimant's restrictions is available in his geographic locale, it must also be shown that Claimant has a "reasonable opportunity" to secure such work ("*Malueg*") or that the available work is "suitable" for Claimant (Idaho Code § 72-403). As another example, suppose that claimant has looked diligently but unsuccessfully for a job, but employer, equipped with better resources, has identified ten jobs for the claimant, consistent with his restrictions and in his geographic locale. Under *Malueg*, the employer could rely on this proof to curtail TTD benefits, but claimant has a better argument for continued receipt of benefits under Idaho Code § 72-403; although his work search was unsuccessful, it cannot be said that he unreasonably failed to look for suitable work.

Roberts, IC 2019-008048 at 17-18. The Commission noted subtle divergence between the requirements of Idaho Code § 72-403 and *Malueg*, and found *Roberts* entitled to temporary disability benefits even though he had been terminated for cause and his work search was not stellar.

69. In the present case, regarding the first prong of Idaho Code § 72-403, there is no evidence Claimant unreasonably failed or neglected to work after suitable work was offered to him. Indeed, there is no evidence Defendants or anyone else offered him any work.

70. Under the second prong of Idaho Code § 72-403, "Simply showing there was work available which fell within Claimant's work restrictions is insufficient to deny him TTD benefits; instead Claimant must refuse or unreasonably fail to seek suitable work." *Roberts*, IC 2019-008048 at 21. Dr. Collins opined work was available within Claimant's restrictions. However, this is insufficient. No evidence shows Claimant refused to seek suitable work.

71. The final inquiry is whether Claimant unreasonably failed to seek suitable work. Nine months after Claimant's hernia surgery, Dr. Collins opined that considering a 20-pound lifting restriction, between January 2017 and January 2019, there were approximately 211 truck driver postings and 186 delivery driver postings in the Lewiston-Clarkston labor market. She also opined that there were more than 1,000 additional jobs in this time frame and labor market in the general freight trucking industry that did not require a CDL and that a percentage of these jobs would have been consistent with Claimant's 20-pound restriction. She concluded there were appropriate light physical exertion driving jobs regularly available. Exhibit 23, p. 7.

72. After failing his June 2016 DOT physical due in part to the limitations of his hernia, Claimant did not believe he could drive truck. His undisputed testimony was that he sought employment he believed he could perform and in fact "applied for a few jobs, auto parts stores.

.... All the ones here in town: Napa, O'Reilly's, Auto Zone." Transcript, p. 39, 11. 13-19. He also applied for work in sporting goods but found no job. The true nature and full extent of Claimant's industrial injury was not accurately identified for nearly three years. Claimant dutifully presented himself to and accepted the care offered by every physician to whom he was sent by Defendants. He was misadvised by several of the physicians to which Defendants sent him, that his left groin and testicular pain were caused by his left hip and/or lumbar spine. After Dr. Thorne misinformed Claimant that his left groin pain was due to his hip, Claimant understandably attributed his left groin pain to his hip until his left hip arthroplasty procedure was completed and his left groin pain continued unresolved. Thereafter, Dr. Greendyke advised Claimant that his left groin and testicular pain were due to his lumbar spine. Claimant's failure to more actively seek suitable work is explained in significant part by the failure of the physicians by which Defendants required him to be examined to accurately diagnose and definitively treat his hernia. Claimant should not be further penalized thereby. Claimant credibly testified, and the weight of the evidence confirms, that from the time of his industrial accident until surgical repair of his hernia he experienced limiting left groin pain. Transcript, p. 39. Although the record shows limited efforts to seek work, when the totality of the evidence is considered, the Referee does not find that Defendants have shown Claimant unreasonably failed to seek suitable work.

73. Claimant has proven his entitlement to temporary disability benefits from the time of his February 5, 2016 industrial accident until February 8, 2019, when he was released following his hernia repair surgery by Dr. Bell. Defendants are entitled to credit for temporary disability benefits already paid.

74. Attorney fees. The final issue is whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

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

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133(1976).

75. Defendants have a continuing duty to investigate and correct denials that hindsight reveals were in error. Unreasonably maintaining a denial of a claim shown in hindsight to be legitimate may result in an award of attorney fees. *Zielinski v. U.S. Crisis Inc.*, 2011 WL 2199791, at 5-6 (Idaho Ind. Com. May 16, 2011). Thus, Defendants' reasons for denial must be reasonable both at the time of denial and in hindsight.

76. In the present case, Claimant asserts entitlement to attorney fees for Defendants' allegedly unreasonable denial of temporary disability benefits. Defendants have principally relied upon the opinions of Dr. Thorne and Dr. Collins, and upon the Commission's decision in *Hanson v. UPS*.

77. *Dr. Thome's opinion.* Defendants' denial based upon Dr. Thome's missed diagnosis as set forth in the May 19, 2016 Notice of Claim Status was reasonable at the time, but not in hindsight. Continued denial of benefits based on Dr. Thome's opinion became questionable no later than August 24, 2018 when Dr. Ludwig issued his opinion, and unreasonable when Dr. Bell's January 14, 2019 surgical findings were known.

78. *Dr. Collins' opinion.* Defendants relied upon Dr. Collins' testimony that suitable work was available to Claimant during the entire time between his accident and his release from hernia surgery, thus precluding Defendants' liability for temporary disability benefits under *Malueg*. However, "Simply showing there was work available which fell within Claimant's work restrictions is insufficient to deny him TTD benefits; instead Claimant must refuse or unreasonably fail to seek suitable work." *Roberts v. Portapros, LLC*, IC 2019-008048, p. 21 (October 11, 2019).

