





ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the   1   day of   July  , 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

L CLYEL BERRY  
P O BOX 302  
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
P O BOX 1368  
BOISE ID 83701-1368

E SCOTT HARMON  
LAW OFFICES OF HARMON, WHITTIER & DAY  
P O BOX 6358  
BOISE ID 83707-6358

jkc

/s/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LINCOLN LaVALLEY, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 PERSONNEL PLUS, INC., Employer, )  
 and STATE INSURANCE FUND, Surety, )  
 )  
 and )  
 )  
 CLEAR SPRINGS FOODS, INC., )  
 Employer, and LIBERTY NORTHWEST )  
 INSURANCE CORPORATION, Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2007-014512**  
**IC 2007-033288**

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

July 1, 2009

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Twin Falls, Idaho, on December 10, 2008. L. Clyel Berry of Twin Falls represented Claimant. Neil D. McFeeley of Boise represented Defendants Personnel Plus, Inc. and State Insurance Fund (Personnel Plus). E. Scott Harmon of Boise represented Defendants Clear Springs Foods, Inc. and Liberty Northwest Insurance Corporation (Clear Springs). The parties submitted oral and documentary evidence. Three post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on April 27, 2009 and is now ready for decision.

## **ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident of April 18, 2007 filed against Personnel Plus;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident of either August 17, 2007 or August 24, 2007 filed against Clear Springs;
3. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including whether either Defendant is liable for the costs of cervical surgery performed by David B. Verst, M.D., on November 4, 2008; and
4. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits.

The parties expressly agree to reserve issues regarding permanent impairment, permanent disability and attorney fees.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he did not have a history of injury or medical treatment to his neck prior to commencing work for Defendants. He sustained an injury to his neck while working for Personnel Plus on April 18, 2007 for which he received medical care through mid-May 2007 and was released to return to work without restrictions. Claimant worked for an alternate employer for five weeks without difficulty. Claimant was hired by Clear Springs in mid-July 2007 and re-injured his neck at work in August 2007. A discrepancy exists as to the date of the Clear Springs injury, but is immaterial. Claimant was injured on either August 17<sup>th</sup> or

24<sup>th</sup>. Claimant's condition worsened and cervical surgery was performed on December 7, 2007. In September 2008, recurrent symptoms developed and Claimant required a second surgery on November 4, 2008. The need for both surgeries resulted from either of the two industrial injuries or a combination of both. Claimant seeks medical and temporary income benefits and continues to be in a period of recovery.

Personnel Plus contends that Claimant experienced general soreness from the work he performed but that he provided inconsistent information about the onset of his pain and the existence of a specific injury. Claimant received treatment for neck pain and symptoms compatible with carpal tunnel syndrome (CTS). His neck symptoms resolved within a few days and his CTS symptoms abated with steroid treatment. Claimant performed heavy work without difficulty for an alternate employer until starting his employment with Clear Springs. Claimant has not met his burden of proof to establish that he sustained an industrial injury while working for Personnel Plus. At most, Claimant sustained a neck strain and experienced CTS symptoms that resolved by May 2007. Claimant's Personnel Plus injury does not extend to a cervical disc herniation. Claimant's need for surgery was caused by the injury he sustained while working for Clear Springs. Personnel Plus asserts that they have no additional liability and that they are entitled to recovery of benefits previously paid on behalf of Claimant.

Clear Springs contends that Claimant's August 2007 cervical symptoms were a recurrence of symptoms from his April 2007 injury and not related to the injury he sustained while working for Clear Springs. The injury of either August 17<sup>th</sup> or 24<sup>th</sup> resulted in a scrape to Claimant's knee and does not include an injury to the cervical spine. Claimant's onset of recurrent cervical symptoms was not temporally related to the Clear Springs injury and Clear Springs is not liable for Claimant's cervical condition. In the alternative, Clear Springs argues

that time loss benefits and medical expenses should be apportioned 75% to Personnel Plus and 25% to Clear Springs.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 27 admitted at hearing;
2. Personnel Plus' Exhibits A through D admitted at hearing;
3. Clear Springs' Exhibits E through F admitted at hearing;
4. Claimant's testimony taken at hearing;
5. The post-hearing depositions of orthopedic spine surgeon David B. Verst, M.D., taken January 14, 2009; orthopedic spine surgeon David Christensen, M.D., taken January 30, 2009; and occupational medicine physician Douglas Stagg, M.D., taken February 23, 2009 with one exhibit attached; and
6. The Industrial Commission's legal file.

