

3. Whether and to what extent Claimant is entitled to temporary total and/or temporary partial disability (TTD/TPD) benefits.

4. Whether and to what extent Claimant is entitled to permanent partial impairment.

5. Whether and to what extent Claimant is entitled to disability in excess of impairment.

6. Whether Claimant is entitled to attorney fees.

The Referee notes that the Notice of Hearing inadvertently excluded the issue of attorney fees and the mistake went unnoticed at hearing. The parties argued the issue in post-hearing briefs and, in a telephone conference on July 16, 2007, they stipulated to include the issue for determination at this time.

CONTENTIONS OF THE PARTIES

Claimant contends he sustained lumbar and cervical spine injuries caused by his April 26, 2005 industrial accident. He alleges entitlement to additional medical benefits, temporary disability benefits, permanent impairment and permanent disability of 50 to 70 percent of the whole person. He requests the Commission award attorney fees for Defendants' mishandling of his temporary disability benefits.

Defendants contend Claimant has nothing physiologically wrong with him and he is not entitled to any further benefits beyond those paid; in fact, Defendants overpaid temporary disability benefits. There is no basis for an award of permanent impairment or disability and Claimant can return to his prior employment. Further, Defendants acted in good faith and Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in the present matter consists of the following:

1. The hearing testimony of Claimant, Luis Nuci, David Price, and Lynn Green;
2. Claimant's Exhibits 1 through 15 and Defendants' Exhibits A through P admitted at hearing; and,
3. The post-hearing deposition of George Nicola, M.D., dated February 8, 2007.

After considering all of the evidence and 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. At the time of hearing, Claimant was 44 years of age. He began working for Employer as a forklift driver in 1995. He also assisted Employer doing other duties when not driving. His work involved significant physical labor. Claimant's records show no workers' compensation claims prior to April 2005.

2. On April 26, 2005, Claimant slipped on an onion at work, twisted his back as he tried to catch himself, and fell onto his buttocks. In addition, Claimant described at hearing and in medical records an incident where he lifted a 50-pound bag of onions at work and felt a popping sensation in his back. The lifting incident occurred close in time to Claimant's slip and fall, but the exact date is unclear and there is no corresponding paperwork.¹

3. On April 27, 2005, Claimant saw Bryon Hemphill, M.D., and described the following history:

States last week he was dumping 50 pound back [*sic*] when he felt and heard a popping sensation in his right lower back. Pain radiated up the back. He notified her [*sic*] supervisor who asked him to watch it carefully and let him know if it got worse. He stated he started to feel fine so he went back to work. Yesterday he slipped while at work and fell on his bottom and began to complain of pain in his lower left back that is very tight. No numbness or tingling down the legs. No loss of bowel or bladder control. No foot drop.

¹ At hearing, Claimant testified that the incidents occurred on the same day, April 26, 2005. However, some of the medical records have indicated the incidents occurred in the same week, but not on the same day.

Exhibit E. Claimant did not appear to be in acute distress during the appointment, but arose from a seated position gingerly. Dr. Hemphill diagnosed a probable lumbar sprain. He prescribed medications and warned Claimant not to use them while driving a forklift or operating machinery requiring good reaction time. He also provided a 15-pound lifting limit and requested Claimant return in three weeks, or sooner with questions or concerns. Claimant returned on May 2, complaining of continuing back pain primarily when bending forward. However, he had no pain down the legs and no problem with bowel or bladder control. Dr. Hemphill noted “ropy spasms” in the lumbar spine and prescribed physical therapy. *Id.*

4. Claimant attended physical therapy with Gary Hoopes, P.T., from May 4 through May 18, 2005. P.T. Hoopes’ records indicated Claimant had returned to his regular work because no light duty was available. He also noted, “after being in the hyster for some time, or sitting in general, he feels the worst. He is unable to tie his shoes. He has been experiencing what he refers to as goosebumps along the left leg.” Exhibit M. As of May 16, Claimant was complaining of intense pain throughout his back. He described any relief as short-lived and then he would return to work where there was no light duty.

5. On May 18, Claimant returned to Dr. Hemphill with extreme pain (10/10) and numbness down into the legs with a sense of bladder urgency. According to Dr. Hemphill, P.T. Hoopes felt he was not making progress with Claimant and “discussions with [P.T. Hoopes] has lead us to believe that possibly there is some secondary gain but believe by his description today and physical exam that a more thorough work-up would be prudent before finalizing that impression.” Exhibit E. Dr. Hemphill requested an MRI.

6. Claimant’s May 23, 2005 MRI showed mild spondylotic changes through the lumbar spine as well as the following at L4-5 and L5-S1:

L4-5: BROAD-BASED CENTRAL DISK PROTRUSION, MILD REDUCTION OF SPINAL CANAL AP CALIBER AND MILD BILATERAL SUBARTICULAR RECESS COMPROMISE.

