

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ALAN G. ABDIAN**) **DOCKET NOS. 17 21133, 17 21134, 17 21135,**
 2) **17 21136, 17 21139 & 17 21236**
 3)
 4 **CLAIM NOS. BB-43022 & AM-86373**) **PROPOSED DECISION AND ORDER.**

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 6 **Lance Palmer, Industrial Appeals Judge** — These six consolidated appeals were filed by
 7 claimant Alan G. Abdian, 65, who sustained two different industrial injuries while working at Suite
 8 Arrangements, Inc., a used furniture store that he owned and operated. Mr. Abdian was aggrieved
 9 by orders issued by the Department of Labor and Industries, which determined that his preexisting
 10 degenerative lumbar spine and right leg conditions were not aggravated by his industrial injuries,
 11 denied authorization for a repeat lumbar MRI, assessed an overpayment for time-loss compensation
 12 paid without certification, and rejected the second claim. Because Mr. Abdian proved by a
 13 preponderance of the evidence¹ that his preexisting degenerative conditions were aggravated by his
 14 industrial injuries, all of the orders on appeal are **REVERSED AND REMANDED** to the Department
 15 to take further action, as set forth in detail below.
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DISCUSSION

Claim BB-43022: The July 7, 2016 Low Back Injury and Treatment

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 23 In 2016, Mr. Abdian owned and operated Suite Arrangements, Inc., a used furniture store in
 24 West Seattle. At all material times, he was a state fund employer and a worker covered under the
 25 Industrial Insurance Act. On July 7, 2016, Mr. Abdian bent over to affix a new tab to the license plate
 26 on his furniture delivery truck and immediately felt severe low back pain. The pain radiated down into
 27 his right leg and was so bad that when he tried to move the truck, he could not lift his right foot from
 28 the accelerator pedal to the brake pedal. He immediately went to his chiropractor, Catherine Sparks,
 29 D.C., who testified that she had provided Mr. Abdian with hundreds of maintenance treatments over
 30 the course of a decade and had never observed him exhibit such severe and intense symptoms. She
 31 immediately directed him to a nearby Franciscan Health clinic, where he saw Michael Putnam, M.D.
 32 for triage and diagnostic work up. Finding nothing that required surgical intervention, Dr. Putnam
 33 sent Mr. Abdian back to Dr. Sparks for conservative care. An industrial injury claim for a low back
 34 injury was filed the next day. The claim was allowed, but not for any specific condition.
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42 When his low back and right leg symptoms persisted, multiple diagnostic films were taken. An
 43 October 4, 2016 lumbar MRI showed what all testifying experts agreed were preexisting degenerative
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46 ¹ *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949), overruled on other grounds by
 47 *Windust v. Department of Labor & Indus.*, 52 Wn.2d 33 (1958).

1 conditions: a small right-sided L4-5 disc extrusion; mild facet hypertrophy, right greater than left; and
 2 a mild circumferential osteophyte with loss of disc space at L5-S1. Notably, the central spinal canal
 3 was unremarkable. Over the next several months, Mr. Abdian's symptoms worsened and he began
 4 to report shooting pains down both legs.
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 7 In the spring of 2017, Polyclinic physiatrist Thomas T. Chung, M.D. requested authorization
 8 for another lumbar MRI. The Department demurred and sent Mr. Abdian for an RCW 51.32.110
 9 medical examination by Charles Peterson, M.D., a semi-retired Seattle orthopedic surgeon who sees
 10 patients one day a week and spends the remainder of his professional time performing forensic
 11 examinations at the request of the Department and self-insurers. Following his June 5, 2017
 12 examination of Mr. Abdian and a medical records review, Dr. Peterson opined that Mr. Abdian
 13 suffered a lumbar sprain when bending over to affix the tab, but did not aggravate the preexisting low
 14 back conditions, which Dr. Peterson characterized as "severe."² In support of his opinion, he asserted
 15 that Mr. Abdian had ongoing back pain for 10 to 15 years before the industrial injury, and that lumbar
 16 MRIs established that the preexisting conditions had not changed as a result of the July 7, 2016
 17 industrial injury. Dr. Peterson based the latter assertion on his comparison of a lumbar MRI taken in
 18 2003 with one taken shortly after the industrial injury. According to Dr. Peterson, as of the date of
 19 the RCW 51.32.110 examination, Mr. Abdian had reached maximum medical improvement, did not
 20 need another lumbar MRI, and was able to work.
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22 **Claim BB-43022: The July 7, 2016 Low Back Injury Appeals**
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24 Relying upon Dr. Peterson's opinions, the Department issued orders denying authorization for
 25 another lumbar MRI and denying responsibility for Mr. Abdian's preexisting low back conditions.
 26 Mr. Abdian appealed each of the following orders:
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- 28 • **Docket No. 17 21133.** On August 14, 2017, the Department determined that a repeat lumbar
 29 MRI was not medically necessary and denied Dr. Chung's request for authorization;
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- 31 • **Docket No. 17 21134.** On August 15, 2017, the Department segregated intervertebral disc
 32 disorders with lumbar myelopathy as not caused or aggravated by the industrial injury;
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- 34 • **Docket No. 17 21135.** On August 16, 2017, the Department segregated segmental and
 35 somatic dysfunction of lumbar region as not caused or aggravated by the industrial injury;
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² Peterson Dep. at 23.