Stipulations to correct transcription and typographical errors in the hearing transcript and deposition transcripts of Drs. Verst and Stagg were filed by the parties and are accepted. These corrections have the effect of modifying the original transcripts.

The undated "Deposition Change Sheet" pertaining to Claimant's deposition taken April 23, 2008 (admitted as Clear Springs' Exhibit E1) is part of the evidentiary record but does not have the effect of modifying Claimant's original deposition transcript. These changes go beyond correction of transcription and typographical errors and will be considered as clarification provided by Claimant and his attorney.

All objections made during the post-hearing depositions are overruled. Many of the objections to Dr. Stagg's deposition testimony were based on Dr. Stagg providing opinions that

were not articulated in his records or otherwise disclosed at least ten days prior to hearing. Although Dr. Stagg expressed opinions that were beyond information included in his chart notes, his opinions were based on information properly admitted into evidence and did not involve the consideration of post-hearing information. Claimant's discovery responses clearly reflect that it was anticipated that Dr. Stagg may provide opinions regarding causation based on his treatment of Claimant.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

#### **Background**

1. Claimant was born in California in 1971. He was 37 years old at the time of hearing and resided in Buhl, Idaho. Claimant earned poor grades in school and dropped out after the eleventh grade. He subsequently participated in an electrical apprenticeship program through the Job Corps and concurrently earned a high school diploma.

2. Prior to 2007, Claimant worked in multiple entry-level job positions including convenience store clerk, cashier, laborer and food service worker. He worked for numerous employers and generally maintained jobs for short periods of time before moving on to something else. His reasons for changing jobs included dislike of the type of work, conflict with co-workers and relocation. Claimant resided in Texas and Nevada after leaving California. Claimant moved to Idaho in early 2007 to be near his girlfriend and her children.

3. Claimant did not have neck problems requiring medical treatment or evaluation prior to April 2007.

## **Personnel Plus Employment, Injury and Treatment**

4. Claimant immediately sought employment upon relocation to Idaho and applied for work with Personnel Plus, a temporary employment agency. Claimant was assigned to Rangen, a processing company, to palletize and load stacks of feed and fertilizer. His job duties included lifting 50 pound bags of fish feed and 25 pound bags of fertilizer from a conveyor belt and placing them onto a pallet. The bags were stacked five per tier with a total of ten tiers. When fully stacked, the tiers were taller than Claimant.

5. Weekly time cards from Rangen reflect Claimant's work hours from April 16, 2007 through April 27, 2007. Claimant recalls that he started work at Rangen a week earlier, on April 9, 2007. Personnel Plus' First Report of Injury was completed by a personnel supervisor and indicates that Claimant was hired on April 9, 2007. Rangen was Claimant's first and only assignment through Personnel Plus. The most likely explanation for the discrepancy in Claimant's start date is that Claimant began working for Rangen on April 9, 2007, but that the initial weekly time card was not included in the evidence.

6. Claimant sought treatment at the emergency room on April 24, 2007 and reported right-sided neck pain with radicular symptoms and loss of sensation in his right upper extremity. He did not identify an occupational injury at the emergency room and the emergency room record reflects that:

The numbness in his fingers has been ongoing for the past week. The pain in his neck has been ongoing for about the past week-and-a-half to 2 weeks. He has been lifting heavy objects recently. He just moved to the area from Las Vegas...He denies any recent car accidents.

(Claimant's Exhibit 1, p.1). Cervical X-rays demonstrated moderate disc degeneration but no acute pathology. Claimant's diagnosis was cervical pain with radiculopathy.

7. Claimant reported an industrial injury to his supervisor on April 27, 2007. He identified an injury date of April 18, 2007 and explained that, after palletizing, he experienced a sore neck with pain and numbness traveling to his forearm.

8. Employer referred Claimant to an occupational clinic where he was evaluated on April 30, 2007 by Douglas Stagg, M.D. Claimant described right-sided neck pain with numbness in his right upper extremity and identified his mechanism of injury as lifting fish food onto a pallet. He explained that he felt general soreness during his first week of palletizing but that he experienced significant neck discomfort at about 3:30pm on April 18, 2007. Claimant was diagnosed with a right neck strain and paresthesias of the right hand; provided with a wrist splint; prescribed medication and assigned a 15 pound lifting restriction pending re-evaluation.