L5-S1: CENTRAL AND LEFT PARACENTRAL PARTIALLY CALCIFIED DISK PROTRUSION, DISK MATERIAL COMING IN CONTACT WITH THE LEFT S1 NERVE ROOT SLEEVE WITHOUT DISPLACING IT SIGNIFICANTLY.

Exhibit F.

7. On June 13, 2005, Dr. Hemphill concluded there is “evidence of disk herniation but I do not believe they [*sic*] completely correspond to his subjective findings.” Exhibit E. Given Claimant’s continued pain, possible neurologic involvement, and the abnormal MRI findings, Dr. Hemphill referred Claimant to orthopedic surgeon George Nicola, M.D.

8. On June 17, Dr. Nicola examined Claimant and conducted a nerve conduction study (NCS). According to Dr. Nicola, the NCS showed a right L5-S1 radiculopathy. Regarding the MRI results, he noted the L5-S1 protrusion “obviously may not be totally new, as there is some calcification noted over the protrusion.” Exhibit I. Nevertheless, he thought Claimant’s symptoms and injury “fit” and he ordered an epidural steroid injection. He also described Claimant as continuing to do his job “even though he is somewhat uncomfortable doing that.” *Id.* Work restrictions included no lifting over five pounds, no twisting or bending at the waist, and “primarily sit-down duty.” *Id.* On June 27, Dr. Nicola reiterated Claimant should be doing mainly sit-down work without lifting, bending, or twisting.

9. On June 28 and July 15, Claimant received epidural steroid injections performed by Matthew Wood, M.D. Dr. Wood noted Claimant seemed to be experiencing significant radicular pain, “most likely from the bulging disks in his back. There seemed to be a radiculopathy from this.” Exhibit K. Although Dr. Nicola’s focus was at L5-S1, Dr. Wood performed the procedure at the L4-5 interspace. In addition, Dr. Wood did not use fluoroscopy

to assist with placement of the needle. Claimant received no discernable improvement from the procedures.

10. On July 25, Claimant followed up with Dr. Nicola, who noted he expected Claimant to have had better results from the injections. He recommended a second opinion with a neurologist “to see if this patient’s symptoms are suggestive of a disc protrusion.” Exhibit I. He assigned less restrictive work limitations to include lifting to 15 pounds and no repetitive twisting or bending.

11. On August 8 and 13, 2005, Claimant presented to the Weiser Memorial Hospital emergency room (Weiser ER). On August 8, Claimant reported he had called Dr. Nicola’s office the prior week for pain medication refill and had not heard back. He received a Toradol injection and prescriptions for Flexeril, Norco and Naproxen. He was instructed to follow up with Dr. Nicola later that week for further pain medication. On August 13, the ER notes indicated Claimant’s “whole back hurts” and his neurosurgeon appointment was nearly one month away. Exhibit D. He again received a Toradol injection and prescriptions for Flexeril, Norco and Naproxen. He was instructed to follow up with the neurologist “ASAP.” *Id.*

12. On August 17, Claimant saw Dr. Nicola in follow up. Dr. Nicola again noted the lack of progress and reiterated the need to see a neurologist, Stephen Asher, M.D., to consider repeat epidural steroid injections and establish the validity of the complaints.

13. On August 22, Claimant saw Dr. Asher, who noted the following symptoms:

He describes pain in the low back, equal bilaterally in the lumbar region. This radiates up to the back of his neck into his legs and into the toes of his left foot. On the left foot he notes tingling and numbness over the posterior calf and overall [*sic*] five toes. He has some independently occurring numbness over the first and second digits of the left hand, which sometimes goes numb.

Exhibit H. Claimant’s examination led Dr. Asher to write: “Confounding findings on today’s

neurological examination; configure collaboration.” *Id.* He also assessed low back pain of unclear etiology, abnormal MRI examination with features that would be compatible with an S1 radiculopathy, and left-hand numbness, rule out carpal tunnel syndrome. Dr. Asher recommended a left lower extremity electromyography and, if the results were inconclusive, CT myelography would be the next step.

14. On August 25, Claimant presented to the Weiser ER describing chronic thoracic pain with left arm numbness. He received a Toradol injection.

15. On August 31, Claimant presented to the Weiser ER describing continued trapezius pain and herniated lumbar discs. He received a Toradol injection and a prescription for Neurontin (the ER physician added this to Claimant’s other three prescribed medications), and was instructed to follow up with Dr. Hemphill for a thoracic spine evaluation.

14. On September 1, 2005, Claimant saw Dr. Hemphill, who noted:

This is a 42 y/o Latino who presents to the clinic today for an attempt to secure more efficacious care. He has seen Dr. Nicola who recommended epidural injection. It was performed x 2 and ultimately referred to Dr. Asher for ongoing considerations. He has seen Asher on the 22nd of August and his appointment is October 7th. His feeling is he cannot get in any sooner though he feels his care is getting no where [*sic*] and he continues to have pain. He has been in the ED approximately 3 times for interval care since seeing Dr. Asher. He has attempted to contact Dr. Nicola’s office who [*sic*] also has not been able to provide him with any other care. Essentially, I told him I am unsure of being able to get him into any other specialists sooner than what is already scheduled on the 7th. Exhibit E.