79. Moreover, Defendants cannot justify their denial of temporary disability benefits long after the denial by retaining an expert to establish there was suitable employment available. The basis for denial of temporary disability benefits must be reasonable at the time of denial and in hindsight. Defendants may not justify their denial after the fact by citing a reason they did not rely on and disclose to Claimant when they

denied benefits, a reason no evidence shows they considered when they denied benefits.

80. In *McCrorey v. Boise Pavins & Asphalt Co.*, 2011 WL 1313053 (Idaho Ind. Com. Mar. 28, 2011), the worker was found eligible for temporary disability and further medical treatment from April 10 through June 30, 2009, related to diagnosing her nickel sensitivity preparatory to prosthesis revision. Surety denied benefits without having consulted a medical expert. Finding this denial unreasonable, the Commission declared:

Surety must have adequate grounds for denial at the time a request for benefits is refused. Failure to investigate a claim in a "timely and reasonably thorough manner constitutes an unreasonable denial of compensation, for which claimant is entitled to attorney fees," *Matter of Burke*, 85 IWCD 70 (1985). The practice of denying medical benefits without reasonable grounds, and then six months later seeking to develop a reasonable basis to support the denial is wholly contrary to one of "the primary duties of an employer to an injured workman (which) is to furnish him reasonable medical, surgical or other treatment necessary to rehabilitate him and as far as possible restore his health, usefulness, and earning capacity." *Steinebach v. Hoff Lumber Company*, 98 Idaho 428 (1977); quoting *Clevenger v. Potlatch Forests. Inc.*, 85 Idaho 193 (1963).

McCrorey, 2011 WL 1313053, at 19-20. Similarly, the practice of denying temporary disability benefits without reasonable grounds and then obtaining a vocational opinion nine months later to develop a reasonable basis to support the denial is wholly contrary to one of the primary duties of an employer to an injured worker which is to pay temporary disability benefits during a time of disability and is unreasonable.

81. *Hanson v. UPS*. Defendants' denial of temporary disability benefits based upon the assertion set forth in the November 7, 2017 Notice of Claim Status that Claimant was disabled by his left hip arthroscopy rests upon Defendants' reading of *Hanson v. UPS*, 2016 WL 6884638 (Idaho Ind. Com. Aug. 29, 2016). Their reliance finds arguable support in the language of *Hanson* given Dr. Thome's missed diagnosis. As noted, Dr. Kym's records establish Claimant was disabled from working as a truck driver due to his total left hip arthroplasty from approximately September 12, 2016 until April 26, 2017, being six months after October 26, 2016. Defendants' denial of temporary disability benefits from September 12, 2016 until April 26, 2017 while Claimant was recuperating from total left hip arthroscopy, although not persuasive, was not unreasonable. Defendants' denial of temporary disability benefits as to the remainder of the time from Claimant's February 5, 2016 accident until he was released following hernia surgery on February 8, 2019 was not reasonable in hindsight.

82. Claimant has proven Defendants are liable for attorney fees for unreasonable denial of temporary disability benefits except for the period from September 12, 2016 until April 26, 2017.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to temporary disability benefits from the time of his February 5, 2016 industrial accident until February 8, 2019, when he was released following his hernia repair surgery by Dr. Bell. Defendants are entitled to credit for temporary disability benefits already paid.
2. Claimant has proven Defendants are liable for attorney fees for unreasonable denial of unpaid temporary disability benefits except for the period from September 12, 2016 until April 26, 2017.

RECOMMENDATION

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

DATED this 13th day of October, 2020

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee

ORDER

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

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

1. Claimant has proven his entitlement to temporary disability benefits from the time of his February 5, 2016 industrial accident until February 8, 2019, when he was released following his hernia repair surgery by Dr. Bell. Defendants are entitled to credit for temporary disability benefits already paid.

2. Claimant has proven Defendants are liable for attorney fees for unreasonable denial of unpaid temporary disability benefits except for the period from September 12, 2016 until April 26, 2017. Within twenty-one (21) days of the date of this order, Claimant shall submit his memorandum in support of his claim for attorney fees, with particular attention to the factors enumerated in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

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

INDUSTRIAL COMMISSION

Aaron White, Commissioner, Thomas E. Limbaugh, Commissioner.

Notes:

[1] A brief discussion of the period of Claimant's alleged period of disability due to his left hip arthroplasty is warranted. Defendants assert Claimant was totally disabled by his nonindustrial total left hip arthroplasty for two years. Claimant disagrees.

Dr. Kym performed total left hip arthroplasty on September 12, 2016. His October 26, 2016 record indicates Claimant "can easily need 6 months of rehab and gait training and therefore will be disabled from work for this amount of time." Exhibit 11, p. 10. On January 19, 2017, Dr. Kym noted that Claimant "cannot return to driving a truck, which is his profession." Exhibit 1, p. 125. Defendants have cited no record from Dr. Kym purporting to specify any additional period of disability.

Claimant observes that the only reference to two years in the record comes from Claimant's alleged comments to Dr. Rudolph which Dr. Rudolph recorded in his February 2, 2017 office note as follows: "Dr. Kym recommended him being in 3 times weekly physical therapy over the next 18 months, has recommended being off work for the next 2 years for aggressive rehab." Exhibit 1, p. 102. However, a physician does not render a medical opinion by merely recording the assertion of a patient. See *Meikle v. Alpine Flattening, LLC*. 2001 WL 470656 (Idaho Ind. Com. Apr. 27, 2001). Dr. Rudolph's records do not establish Claimant was restricted from all work for two years due to his left hip condition. At most, Dr. Kym's records establish Claimant was disabled from working as a truck driver due to his total left hip arthroplasty from approximately September 12, 2016, until six months after October 26, 2016, which would be April 26, 2017.