9. Claimant returned to Dr. Stagg for follow-up treatment and evaluation on three occasions during May 2007. He received a steroid injection to his right carpal tunnel area on May 8, 2007. By May 14, 2007, Claimant's neck was "doing well" and his right hand numbness was "completely gone." (Claimant's Exhibit 2, p.9).

10. Dr. Stagg released Claimant to return to work without restrictions on May 8, 2007 and reiterated the release on May 14, 2007 at which time Claimant was released from care.

11. On May 9, 2007, Claimant began working for Freedom Electric as an electrical apprentice. His job duties included heavy labor such as digging ditches and underground pipe work. Claimant was terminated by Freedom Electric on June 14, 2007 because he lacked the required skills to perform the job. Claimant denied cervical problems or physical difficulty performing his job duties during the two months he worked for Freedom Electric. Claimant's testimony is corroborated by a written statement from Dan Hasbargen, a principal of Freedom Electric, who indicated that Claimant performed significant lifting, carrying, pushing, pulling

and overhead work without complaints or observed difficulties with his neck and upper extremities.

### **Clear Springs Employment, Injury and Treatment**

12. Claimant began working for Clear Springs on July 12, 2007 as a member of the ponds crew. His job duties included herding fish from one end of a pond to the other end by using a wire screen. The task required Claimant to stand and walk in the pond. Once herded, the fish were pumped into a hopper. When the hopper became full, Claimant would climb out of the pond onto a metal grating and turn off the pump.

13. On August 17, 2007, Claimant was rushing to turn off the pump when he slipped and fell on a wet grate. Claimant landed on his left knee and then on his outstretched hands. The fall was witnessed and its existence is not disputed. Immediately following the accident Claimant only felt pain to his knee. He did not pursue medical care at that time and believed that the only injury was a scrape to his left knee.

14. Claimant recalled that his injury at Clear Springs occurred on August 24, 2007 and that date of injury is reiterated throughout the evidence. The contemporaneous accident reports completed by Clear Springs reflect an injury date of August 17, 2007. The credible evidence establishes that Claimant's injury at Clear Springs occurred during the morning of August 17, 2007 and that Claimant did not sustain an industrial injury on August 24, 2007.

15. Claimant sought treatment at the emergency room on August 26, 2007 with complaints of neck pain and described the onset as occurring three days prior. He did not mention either his injury at Personnel Plus or his injury at Clear Springs. Rather, Claimant indicated that he believed he had "slept wrong." (Claimant's Exhibit 3, p.1). Claimant was diagnosed with torticollis.

16. Claimant returned to the emergency room the next morning with increased symptoms. He reported an inability to move his neck when he awoke at 2:00am and experienced difficulty breathing and talking. He denied numbness, tingling or trauma. He was released with a diagnosis of neck pain.

17. Claimant returned to the emergency room on August 31, 2007 and September 4, 2007 with complaints of right trapezial pain and was diagnosed with a strain.

18. On September 10, 2007, Claimant again sought emergency room treatment and described muscle spasms in his neck. He specifically denied a history of trauma. Claimant was diagnosed with chronic neck pain and advised to follow-up with a family practitioner for consideration of an MRI to his neck.

19. Claimant sought treatment with family practice physician, Dan L. Nofziger, M.D., on September 11, 2007. Claimant described his fall at Clear Springs and indicated that he experienced excruciating pain in his neck and going down his arm since the fall. An x-ray was performed on September 11, 2007 that was not significantly changed from the April 2007 x-ray. A cervical MRI was performed on September 14, 2007.

20. Claimant returned to Dr. Nofziger to discuss the MRI results. The MRI identified a herniated disc at C5-C6 with compression of the lateral recess sufficient to cause right arm pain and radiculopathy. Dr. Nofziger concluded that Claimant's injury should be handled through workers' compensation and recommended that Claimant coordinate care through Dr. Stagg.

21. Dr. Stagg evaluated Claimant on September 19 and 24, 2007. He noted Claimant's fall at Clear Springs and pursued approval for treatment through Clear Springs' surety. Dr. Stagg referred Claimant to David B. Verst, M.D., for surgical consultation.