Dr. Hemphill described Claimant as tending to straighten his back, roll his eyes and complain of pain throughout: “Doesn’t seem to matter where I touch it seems to give him discomfort.” *Id.* He concluded, “I believe some of his pain is augmentation though he has findings that would warrant a portion of his pain.” *Id.* He felt he had no other assets to offer Claimant and recommended he follow up with the specialists.

15. On September 3, Claimant presented to Weiser ER with continuing pain (upper

back with shooting pain down the left arm/leg). He received a Demerol/Phenergan injection.

16. On September 9, Claimant presented to Weiser ER describing an exacerbation at work that day while twisting at the conveyer belt. He received a Toradol/Phenergan injection and a prescription for Percocet instead of Norco. In addition, he was taken off work entirely from September 9 through 16 due to back pain.

17. On September 19 and 21, Claimant saw Dr. Hemphill and indicated Dr. Nicola's office was not returning his calls. Dr. Hemphill noted he had not received information from Dr. Nicola either, despite his requests, and that Claimant was stuck between referrals. Dr. Hemphill refilled Claimant's Percocet and asked that he make it last until his appointment with Dr. Asher.

18. On October 7, 2005, Dr. Asher indicated Claimant's EMG (NCS and concentric needle study) appeared normal. There are no other notes from Dr. Asher for this date of service (*i.e.*, no notes describing an examination or indicating Dr. Asher even met with Claimant).

19. On October 17, Claimant underwent an independent medical evaluation (IME), at his own request, by orthopedic surgeon Sid Garber, M.D. Dr. Garber concluded the April 26, 2005 accident caused Claimant's back pain, radiculopathy in the left leg, numbness and tingling in the left leg and drop foot, as well as cervical symptoms. He diagnosed a herniated lumbar disc at L5-S1 on the left and recommended further testing to evaluate L4-5 and the cervical spine. He opined Claimant was not stable and needed a surgical referral and he recommended Dr. Verska or Dr. Jorgenson. He thought Claimant should be taken off work altogether and noted that if he were to rate him at the time, Claimant would have a 5% whole person PPI (DRE category 2) for the cervical spine and a 13% whole person PPI (DRE category 3) for the lumbar spine.

20. On October 24, Claimant presented to Weiser ER indicating he had returned to work that day, making his back hurt worse. He received an injection and a return to work note

stating: “Mr. Prado can return to work but needs to limit lifting/pushing/pulling to [less than or equal to] 25 lbs & limit reaching & twisting movements.” Exhibit D.

21. On November 3, 2005, Dr. Hemphill denied Claimant’s request for medication refills indicating Claimant needed to contact Dr. Asher.

22. On November 14, with the authorization of Surety, Claimant began treating with spine surgeon Samuel Jorgenson, M.D. Dr. Jorgenson’s diagnoses included: 1) Cervical spondylosis; 2) Cervical musculoligamentous strain syndrome; 3) Lumbar spondylosis; 4) L4-5 disc protrusion; and, 5) Left lumbar radiculopathy. He related Claimant’s condition to the industrial accident and recommended a lumbar spine CT myelogram and cervical spine MRI. In response to a question from Surety regarding “evidence of pain exaggeration to prolong disability benefits,” he wrote:

There appears to be at the very least a language and cultural barrier regarding the patient and his perception of pain. He certainly has more severe pain than can be appreciated on the studies at this time. I certainly would not opine that he is attempting to prolong his disability benefits. Exhibit G.

Dr. Jorgenson noted it was very difficult to obtain an accurate history even with a Spanish-speaking interpreter and Claimant “has multiple pain complaints, which are difficult to pinpoint and characterize.” *Id.* He indicated Claimant had been working in a modified duty capacity but was having considerable difficulty with it, and he found him capable of performing modified duty including maximum lifting of 20 pounds, minimal bending, lifting and twisting, position change every hour, and no machinery operation.

23. On November 29, Claimant again requested medications from Dr. Hemphill, who wrote:

He’d been referred on to Dr. Nicola and Dr. Asher and I see little that I can do to help his back. All I am getting is a request for Percocet. I think if there is something more aggressive that needs to be done it should and it if [*sic*] is not

then I need more help. Otherwise, I feel that it is inappropriate just to keep writing for prescriptions for meds for a problem I cannot exclude a more appropriate option. At this point in time, I am going to leave his further treatment to Dr. Asher as Dr. Asher has essentially assumed the care from Dr. Nicola. I have not seen Francisco for well over 2 months. Exhibit E.