- **Docket No. 17 21136.** On August 17, 2017, the Department segregated other intervertebral disc displacement as not caused or aggravated by the industrial injury; and
- **Docket No. 17 21139.** On September 7, 2017, the Department demanded repayment of \$5,500 in time-loss compensation benefits paid without medical certification of eligibility from February 27, 2017 through June 16, 2017.

Claim BB-43022 and Docket No. 17 21133: The Repeat MRI

Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice.³

There is no statutory definition of "proper and necessary,"⁴ but an administrative regulation defines the term to include diagnostic testing.⁵ Another administrative regulation provides for repeat MRIs to confirm changes in a work-related condition.⁶ When the Department denies authorization for a diagnostic test that is not specifically excluded from coverage by statute or regulation, and an injured worker appeals the denial, the worker will prevail if a preponderance of the credible medical evidence—some of it based on objective findings—establishes that the diagnostic test is medically necessary.⁷ If the MRI has been taken without the Department's authorization, the IAJ can order the Department to pay for the MRI if the IAJ finds that the MRI was a proper and necessary diagnostic test.⁸ Finally, the IAJ may consider the results of an unauthorized procedure when determining whether the procedure was proper and necessary.⁹

In support of his appeal, Mr. Abdian presented testimony from two experts: Dr. Sparks and H. Richard Johnson, M.D., an orthopedic surgeon long-retired from clinical practice. Dr. Johnson conducts one forensic evaluation per week, always at the request of lawyers for the injured. Dr. Johnson examined Mr. Abdian on March 8, 2018 and performed the most thorough records review of any of the testifying experts: he read medical charts going back as far as 1971. Since Dr. Peterson opined that Mr. Abdian sustained a lumbar strain, resolved as of June 5, 2017, one of the most important objective findings made by Dr. Johnson during his examination of

³ RCW 51.36.010(2)(a).

⁴ *In re Susan Pleas*, BIIA Dec., 98 7931 (1998).

⁵ WAC 296-20-01002.

⁶ WAC 296-20-121.

⁷ *In re Zbigniew Krawiec*, BIIA Dec., 90 2281 (1991).

⁸ *In re David Harrington*, BIIA Dec., 97 A033 (1999).

⁹ *In re Zbigniew Krawiec*, BIIA Dec., 90 2281 (1991).

1 Mr. Abdian was a 3+ paravertebral muscle spasm that extended from T10 to S1 and caused a
2 flattening of the normal curvature of Mr. Abdian's entire lumbar spine, consistent with an unresolved
3 lumbar strain. As a result, Mr. Abdian had limited range of lumbar motion, another objective finding.
4 Although Dr. Johnson made no objective findings of radiculopathy, based on his medical records
5 review, he noted that others had done so. With regard to whether the repeat MRI was a proper and
6 necessary diagnostic procedure, Dr. Johnson opined that the earlier MRIs were taken too close in
7 time to the industrial injury to show injury-related progression of the degenerative conditions, and that
8 "the need for an additional MRI of the lumbar spine was to facilitate a decision with regards to
9 treatment."¹⁰ According to Dr. Johnson, if progression was shown on a repeat MRI, future treatment
10 for Mr. Abdian would include epidural steroid injections, medial branch blocks, or facet joint injections
11 "to provide him with improvement, if not resolution, of his current chronic low back pain."¹¹
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13 The repeat lumbar MRI was taken on May 9, 2018, without the Department's approval, and
14 after Dr. Johnson's testimony was perpetuated. The findings, as reported by Dr. Sparks during her
15 May 29, 2018 perpetuation deposition, established that Dr. Johnson was correct: there was an
16 accelerated progression of Mr. Abdian's degenerative lumbar conditions during the year-and-a-half
17 that passed between the October 4, 2016 MRI and the May 9, 2018 MRI. According to Dr. Sparks,
18 the mild right-sided facet hypertrophy at L4-5 had worsened and become moderate. Moreover, the
19 mild circumferential osteophyte at L5-S1 had grown and might be contacting the left L5 nerve root,
20 which would account for Mr. Abdian's left-sided radicular symptoms. Finally, since the October 4,
21 2016 MRI, Mr. Abdian had developed central canal narrowing, which might also account for his
22 reported radiculopathy. Like Dr. Johnson, Dr. Sparks was of the opinion that the May 9, 2018 lumbar
23 MRI was an appropriate diagnostic procedure, given Mr. Abdian's changing symptoms.
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25 Even though he was deposed a full month after Dr. Sparks, Dr. Peterson was not asked
26 about—nor did he mention—the May 9, 2018 lumbar MRI findings. He simply reiterated the opinion
27 he had given in his original report: another MRI was unnecessary because Mr. Abdian's lumbar strain
28 had resolved and there had been no change in the preexisting lumbar conditions in the 13 years that
29 passed between the MRIs taken in 2003 and 2016. Given the new MRI findings, the foundation for
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46 ¹⁰ Johnson Dep. at 36-37.