22. Dr. Verst evaluated Claimant on September 20, 2007 and confirmed that Claimant had a very large herniated nucleus pulposus at C5-6 creating spinal cord irritability and severe pain. He recommend physical therapy and additional time off of work. Claimant's neurological condition deteriorated and Dr. Verst recommended surgical intervention on September 27, 2007.

23. On December 7, 2007, Dr. Verst performed an anterior cervical decompression and fusion at C5-6 with instrumentation and cage placement.

24. Claimant improved with post-operative care and was released to modified duty work on March 12, 2008. Claimant continued to improve but experienced ongoing headaches. Claimant experienced recurrent symptoms in September 2008 in the absence of a new injury. Repeat diagnostic studies revealed a large disc herniation at C6-7 and Dr. Verst recommended additional surgery.

25. On November 4, 2008, Dr. Verst performed a decompression and fusion at C6-7 with instrumentation and cage placement.

### **Expert Medical Opinions Regarding Causation**

#### **David B. Verst, M.D.**

26. Dr. Verst is an orthopedic spine surgeon who performed both of Claimant's cervical surgeries as described above. His opinions regarding causation in contemporaneous medical records and letters of clarification are inconsistent. Dr. Verst's initial report identifies the injury date as August 2007 and notes Claimant's description of the Clear Springs injury, but indicates that the mechanism of injury is lifting which would be consistent with the Personnel Plus injury.

27. In November 2007, Dr. Verst checked off a form letter indicating that he agreed with the opinions of Dr. Christensen (see below). In March 2008, Dr. Verst responded to a letter

from Claimant's attorney seeking clarification on the causation issue at which time he determined that Claimant's radicular symptoms began with the Personnel Plus injury but were profoundly exacerbated following the Clear Springs injury with no direct temporal relationship between the fall at Clear Springs and onset of neck and upper extremity symptoms. In August 2008, Dr. Verst explained that Claimant's symptoms were exacerbated by working at Clear Springs and recommended that Claimant's need for surgery be apportioned 75% to Personnel Plus and 25% to Clear Springs.

28. During his post-hearing deposition, Dr. Verst explained that C6 radicular symptoms resulted from the Personnel Plus injury but that the Clear Springs injury aggravated Claimant's condition and prompted the need for surgery that did not exist before the Clear Springs injury. Claimant's symptoms from the Personnel Plus injury had abated and a more significant protrusion in the disc material resulted from the Clear Springs injury.

29. Claimant's delay of neurogenic symptoms during the ten day period after the Clear Springs injury does not negate causation and it is not uncommon for a patient to have a delay with regard to the presentation of symptoms. The timing and extent of the onset of symptoms is not always directly related to the size, location or magnitude of the herniation.

30. Dr. Verst relates Claimant's need for the November 2008 surgery to the previous December 2007 surgery. Dr. Verst anticipated that Claimant would reach MMI in February 2009.

**David Christensen, M.D.**

31. Dr. Christensen is a board certified orthopedic surgeon who specializes in spinal conditions. He evaluated Claimant on November 6, 2007 at the request of Clear Springs. He

reviewed Claimant's medical records, obtained a history from Claimant and performed a physical examination.

32. Dr. Christensen determined that Claimant's cervical x-rays from April 2007 and September 2007 varied in that the April study showed a straightening of the cervical spine but the September study demonstrated a reversal of normal curvature centered at C6. Claimant's September 2007 cervical MRI showed an extrusion of disc material at C5-6 and a protrusion at C6-7. There were no previous MRIs available for comparison purposes.

33. Dr. Christensen concluded that Claimant's April 2007 symptoms reached near complete resolution without operative care. However, he opined that Claimant's August 2007 symptoms were merely a recurrence of the previous symptoms and that there was not a direct temporal relationship between his fall at Clear Springs and the subsequent onset of neck and upper extremity symptoms. It would be unusual for there to be a delay of two to nine days from an injury and onset of symptoms and he disagrees with Dr. Verst's opinion to the contrary.

34. There are multiple possibilities as to what could have caused Claimant to have a recurrence of symptoms. One possible scenario is that Claimant slept wrong as he reported to the emergency room doctor and another possible scenario is the fall at Clear Springs. However, there were no symptoms directly after the Clear Springs fall (defined as within a few hours) that would be consistent with a disc herniation. Dr. Christensen is not able to say, on a more probable than not basis, whether Claimant had a disc herniation in April 2007 or what caused his recurrent symptoms in August 2007.