24. On December 5, 2005, Claimant went to Weiser ER stating he had been out of medications for two days and Dr. Hemphill did not want to give him any more until he saw Dr. Jorgenson. He received an injection at the hospital and two Percocet and three Flexeril to take home with him. On December 16, he returned to Weiser ER describing an exacerbation of back pain from physical duties at work the prior evening. He received an injection and prescriptions for Percocet, Flexeril, and Naproxen.

25. On December 20, Claimant underwent his CT Myelogram and was medically released from work for 24 hours following the procedure.

26. On December 30, Claimant again went to Weiser ER for an exacerbation at work (“moved wrong at work”). Exhibit D. He received an injection.

27. On January 1, 2006, Claimant went to Weiser ER where Dr. Hemphill treated him. Claimant reported he fell at work, but was able to catch himself. He had increased pain in the right lower lumbar region. He received an injection and was taken off work until his appointment with Dr. Jorgenson later that week.

28. On January 6 and 9, Claimant saw Dr. Jorgenson to review the CT Myelogram, the results of which were normal. Dr. Jorgenson wrote, “I do not appreciate enough neurologic impingement pathology to warrant surgical intervention,” and he recommended pain management with Dr. Dubose. Exhibit 14. He indicated Claimant was approaching permanent stationary status and “this would best be undertaken with an IME evaluation.” *Id.* He listed Claimant’s light duty work restrictions as no lifting over 20 pounds and no repetitive lifting.

29. Claimant was scheduled to see Dr. Dubose on March 9, 2006. In the meantime, he presented to Weiser ER on January 15 and 19, and February 14 and 23. He received injections and medication prescriptions.

30. On March 9, Dr. Dubose examined Claimant and opined it would be worthwhile to pursue an L4-5 epidural steroid injection for left leg radiculopathy and a C6-7 epidural steroid injection for left arm radiculopathy. He also noted Claimant was difficult to assess, his movements were guarded, and he appeared quite miserable throughout the entire exam. In this regard, he wrote, “[Claimant] does project a nonspecific pain behavior that is quite worrisome.” Exhibit J. Dr. Dubose discussed appropriate and safe use of narcotics with Claimant and had him sign a narcotic agreement. He provided work restrictions including no bending, twisting, and lifting pending the initial injection and follow-up.

31. On March 16, 2006, Dr. Nicola performed an IME at the request of Surety. He noted Claimant’s chief complaints as a painful neck and back and described inconsistent results and exaggerated pain behaviors on examination. He opined Claimant’s diagnosis was “pain behaviors without significant pathological findings,” although he also noted Claimant had degenerative changes and some questionable nerve impingements on lumbar MRI. He concluded Claimant’s current condition was not related to the April 26, 2005 accident and injury; no further treatment was recommended; Claimant was medically stable; and, he had no permanent impairment or restrictions related to the industrial accident and injury. He felt that, at the most, Claimant had sustained a mild lumbar sprain, “but at this point he has pain behaviors, which I think are unrelated to his industrial accident.” Exhibit I. Dr. Nicola provided no explanation or opinion regarding alternative causes of Claimant’s pain behaviors.

32. Initially, both Dr. Jorgenson and Dr. Dubose “checked a box” on correspondence from Surety indicating they agreed with Dr. Nicola’s IME. However, in response to a letter from Claimant’s attorney, Dr. Dubose later wrote that he felt Claimant’s low back and radicular symptoms are more likely than not related to his accident since there was no previous history, and he opined Claimant should undergo at least one more lumbar epidural steroid injection. He further noted Claimant had a strong psychiatric overlay and aggressive surgical or procedural intervention should not be done without additional evaluation and ongoing management.

33. As described in many of the medical records, Claimant presented at hearing with significant pain behaviors. However, the Referee did not perceive intentional deception or manipulation in his demeanor or testimony.

DISCUSSION AND FURTHER FINDINGS

1. **Causation; Pre-existing and/or Subsequent Injury or Condition.** A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

A pre-existing disease or infirmity of the employee does not disqualify a worker’s compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him or her. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

A claimant seeking compensation for the aggravation of a preexisting condition must prove that an accident as defined by Idaho Code § 72-102(17) aggravated the preexisting condition. Nelson v. Ponsness-Warren IDGAS Enterprises, 126 Idaho 129, 879 P.2d 759 (1994).

The provisions of the Workers' Compensation law are to be liberally construed in favor of the employee. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

A. Lumbar Spine. The weight of the medical evidence in this matter supports that the April 26, 2005 industrial accident caused Claimant's lumbar spine condition, including disc protrusions at L4-5 and L5-S1 and left lumbar radiculopathy. Only Dr. Nicola has opined otherwise.² One could argue that Dr. Jorgenson "signed off" on Dr. Nicola's causation opinion set forth in his IME; however, the Referee assigns minimal weight to "check the box" opinions when they conflict with that physician's own authored opinions and when, as in this case, such inconsistency (*i.e.*, complete reversal of a causation opinion) is unexplained. In his written report, Dr. Jorgenson, a spine specialist, clearly related Claimant's lumbar condition to the accident, even while acknowledging the disproportionate pain complaints. Drs. Garber and Dubose also provided causation opinions favorable to Claimant.