47 ¹¹ Johnson Dep. at 37.

1 Dr. Peterson's opinion crumbled away, and the opinions of Dr. Sparks and Dr. Johnson were more
2 persuasive.¹²

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4 Accordingly, Mr. Abdian met his burden of proving—by a preponderance of the credible
5 medical evidence, some of it based upon objective findings—his entitlement to a repeat lumbar MRI,
6 which was a proper and necessary diagnostic test for a changed condition proximately caused or
7 aggravated by his industrial injury. The Department's August 14, 2017 order is reversed and
8 remanded to the Department with direction to authorize and pay for the May 9, 2018 lumbar MRI.

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10 **Claim BB-43022 and Docket No. 17 21134: Intervertebral Disc Disorders with Myelopathy**

11 **Claim BB-43022 and Docket No. 17 21135: Segmental and Somatic Dysfunction**

12 **Claim BB-43022 and Docket No. 17 21136: Intervertebral Disc Displacement**

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14 Mr. Abdian's appeals of the three segregation orders turn on whether his preexisting
15 degenerative conditions were aggravated by the July 7, 2016 industrial injury. According to
16 Mr. Abdian, he had an L5 discectomy in 1997 and an L5 laminectomy in 2004. He testified that after
17 the surgeries, he was for the most part symptom free, but experienced periodic flare-ups of lumbar
18 pain. In order to avoid and treat these flare ups, he saw Dr. Sparks for regular adjustments,
19 sometimes once or twice a week, sometimes not at all for a month or more. After the July 7, 2016
20 bending incident, Mr. Abdian said he experienced constant and debilitating pain of a type he had not
21 experienced since his surgeries. Dr. Sparks, his attending medical provider, backed him up. I gave
22 her testimony special consideration due to her unique perspective as an eyewitness to Mr. Abdian's
23 symptoms before and after the industrial injury, which placed her in a superior position to gauge
24 whether the industrial injury exacerbated his preexisting degenerative conditions, as compared to
25 Dr. Johnson and Dr. Peterson, who saw Mr. Abdian one time.¹³ According to Dr. Sparks, the
26 preexisting degenerative conditions were more probably than not aggravated by the industrial injury.
27 Dr. Johnson, the forensic expert who reviewed Mr. Abdian's treatment records going back to 1971,
28 concurred. Based upon his review of the records, Dr. Johnson concluded that "the biggest change
29 is that the patient has gone from episodic problems with recurrent low back pain to that of constant
30 low back pain radiating into the lower extremities."¹⁴

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45 ¹² *Sayler v. Department of Labor & Indus.*, 69 Wn.2d 893 (1966); *Parr v. Department of Labor & Indus.*, 46 Wn.2d 144 (1955);

46 ¹³ *In re Natishia M. Powell*, Dckt. No. 00 16728 (October 1, 2001).

47 ¹⁴ Johnson Dep. at 35.

Dr. Peterson reviewed some—but not all—of Mr. Abdian's preinjury treatment records. Except for describing the surgeries, Dr. Peterson provided scant detail concerning the symptoms recorded in the preinjury medical records, which he relied upon to support his contention that Mr. Abdian's preinjury symptoms were unchanged by the industrial injury. Instead, Dr. Peterson chose to give long narrative answers, liberally salted with opinions he based upon inapplicable legal standards:

Well, the back is an ongoing problem. There's nothing set off. There's no difference. This man has had ongoing problems. He's been operated on twice. The last one was a salvage operation done by Dr. Hanscom. That didn't work. He's just had ongoing problems. It's not any different than it was before. He's got back pain. It's all subjective. There is nothing objective about this. I don't deal with subjective problems like pain. You have to have objective changes. He has no objective changes. He just says he hurts more, and there's just nothing going on there that we can say objectively.¹⁵

While objective findings are required for disability determinations¹⁶ and claim reopenings,¹⁷ objective findings are not required for a trier of fact to find that a preexisting condition has been exacerbated by an industrial injury.¹⁸ Dr. Peterson again ventured into legal waters when he cited the Washington Supreme Court's *Miller* decision and offered the following: "Lighting up, of course, has to have no preexisting problems. He did have preexisting, so it can't be a lighting up condition."¹⁹ Like objective findings, the lighting up doctrine does not apply to an appeal of an order segregating a preexisting condition.²⁰ Given that there was no progression of the preexisting conditions for 13 years before the industrial injury (between the 2003 and October 4, 2016 MRIs), the progression of those conditions in the year-and-a-half after the industrial injury (between the October 4, 2016 and May 9, 2018 MRIs) was most likely due to injury-related exacerbation, as convincingly articulated by Dr. Sparks and Dr. Johnson, who opined that age-related progression would not manifest so quickly.

According to Dr. Sparks, intervertebral disc disorder with myelopathy is lumbar disc dysfunction that affects the central spinal canal, and the May 9, 2018 lumbar MRI shows that Mr. Abdian has this condition. Additionally, she explained that segmental and somatic dysfunction of the lumbar region is dysfunction of the biomechanical joints of the lumbar spine, as manifested by Mr. Abdian's loss of lumbar range of motion, which was documented by Dr. Johnson. Finally, she

¹⁵ Johnson Dep. at 62.

¹⁶ WAC 296-20-01002.

¹⁷ *Phillips v. Department of Labor & Indus.*, 49 Wn.2d. 195 (1956).

¹⁸ *In re Samuel L. Pierce*, Dckt. No. 16 21911 (February 28, 2018); *In re Steve R. Clearwater*, Dckt. No. 06 18494 (December 18, 2007).

¹⁹ Peterson Dep. at 63.

²⁰ *In re Aaron Libby*, BIIA Dec., 04 20487 (2005); *In re Naomi G. Ramirez*, Dckt. No. 12 14480 (November 5, 2013).

1 testified that vertebral displacement of the lumbar spine describes Mr. Abdian's disc extrusion in the
2 right foramen at L4-5, which is consistent with his right-sided radicular symptoms. She and
3 Dr. Johnson agreed on a more-probable-than-not basis that each of these segregated conditions
4 were aggravated by the July 7, 2016 industrial injury. Because their understanding of Mr. Abdian's
5 preinjury symptoms was more accurate than Dr. Peterson's, and because Dr. Sparks based her
6 opinions upon the May 9, 2018 MRI findings, which showed a progression of Mr. Abdian's preexisting
7 degenerative conditions, I found the causation opinions of Dr. Sparks and Dr. Johnson more
8 persuasive than Dr. Peterson's opinions.
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10 Thus, Mr. Abdian met his burden of proving—by a preponderance of the credible medical
11 evidence—that his preexisting degenerative conditions of the lumbar spine were aggravated by his
12 industrial injury of July 7, 2016. The Department's August 15, 2017 order is reversed and remanded
13 to the Department with direction to find that the condition diagnosed as intervertebral disc disorders
14 with lumbar myelopathy was aggravated by the industrial injury of July 7, 2016, and to accept
15 responsibility for that condition. The Department's August 16, 2017 order is reversed and remanded
16 to the Department with direction to find that the condition diagnosed as segmental and somatic
17 dysfunction of lumbar region was aggravated by the industrial injury of July 7, 2016, and to accept
18 responsibility for that condition. The Department's August 17, 2017 order is reversed and remanded
19 to the Department with direction to find that the condition diagnosed as intervertebral disc
20 displacement was aggravated by the industrial injury of July 7, 2016, and to accept responsibility for
21 that condition. The degree and duration of aggravation are matters for the Department to determine
22 after remand.²¹

23 **Claim BB-43022 and Docket No. 17 21139: Time-Loss from February 27, 2017 - June 16, 2017**

24 Based on Dr. Peterson's opinion that the preexisting conditions were not aggravated by the
25 industrial injury, the Department issued its September 7, 2017 order demanding repayment of \$5,500
26 in time-loss compensation benefits paid without medical certification of eligibility from February 27,
27 2017 through June 16, 2017.²² In support of the appeal, Dr. Johnson made a prima facie case for
28 entitlement when he gave the following testimony about Mr. Abdian's physical capabilities during the
29 relevant time period:
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46 ²¹In re Orena Houle, BIIA Dec., 00 11628 (2001).

47 ²²Ex. 1.

1 It is my opinion that based on those physical findings as they related to his low back
2 condition, he would be unable to sustain employment on a regular, continuous basis
3 even at a sedentary level. Again, that's based on my findings at the time of my
4 evaluation. He would not be able to tolerate the sitting that is required for a sedentary
5 employment, and he does not have the lifting capabilities to move beyond sedentary
6 employment.²³

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8 Dr. Peterson opined that Mr. Abdian was capable of returning to work as a furniture salesman
9 during the period in question, but conceded during cross examination that in forming his opinion, he
10 did not consider the limitations attributable to Mr. Abdian's preexisting lumbar conditions. It is
11 important to note that at the hearing, counsel for the parties stipulated that the time-loss recoupment
12 order should be reversed and remanded if the three segregation orders were reversed.²⁴ As noted
13 above, those segregation orders are reversed.

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15 Dr. Johnson's opinion on employability was more persuasive than Dr. Peterson's, since it was
16 based upon Dr. Johnson's review of contemporaneous treatment records and his examination
17 findings of lumbar spasm and persistent lumbar sprain. Thus, Mr. Abdian met his burden of proving—
18 by a preponderance of the credible medical evidence—that he was temporarily totally disabled by his
19 injury-related lumbar conditions from February 27, 2017 through June 16, 2017. The Department's
20 September 17, 2017 order is reversed and remanded to the Department with direction to find that
21 Mr. Abdian was temporarily totally disabled from February 27, 2017 through June 16, 2017, and to
22 pay him time-loss compensation benefits for that period, less any prior awards.