Claimant performed strenuous work for Employer for ten (10) years prior to the industrial accident and he did so without physical problems or restrictions. The day after the accident, he reported left-sided lumbar problems to Dr. Hemphill and within a month he described radicular symptoms. The symptoms have continued since that time and there is no evidence of similar issues prior to the industrial accident. As to the disproportionate nature of Claimant's pain

² Of note, Dr. Nicola indicated in his deposition that he does not "do backs," and had not done so for several years prior to seeing Claimant. Apparently, he specializes in shoulder and knees.

complaints, the Referee found Dr. Hemphill's and Dr. Jorgenson's comments helpful. Per Dr. Hemphill, " ... some of [Claimant's] pain is augmentation though he has findings that would warrant a portion of his pain," and Dr. Jorgenson described, "at the very least a language and cultural barrier regarding the patient and his perception of pain." Exhibits E and G, respectively.

B. Cervical Spine. The weight of the medical evidence does not support that Claimant sustained a cervical spine injury caused by the April 26, 2005 industrial accident. Unlike his lumbar symptoms, Claimant did not describe cervical/upper extremity symptoms until several months post-accident (most of these symptoms began appearing in the records in August 2005). Although Drs. Garber and Jorgenson provided opinions that could be used to establish causation with respect to Claimant's cervical spine condition, it appears these physicians did not have the opportunity to review the early medical records, and in particular, those of Dr. Hemphill. If they did review these records, Claimant has not adequately documented such a review. This is significant given the lack of documented cervical symptoms following the accident.

The historical summary contained in Dr. Garber's report describes neck pain and left arm numbness and tingling in conjunction with the April 2005 accident; such findings are not consistent with the early medical records. Dr. Jorgenson's report does not discuss the history of Claimant's cervical symptoms. The Referee cannot determine what caused Claimant's cervical problems, but Claimant has not met his burden of proof and has not established the industrial accident as that cause.

2. **Medical Benefits.** An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time

thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

Claimant requests further treatment with Dr. Dubose for pain management. He also requests payment of Weiser ER bills totaling \$1,245.92 for dates of service beginning January 19, 2006, when Surety stopped paying the ER bills. Based on her causation finding above, the Referee concludes Claimant is entitled to lumbar spine related treatment with Dr. Dubose, whose recommendations as of March 2006 were essentially palliative in nature. Dr. Dubose is a duly authorized treating physician whose treatment was prematurely terminated by Dr. Nicola's IME. Dr. Nicola opined Claimant should have no further medical treatment, but also found none of Claimant's problems related to the accident; this is not consistent with the Referee's findings.

Claimant is also entitled to payment for five of the last six dates of service at Weiser ER (1/19/06, 2/14/06, 2/23/06, 3/12/06, and 3/30/06) in the amount of \$1,025.42. Claimant did not adequately substantiate the visit and treatment received on the final date of service, 5/18/06, and he is not entitled to payment of that bill. According to Claimant, Surety did not cease paying the Weiser ER bills until the January 19, 2006 date of service, and the Weiser ER bill shows an outstanding balance for only those dates of service beginning January 19, 2006. Surety's earlier payments would weigh in favor of finding that Weiser ER was authorized as a treatment provider. On February 23, 2006, Claimant was still under the impression that "Workman's Comp [*sic*]" would not allow him to see anyone except his treating physician or the ER. *See* Exhibit D, p. 96. Although Surety's case manager testified Claimant was informed at some point

that ER bills would not be paid, the testimony was vague and the record does not contain the denial letter to substantiate that fact or to explain the circumstances surrounding it. Moreover, in December 2005, Dr. Hemphill, one of Claimant's treating physicians, directed Claimant go to the ER if he had concerns or increased symptoms.

3. **Temporary Total and/or Temporary Partial Disability.** Idaho Code § 72-102(10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-102(31) provides that "wages" and "wage earning capacity" after the injury or disablement from occupational disease shall be presumed to be the actual earnings after the injury or disablement, which presumption may be overcome by showing that those earnings do not fairly and reasonably represent wage earning capacity; in such a case wage earning capacity shall be determined in the light of all factors and circumstances which may affect the workers' capacity to earn wages.

Idaho Code § 72-408 further provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of

employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

A. Medical Stability/MMI. The Referee finds Claimant is medically stable, *i.e.*, he has reached maximum medical improvement (MMI). His MMI date is March 9, 2006, when he saw Dr. Dubose. As of January 9, 2006, Dr. Jorgenson felt Claimant was nearing medical stability, but he recommended Claimant see Dr. Dubose. Dr. Dubose's treatment recommendations on March 9 were essentially palliative in nature. While Claimant may be entitled to this additional treatment, he was no longer in a period of recovery following March 9, 2006.

B. Appropriateness of Light Duty Work prior to MMI. The Referee finds the record unclear as to when Employer offered which light duty positions to Claimant. Further complicating the matter is the fact that Claimant's restrictions were a "moving target," changing with each new doctor he saw. It is clear, however, that Claimant had significant work restrictions from the day after his injury forward. It is also clear that Claimant continued to work, attending work regularly but leaving before his scheduled 8-hour shift ended. Claimant contends he left work early due to physical difficulties caused by his injury, and Employer's HR manager substantiated this contention at hearing:

He would come into work and just kind of work as much as he could. We said, you know, whatever he thought he could work and, then, just let us know when he's leaving. Most of the time he'd just kind of let us know I can't do this anymore and he would go home.

Hearing Transcript, p. 58. The citation above also confirmed Employer's acquiescence in Claimant's early departures from work; he received no penalties or warnings.

Defendants now argue they made appropriate light duty work available to Claimant eight hours per day and, as such, they paid him no time loss benefits for hours he did not work. Surety counted the time against him when he left early and computed temporary disability benefits as if he had worked 8 hours per day, five days per week. The Referee also notes that, on several occasions, it appears Defendants did not pay Claimant for days when he had medical appointments related to his industrial injury. Claimant's attorney wrote several letters to Surety attempting to find out why Claimant's TPD checks were so low, and confirming the dates Claimant had medical appointments.

Once a Claimant shows he has been released to light duty work, the burden falls to Defendants to show that the employer offered appropriate light duty work. The Referee finds Defendants did not meet that burden in this case. For several weeks following the accident, Claimant continued to perform his regular work, which was clearly inconsistent with the assigned restrictions. Moreover, for several weeks after he began seeing Dr. Nicola, Claimant was performing line work, standing and reaching across a three to four foot conveyor belt to sort, pick out, and/or clean onions. During this time period, Dr. Nicola had restricted Claimant to primarily sit down work. Even with the option of taking breaks at will, the light duty work provided was standing work, not sitting work.

In addition, most of the physicians restricted Claimant from bending or twisting, actions realistically required to reach across a waist-high, three to four foot moving belt to remove objects and put them in a bucket – repetitively, all day long, while standing. Claimant would also lift the bucket approximately ten times per hour when it was full and pass it over the belt to

another worker. Claimant testified the bucket of onions weighed 25-30 pounds when full; Defendants provided no evidence to the contrary. The Referee found persuasive the testimony of Claimant and another employee (two people who had performed these duties) when they described the line work. On the other hand, the Industrial Commission Rehabilitation Division (ICRD) light duty job site evaluation for this modified position is not accurate; in fact, the ICRD documentation made no mention of lifting buckets of onions at all. At hearing, the HR manager said Claimant could have had someone else lift the buckets for him. This is not a realistic expectation and, more than that, it is not Claimant's responsibility to find someone to lift buckets for him every six minutes when they fill up; it is Employer's responsibility to provide him with adequate light duty work. It is more likely that the conveyor belt work exceeded Claimant's restrictions.

The other light duty position described by Employer was "bin dumping," which Defendants describe in their brief as simply pushing a button. At hearing, Employer's HR manager described it as follows:

Bin dumping is bins are brought in, they are placed on a chain, conveyor by a forklift and the bin dumper, the person that's running the equipment, will press a button, the bin will move to the dumping area, which would be hydraulically dumped into an even flow or a bin, press another button it comes back down, and moves along to the – I guess the exit end and the forklift takes off. Hearing Transcript, p. 54.

The manager stated it was "mostly just pushing buttons," but also described the location, which was up on a five-foot by ten-foot platform with a railing seven to ten steps off the ground. The manager testified Claimant did not like to climb up the steps; Claimant testified as follows:

Well, the work for one person who is not injured would be fine, but since I was on medicine and treatment and it was very difficult for me, because you had to go up seven steps on a metal ladder and it was a dangerous job, because there were chains and belts and electricity.

Id. at 33. At least two physicians restricted Claimant from working with machinery, or in jobs that required quick reaction time while on medication. As far as the Referee can tell, Claimant continued to take prescription pain medication throughout the time he worked for Employer. While it is possible Employer's offer of bin dumping work was appropriate light duty work for Claimant, Employer failed to adequately prove it. No physician signed off on the job, and the Referee is left with significant doubt about the requirements with respect to reaction times, dangerous equipment, and climbing. And, again, it is unclear at what point in time this work was offered to Claimant; the evidence indicates most of Claimant's recovery time was spent performing line work, as opposed to bin dumping.

Claimant is entitled to temporary disability benefits from April 27, 2005, through March 9, 2006. Because Defendants did not offer appropriate light duty work, their argument that Claimant had such work available to him eight hours per day, five days per week cannot be maintained. If Claimant had chosen not to work, Defendants would be responsible for temporary total disability benefits for the entire time period. Given the confusing nature of the documentation submitted, the Referee declines to recalculate the nearly one year of temporary disability benefits. Surety's recalculation of temporary disability benefits shall be done in a manner consistent with this decision. If the parties still dispute the amount owed, the Commission can revisit the issue at the request of either party.