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24 **Claim AM-86373 and Docket No. 17 21236: The July 14, 2016 Right Hip and Right Knee Injury**

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26 On July 14, 2016, only one week after his low back injury, Mr. Abdian was walking off his
27 showroom floor when he experienced what he described as a second sudden and injurious trauma.
28 As he stepped from the showroom's carpet onto a hard tiled surface, he tried to turn to his right, but
29 his planted right foot did not pivot with the rest of his body, and he felt a "pop" in his right hip joint.
30 When he awoke the next morning, he had severe right hip pain. He reported the incident to
31 Dr. Sparks and sought treatment from her the same day, July 15, 2016. According to Dr. Sparks,
32 Mr. Abdian had never reported right hip or knee pain during their many prior treatment sessions.

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34 Mr. Abdian testified that after the July 14, 2016 twisting incident, his right leg pain worsened,
35 especially in his right hip and right knee. Unsure of the source of his pain, he saw different providers
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46 ²³ Johnson Dep. at 58.

47 ²⁴ 5/31/18 Tr. at 6. See also Ex. 1.

1 for diagnosis and treatment of his symptoms. One of them was physical medicine and rehabilitation
2 specialist Christopher Standaert, M.D., who saw Mr. Abdian on December 12, 2016, and January 10,
3 2017. The Department deposed Dr. Standaert, who—after seeing Mr. Abdian—moved to Pittsburgh,
4 where he continues to treat patients. When deposed, Dr. Standaert had no independent recollection
5 of Mr. Abdian and had only a portion of his treatment notes, which were provided to him by the
6 Department. The chart did not include the patient intake questionnaire, which Dr. Standaert said
7 would document any history of injury provided by Mr. Abdian. Though he helpfully described the
8 anatomy of the hip, Dr. Standaert provided no other help to the parties, since he offered no opinions
9 concerning diagnosis or causation:

14 I'm sure the intent in sending him to me was to get to some sort of definitive or helpful,
15 at least, treatment or understanding of what was wrong with him, but I saw him twice.
16 We made it through the phase of trying—part way through the phase of trying to
17 understand where his pain was from and what his underlying anatomy was but that's
18 as far as I made it. So I never got to a point of a causal connection of his pain or even
19 the source of his pain.²⁵

22 On March 6, 2017, Dr. Sparks filed an Application for Benefits on behalf of Mr. Abdian for
23 "multiple injuries" sustained when Mr. Abdian "turned and twisted hip socket."²⁶ On the claim form,
24 Mr. Abdian misidentified the injury date as July 15, 2016. When the Department sent Mr. Abdian to
25 see Dr. Peterson on June 5, 2017, it asked Dr. Peterson to address both of Mr. Abdian's claims.
26 According to Dr. Peterson, he failed "to recognize that there was a separate injury"²⁷ and concluded
27 that Mr. Abdian had preexisting degenerative arthritis of the right hip joint, not exacerbated by the
28 first industrial injury on July 7, 2016. Dr. Peterson was unaware of a right knee problem and did not
29 comment on it in his report.

34 On June 21, 2017, relying on Dr. Peterson's report, the Department rejected the second claim
35 because "the claimant's condition preexisted the alleged injury and is not related thereto."²⁸ The
36 Department did not identify any medical condition in its order. Mr. Abdian protested, but the
37 Department affirmed the rejection on September 11, 2017. Mr. Abdian appealed "because the
38 causation of the hip condition is occupationally related."²⁹ In an amended litigation order dated
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44 ²⁵ Standaert Dep. at 38.

45 ²⁶ Peterson Dep. at 56.

46 ²⁷ Peterson Dep. at 66.

47 ²⁸ Department order dated 6/21/17, Claim No. AM-86373.

²⁹ 9/14/17 Notice of Appeal, Docket. No. 17 21236.

1 January 23, 2018, the industrial appeals judge previously assigned to these consolidated appeals
 2 narrowly framed the issue as "[o]n or about July 15, 2016, did Alan Abdian sustain an industrial injury
 3 in the course of his employment with Suite Arrangements Inc., within the meaning of
 4 RCW 51.08.100?"³⁰ At the beginning of the original hearing, Mr. Abdian's counsel asked for claim
 5 allowance for "an alleged primarily hip and right knee but it was mostly considered at the Department
 6 as a right hip claim."³¹ The Department did not object to litigating the right knee condition, nor did it
 7 object when expert witnesses were asked to give causation opinions concerning the knee condition.
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 10 When the Department rejects a claim on the ground that a condition is not the result of an
 11 industrial injury, three issues arise on appeal: (1) whether there was an industrial injury; (2) whether
 12 there is a condition requiring treatment or causing disability; and (3) whether the condition requiring
 13 treatment or causing disability is causally related to the alleged industrial injury.³² RCW 51.52.080
 14 requires that every notice of appeal of a Department order set forth every issue to be considered by
 15 the Board of Industrial Insurance Appeals. Evidence put before an industrial appeal judge may take
 16 a wide range, but the judge may not enlarge the scope of the proceedings beyond the issues raised
 17 in the notice of appeal.³³ Under *Lenk*,³⁴ Mr. Abdian has the burden to "prove up" the conditions he
 18 alleges require treatment, and although he only referenced the hip condition in his notice of appeal,
 19 he clearly staked his claim for both the hip and knee conditions at the beginning of the hearing.
 20 Because the Department did not object to questions about the knee condition at the hearing or during
 21 the perpetuation depositions, I will address the causation of both the right hip and right knee
 22 conditions in this proposed decision and order, in accord with Board precedent.³⁵
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 25 According to Mr. Abdian, he was a jogger when young, had periodically experienced hip
 26 soreness, and had mentioned the soreness to a doctor in the 1970s. Although Mr. Abdian did not
 27 acknowledge having hip pain in recent times, both Dr. Johnson and Dr. Peterson testified that they
 28 reviewed medical records that established that Mr. Abdian complained of hip pain in 2015, after which
 29 a doctor took x-rays of Mr. Abdian's hips. No additional testimony was given concerning the 2015
 30 hip complaints, and no evidence was offered that would tend to prove that Mr. Abdian complained
 31 of—or treated for—hip pain between the 1970s and 2015. As with his low back symptoms, Mr. Abdian
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33 1/23/18 Litigation Order.

34 5/31/18 Tr. at 9.

35 *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).

36 *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956).

37 *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).

38 *In re Jeroen H. Eichhorn*, Dckt. No. 16 13477 (January 8, 2018).

1 said that he had never had constant and severe hip pain like he experienced after July 14, 2016. He
2 also denied ever having mechanical knee pain or treatment prior to the twisting incident.

3 In support of his appeal of the claim rejection order, Mr. Abdian relied upon expert testimony from
4 Dr. Johnson. Dr. Johnson stated that an August 30, 2017 MRI arthrogram of the right hip showed
5 that Mr. Abdian had preexisting degenerative changes in the hip joint and a torn acetabular labrum,
6 a lip of cartilage that extends past the bony edge of the hip socket. According to Dr. Johnson, the
7 twisting motion more probably than not aggravated the preexisting changes.
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9 Dr. Peterson disagreed, but his disagreement was based on his wrong-headed lighting up
10 analysis. "This man did not have a lighting up of his hip because he had preexisting hip problems,"
11 he insisted. Nevertheless, Dr. Peterson conceded that Mr. Abdian more-probably-than-not suffered
12 an industrial injury to his right hip:
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14 I don't believe that the twisting of his hip did anything at all to his hip arthritis. I think
15 that the twisting of the hip caused him to have a hip sprain involving the capsule or soft
16 tissues around the hip.³⁶
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18 With regard to the right knee, Dr. Johnson testified that on May 2, 2017, Mr. Abdian underwent
19 debridement of the knee joint and medial and lateral meniscectomies. He cited the operative report
20 and relied upon its findings of degenerative changes in the form of fragmented cartilage surfaces.
21 According to Dr. Johnson, "the most common cause of a meniscal tear is a torsional or twisting stress
22 to the knee."³⁷ Dr. Johnson concluded on a more-probable-than-not basis that the July 14, 2016
23 incident aggravated Mr. Abdian's preexisting degenerative knee joint conditions. Thus, a prima facie
24 case was made.
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26 The Department's direct examination of its expert, Dr. Peterson, brought out nothing that
27 rebutted Mr. Abdian's prima facie case:
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29 Q: Doctor, what's your [sic] opinion regarding whether the aggravation of preexisting
30 degenerative joint disease of the right knee is related to the injury as described?
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32 A: I'm not aware of any aggravation of his knee joint. That didn't ever come up and
33 was never reported in the record review or in the report of industrial injury. I don't
34 see how that's related.³⁸
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45 ³⁶ Peterson Dep. at 63.

46 ³⁷ Johnson Dep. at 47.

47 ³⁸ Johnson Dep. at 59.