4. **Permanent Impairment (PPI).** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal

efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989).

Dr. Garber is the only physician to provide an impairment rating in this matter (13% whole person impairment for the lumbar spine), although Dr. Dubose also opined Claimant should be awarded one. Dr. Nicola opined Claimant had no permanent impairment as a result of his industrial injury.

Dr. Garber, at the time of his rating, did not have the benefit of reviewing the subsequent medical records or the results of the additional diagnostic testing, which were normal. The Referee finds that, while Claimant sustained a lumbar spine injury and a portion of his symptoms “fit” his injury and the abnormal MRI findings, many of his complaints are nonverifiable and not substantiated by objective testing. As such, the weight of the evidence dictates a much lower rating than that assigned by Dr. Garber. Claimant has sustained permanent partial impairment of 6% of the whole person (DRE category 2) as a result of the April 26, 2005 accident.

5. **Permanent Partial Disability.** The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). The test for such determination is not whether Claimant is able to work at some employment, but whether the physical impairment, taken in conjunction with non-medical factors, has reduced Claimant’s capacity for gainful activity.

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent

impairment and no functional or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the Claimant’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disability, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

The test for determining whether a claimant has suffered a permanent disability greater than impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful activity.” Bennett v. Clark Hereford Ranch, 106 Idaho 438, 440-441, 680 P.2d 539, 541-542 (1984). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

No expert vocational testimony was presented in this matter, although the ICRD consultant performed a vocational analysis with recommendations. Most of the consultant’s conclusions are inapplicable since she determined Claimant had no restrictions whatsoever based on Dr. Nicola’s IME. However, she did describe non-medical factors to include Claimant’s age

and the fact that he had a 12th grade education in Mexico and obtained a GED, provided in Spanish. She described Claimant as capable of speaking English on a limited basis and noted his English reading and writing skills were, according to Claimant, minimal.

In addition, there is no solid evidence regarding Claimant's permanent physical restrictions and/or functional capacity. Claimant, who bears the burden of proof in this regard, has given the Referee little to go on. When Dr. Jorgenson last saw Claimant, in January 2006, he assigned lifting restrictions only: no repetitive lifting and no lifting greater than 20 pounds. Dr. Dubose's restrictions on March 9, 2006 (no bending, lifting, twisting) were noted to be temporary in nature.

Claimant has not worked since being laid off in April 2006, and the Referee finds that he perceives himself as more limited than the evidence supports. However, the Referee also finds he cannot return to his time-of-injury job, which involved lifting up to 50 pounds, and he is precluded from doing the strenuous work he has usually performed. In addition, the non-medical factors (age, language barrier, education, and limited work experience) weigh in favor of a more substantial disability than is reflected by his lower PPI. The Referee finds Claimant has sustained a 25% permanent partial disability, inclusive of his impairment.

6. **Attorney Fees.** Attorney fees may be recovered for unreasonable denial, delay in payment, or discontinuance of benefits pursuant to Idaho Code § 72-804. Claimant seeks an award of attorney fees for Defendants' unreasonable actions with respect to temporary disability benefits. In his brief, he alleges:

The evidence in Exhibits 2, 3, 4, 5, 6 when read as a whole, indicates Liberty was on a self-serving mission to minimize TPD payments. As previously argued (1) Liberty paid no TPD for 6 months, then undercalculated AWW. After counsel got them to investigate AWW and raise it they took another 2 months to issue a significant make up check. (2) the [*sic*] temporary partial hour report in Exhibit 4 show Liberty increasingly added extra hours in the "hours worked" column to

avoid TPD. These hours added even occur when Liberty knew Mr. Prado had medical appointments, or was taken off work by a doctor. Liberty continued to use these fabricated “hours worked” on their “Partial Temporary Disability Calculation Sheets” to lower the TPD they paid. (3) defendants [*sic*] escaped paying full TTD throughout by job offers that failed the Malueg test. Prado was a team player and continued to report to work even though he knew he’d be made to exceed his restrictions. He should not be penalized for trying. (4) Counsel had to repeatedly write Liberty regarding TPD and despite that they repeatedly shorted Mr. Prado.