1 In fact, Dr. Peterson also gave the following answer in response to a different direct examination
2 question: "Certainly, if you are walking and you turn a corner and your foot catches you can twist
3 your leg and you can sprain your hip and your knee at the same time."³⁹
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5 Mr. Abdian met his burden of proving—by a preponderance of the credible medical evidence—
6 that his preexisting degenerative conditions of the right hip and right knee were aggravated by his
7 industrial injury of July 14, 2016. The September 11, 2017 claim rejection order is reversed and
8 remanded to the Department with direction to allow the claim and to accept responsibility for
9 Mr. Abdian's preexisting right hip and right knee conditions, which were aggravated by the industrial
10 injury of July 14, 2016. However, as with the preexisting lumbar conditions, the degree and duration
11 of aggravation of the right hip and right knee conditions are matters for the Department to determine
12 after remand.⁴⁰
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17 DECISION

18 Claim No. BB-43022

19 In Docket No. 17 21133, the claimant, Alan G. Abdian, filed an appeal with the Board of
20 Industrial Insurance Appeals on September 12, 2017. The claimant appeals a Department order
21 dated August 14, 2017. In this order, the Department denied authorization for a repeat lumbar MRI,
22 which it determined was not medically necessary. This order is incorrect, and is reversed and
23 remanded to the Department with direction to find that the MRI taken on May 9, 2018 was proper and
24 necessary treatment, and to authorize and pay for that MRI.
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30 In Docket No. 17 21134, the claimant, Alan G. Abdian, filed an appeal with the Board of
31 Industrial Insurance Appeals on September 12, 2017. The claimant appeals a Department order
32 dated August 15, 2017. In this order, the Department segregated the condition diagnosed as
33 intervertebral disc disorders with lumbar myelopathy as not caused or aggravated by the industrial
34 injury. This order is incorrect, and is reversed and remanded to the Department with direction to
35 accept responsibility for the condition diagnosed as intervertebral disc disorders with lumbar
36 myelopathy because the condition was aggravated by the industrial injury.
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41 In Docket No. 17 21135, the claimant, Alan G. Abdian, filed an appeal with the Board of
42 Industrial Insurance Appeals on September 12, 2017. The claimant appeals a Department order
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46 ³⁹ Peterson Dep. at 56.

47 ⁴⁰ *In re Orena Houle*, BIIA Dec., 00 11628 (2001).

1 dated August 16, 2017. In this order, the Department segregated the condition diagnosed as
2 segmental and somatic dysfunction of the lumbar region as not caused or aggravated by the industrial
3 injury. This order is incorrect, and is reversed and remanded to the Department with direction to
4 accept responsibility for the condition diagnosed as segmental and somatic dysfunction of the lumbar
5 region because the condition was aggravated by the industrial injury.
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9 In Docket No. 17 21136, the claimant, Alan G. Abdian, filed an appeal with the Board of
10 Industrial Insurance Appeals on September 12, 2017. The claimant appeals a Department order
11 dated August 17, 2017. In this order, the Department segregated the condition diagnosed as other
12 intervertebral disc displacement as not caused or aggravated by the industrial injury. This order is
13 incorrect, and is reversed and remanded to the Department with direction to accept responsibility for
14 the condition diagnosed as other intervertebral disc displacement because the condition was caused
15 or aggravated by the industrial injury.
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19 In Docket No. 17 1139, the claimant, Alan G. Abdian, filed an appeal with the Board of
20 Industrial Insurance Appeals on September 12, 2017. The claimant appeals a Department order
21 dated September 7, 2017. In this order, the Department demanded repayment of \$5,500 in time-loss
22 compensation benefits paid without medical certification of eligibility from February 27, 2017 through
23 June 16, 2017. This order is incorrect, and is reversed and remanded to the Department with
24 direction to find that Mr. Abdian was temporarily totally disabled from February 27, 2017 through
25 June 16, 2017, and to pay him time-loss compensation benefits for that period, less any prior awards.
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29 **Claim No. AM-86373**
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31 In Docket No. 17 21236, the claimant, Alan G. Abdian, filed an appeal with the Board of
32 Industrial Insurance Appeals on September 14, 2017. The claimant appeals a Department order
33 dated September 11, 2017. In this order, the Department affirmed prior orders dated July 27, 2017
34 and June 21, 2017 in which it rejected the claim as an industrial injury or occupational disease for the
35 following reason: that the claimant's condition preexisted the alleged injury and is not related thereto.
36 This order is incorrect, and is reversed and remanded to the Department with direction to allow the
37 claim and to accept responsibility for preexisting right hip and right knee conditions, which were
38 aggravated by the industrial injury.
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FINDINGS OF FACT**Claim No. BB-43022**

1. On January 10, 2018, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History for Docket Nos. 17 21133, 17 21134, 17 21135, 17 21136, and 17 21139 in the Board record solely for jurisdictional purposes.
2. Alan G. Abdian sustained an industrial injury on July 7, 2016, when he bent over to affix a new tab to the license plate on his furniture delivery truck and immediately felt severe low back pain, later followed by radicular symptoms.
3. Mr. Abdian's lumbar sprain was proximately caused by his industrial injury, which aggravated his preexisting conditions diagnosed as intervertebral disc disorders with lumbar myelopathy, segmental and somatic dysfunction of the lumbar region, and other intervertebral disc displacement.
4. As of August 14, 2017, Mr. Abdian's lumbar conditions proximately caused or aggravated by the industrial injury were in need of further proper and necessary treatment, specifically the repeat lumbar MRI recommended by Thomas Chung, M.D. The MRI was ultimately taken on May 9, 2018.
5. Mr. Abdian's lumbar conditions proximately caused or aggravated by his industrial injury left him with lifting restrictions that prevented him from performing any type of work other than sedentary work, and the same lumbar conditions left the 65-year-old used furniture store owner unable to perform even sedentary work. Thus, given his age, education, work history, preexisting conditions, and injury-related conditions, Mr. Abdian was unable to perform or obtain gainful employment on a reasonably continuous basis from February 27, 2017 through June 16, 2017.