Claimant’s Post-Hearing Brief, p. 19. While the Referee understands that the above is not evidence and is one-sided argument, there is all too much truth to the allegations. As of late September/early October 2005, Surety had paid no temporary disability benefits to Claimant – at all. This despite his light duty restrictions and the fact that he had been losing time at work while attempting to still perform his time of injury job or duties that involved primarily standing, work that clearly did not comply with the physicians’ restrictions during those time periods. Thereafter, Surety miscalculated/undervalued Claimant’s AWW significantly, prompting a letter from Claimant’s attorney and a revision to the AWW amount. Surety “tinkered” with the reported hours from Employer, adding hours that Claimant did not actually work such that Claimant would not receive time loss benefits for that time. Surety did this long after the fact and it credited those hours against Claimant even during the time periods discussed above, when he was attempting to perform his time of injury job or duties that involved primarily standing; again, these were jobs that could not, under any reasonable interpretation of the restrictions, be considered appropriate at the time he was doing them.

Surety also failed to pay time loss for dates when Claimant attended medical appointments. To date, Surety still contends that with the exception of TTDs for December 7, 2005 (Dr. Jorgenson appointment), and January 9, 2005 (Dr. Jorgenson appointment), Claimant is entitled to NO temporary disability benefits from October 29, 2005, through January 30, 2006,

creating an alleged overpayment of \$2,409.14. However, Claimant also attended an appointment with Dr. Jorgenson on January 6, 2005, and was released from work for his CT Myelogram December 20 and 21, 2006. All of these dates, and others, were documented in a letter from Claimant's attorney on February 6, 2006. Lastly, the Referee notes that Surety simply stopped paying time loss benefits altogether as of January 30, 2006 (prompting two more letters from Claimant's attorney). However, his light duty restrictions continued and he had medical appointments with Dr. Dubose on March 9 and an IME with Dr. Nicola on March 16, 2006.

The Referee finds Claimant is entitled to attorney fees for Defendants' unreasonable handling of his temporary disability benefits.

CONCLUSIONS OF LAW

1. The April 26, 2005 industrial accident, and not a pre-existing or subsequent condition, caused Claimant's lumbar spine condition, including disc protrusions at L4-5 and L5-S1 and left lumbar radiculopathy. Claimant has not met his burden of proof and has not established the industrial accident as the cause of this cervical spine condition.

2. Claimant is entitled to lumbar spine related treatment with and as recommended by Dr. Dubose. He is also entitled to payment of the Weiser Memorial Hospital Emergency Room bill in the amount of \$1,025.42

3. Claimant is entitled to temporary disability benefits from April 27, 2005, through March 9, 2006. Surety's recalculation of temporary disability benefits shall be done in a manner consistent with this decision. If the parties still dispute the amount owed, the Commission can revisit the issue at the request of either party.

4. Claimant has sustained permanent partial impairment of 6% of the whole person as a result of the April 26, 2005 accident.

5. Claimant has sustained a 25% permanent partial disability, inclusive of his impairment.

6. Claimant is entitled to attorney fees for Defendants' unreasonable handling of his temporary disability benefits.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED at Boise, Idaho, this 26th day of July, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Lora Rainey Breen, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of September 2007, a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law and Recommendation** was served by regular United States Mail upon each of the following persons:

STEPHEN STARK
1019 2ND ST SO
NAMPA ID 83651

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
P O BOX 7507
BOISE ID 83707

jkc

 /s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANCISCO PRADO,)	
)	
Claimant,)	IC 2005-509326
)	
v.)	
)	
APPLETON PRODUCE COMPANY,)	
)	
Employer,)	ORDER
)	
)	
LIBERTY NORTHWEST)	
INSURANCE CORPORATION,)	September 7, 2007
)	
Surety,)	
)	
Defendants.)	
_____)	

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

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

1. The April 26, 2005 industrial accident, and not a pre-existing or subsequent condition, caused Claimant’s lumbar spine condition, including disc protrusions at L4-5 and L5-S1 and left lumbar radiculopathy. Claimant has not met his burden of proof and has not established the industrial accident as the cause of this cervical spine condition.

2. Claimant is entitled to lumbar spine related treatment with and as recommended by Dr. Dubose. He is also entitled to payment of the Weiser Memorial Hospital Emergency Room bill in the amount of \$1,025.42

3. Claimant is entitled to temporary disability benefits from April 27, 2005, through March 9, 2006. Surety's recalculation of temporary disability benefits shall be done in a manner consistent with this decision. If the parties still dispute the amount owed, the Commission can revisit the issue at the request of either party.

4. Claimant has sustained permanent partial impairment of 6% of the whole person as a result of the April 26, 2005 accident.

5. Claimant has sustained a 25% permanent partial disability, inclusive of his impairment.

6. Claimant is entitled to attorney fees for Defendants' unreasonable handling of his temporary disability benefits. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, a copy of the fee agreement executed by Claimant and his attorney, and an affidavit in support of the claim for fees. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced response, Claimant's counsel may file a reply. The Commission, upon receipt of the

foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 7 day of September, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R. D. Maynard, Commissioner

Participated but did not sign _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of September, 2007, a true and correct copy of the foregoing Order was served by regular United States Mail upon each of the following persons:

STEPHEN STARK
1019 2ND ST SO
NAMPA ID 83651

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
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BOISE ID 83707

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/s/ _____