Claim No. AM-86373

6. On October 30, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History for Docket No. 17 21236 in the Board record solely for jurisdictional purposes.
7. Mr. Abdian sustained an industrial injury on July 14, 2016, when he stepped from his showroom's carpet onto a hard tiled surface and tried to turn to his right as he walked. During that twisting maneuver, his planted right foot did not pivot when the rest of his body turned, and his preexisting degenerative right hip and right knee conditions were aggravated.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

Claim No. BB-43022

2. Mr. Abdian is entitled to further proper and necessary treatment as authorized by RCW 51.36.010.
3. The Department order dated August 14, 2017, is incorrect and is reversed. This matter is remanded to the Department to provide proper and necessary treatment for his lumbar condition; specifically, the Department shall authorize and pay for the May 9, 2018 lumbar MRI recommended by Thomas Chung, M.D.
4. The Department order dated August 15, 2017, is incorrect and is reversed. This matter is remanded to the Department to issue an order accepting the condition diagnosed as intervertebral disc disorders with lumbar myelopathy, which was aggravated by the July 7, 2016 industrial injury.
5. The Department order dated August 16, 2017, is incorrect and is reversed. This matter is remanded to the Department to issue an order accepting the condition diagnosed as segmental and somatic dysfunction of the lumbar region, which was aggravated by the July 7, 2016 industrial injury.
6. The Department order dated August 17, 2017, is incorrect and is reversed. This matter is remanded to the Department to issue an order accepting the condition diagnosed as other intervertebral disc displacement, which was aggravated by the July 7, 2016 industrial injury.
7. Mr. Abdian was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from February 27, 2017 through June 16, 2017.
8. The Department order dated September 7, 2017, is incorrect and is reversed. This matter is remanded to the Department to pay Mr. Abdian time-loss compensation benefits for the period from February 27, 2017 through June 16, 2017, less any prior awards.

1 **Claim No. AM-86373**

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- 3 9. Mr. Abdian did sustain an industrial injury within the meaning of
- 4 RCW 51.08.100 on July 14, 2016.
- 5 10. The Department order dated September 11, 2017, is incorrect and is
- 6 reversed. This matter is remanded to the Department to issue an order
- 7 allowing the claim for an industrial injury, and accepting Mr. Abdian's
- 8 preexisting degenerative conditions of the right hip and right knee, which
- 9 were aggravated by the July 14, 2016 industrial injury.
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11 Dated: October 12, 2018

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LANCE PALMER
Industrial Appeals Judge
Board of Industrial Insurance Appeals

Addendum to Proposed Decision and Order
In re Alan G. Abdian
Docket Nos. 17 21133, 17 21134, 17 21135, 17 21136, 17 21139 & 17 21236
Claim Nos. BB-43022 & AM-86373

Appearances

Claimant, Alan G. Abdian, by Washington Law Center, PLLC, per Spencer D. Parr
Employer, Suite Arrangements, Inc., None
Department of Labor and Industries, by Office of the Attorney General, per Michael E. Duggan

Hearing Testimony Considered

Claimant Witnesses

1. Alan G. Abdian

Perpetuation Deposition Testimony Considered

The following depositions are published in accordance with WAC 263-12-117 with all objections overruled and all motions denied except as indicated below.

Claimant Witnesses

1. H. Richard Johnson, M.D.

The objection lodged on page 10, line 23, is sustained and the exchange on page 10, lines 18-25, is stricken.

The objection lodged on page 52, line 19, is sustained and the exchange from page 52, line 13, through page 56, line 10, is stricken.

2. Catherine Sparks, D.C.

The objection lodged on page 13, lines 22-23, is sustained and the exchange on page 13, lines 18-23, is stricken.

Department Witnesses

1. Charles Peterson, M.D.

The objection lodged on page 27, lines 24-25, is sustained and the exchange from page 27, line 19, through page 28, line 16, is stricken.

The objection lodged on page 32, line 24, through page 33, line 3, is sustained and the answer on page 32, lines 13-23, is stricken after the sentence "I think Dr. Sparks did somewhat."

The objection lodged on page 35, lines 21-23, is sustained and the exchange from page 35, line 16, through page 36, line 6, is stricken.

The objection lodged on page 81, lines 16-17, is sustained and the exchange on page 81, lines 11-18, is stricken.

2. Christopher Standaert, M.D.

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In re: ALAN G. ABDIAN
Docket No. 17 21133 17 21134 17 21135 17 21136 17 21139 17 21236