**Douglas Stagg, M.D.**

35. Dr. Stagg has practiced medicine in Idaho since 1976. He is board certified in emergency medicine. His practice has focused on occupational medicine and workers'

compensation since 2000. As noted above, he served as a treating doctor for both Claimant's Personnel Plus injury and his Clear Springs injury. Dr. Stagg felt that Claimant's injury at Personnel Plus included a cervical strain that resolved by May 2007. Claimant's clinical findings in April and May of 2007 were consistent with right CTS, but Dr. Stagg did not make a formal diagnosis of CTS because nerve conduction studies were not performed. Claimant's CTS symptoms resolved following a steroid injection which suggests that his median nerve inflammation responded well to the injection.

36. Dr. Stagg considered the possibility that Claimant had a cervical disc injury in April 2007 based on his reported symptoms but concluded that Claimant did not have a herniated disc at that time because of how well Claimant's symptoms resolved with conservative care. The steroid injection that resolved Claimant's CTS symptoms would not have cured a cervical disc herniation. Cervical surgery was not medically indicated in April or May of 2007. In the event that Claimant did sustain a cervical disc injury in April 2007, it was a minor one and improved without treatment.

37. Claimant reported different symptoms in September 2007 than in May 2007. His previously right upper extremity complaints were mostly of paresthesia and numbness whereas his complaints in September were of radicular pain. Claimant's complaints of neck pain in September 2007 were similar to his initial May 2007 symptoms. Claimant reported to Dr. Stagg that his symptoms felt different in September 2007.

38. Dr. Stagg explained that it is possible to have a delayed onset of symptoms from a herniated disc. The delay would more likely be a matter of days than weeks. There is usually a correlation between the magnitude of disc injury and the rapidity of symptom onset. Dr. Stagg

would have expected an immediate onset of pain with the nature of herniation reflected on Claimant's September 14, 2007 MRI.

**IME Panel (Drs. Frizzell, Holt and Wilson)**

39. In August 2008, Claimant underwent a panel evaluation by orthopaedic surgeon R. Tyler Frizzell, M.D., psychiatrist Eric F. Holt, M.D., and neurologist Richard W. Wilson, M.D., (the Panel) at the request of Personnel Plus. The Panel reviewed medical records and performed various evaluations of Claimant.

40. The Panel concluded that the Personnel Plus injury resulted in a right C5-6 intervertebral disc herniation and possible mild acute right CTS. Claimant's symptoms recurred following his Clear Springs injury. It was the fall at Clear Springs that resulted in a definitive diagnosis of a disc herniation and necessitated the surgery performed by Dr. Verst.

41. Although the Panel determined that Claimant's surgery was necessitated by the Clear Springs injury, they apportioned 75% of Claimant's permanent impairment to the Personnel Plus injury and 25% to the Clear Springs injury.

42. Dr. Holt obtained a detailed history from Claimant as part of his psychiatric evaluation. He administered multiple assessment tools including the Hendler Pain Scale Inventory; the Symptom Distress Checklist-90, Revised Form; the Beck Depression Inventory; the MMPI-2; and the MCMI-III. Dr. Holt concluded that Claimant did not suffer from a psychiatric disorder. However, he noted that Claimant's memory was "certainly less than average" for dates of his injury and development of symptoms.

**David Jensen, D.O.**

43. Dr. Jensen is a physical medicine and rehabilitation specialist who evaluated Claimant on September 15, 2008 at the request of Clear Springs. He reviewed Claimant's

medical records, obtained a history from Claimant and performed a physical evaluation. As part of his report, Dr. Jensen responded to specific questions posed by Clear Springs.

44. Dr. Jensen concluded that Claimant's symptoms following his Personnel Plus injury were consistent with C6 or C7 radiculopathy. He does not believe that the medical records support a causal link between the Clear Springs injury and Claimant's cervical symptoms. It is significant to Dr. Jensen that Claimant failed to mention his Clear Springs injury during the multiple emergency room visits during September 2007. Dr. Jensen opines that Claimant's need for fusion surgery was more likely related to the Personnel Plus injury and that his previously resolved radiculopathy was aggravated.

#### **Return to Work Evidence**

45. Claimant was unable to work and was under doctor's care from April 18, 2007 through May 14, 2007 as a result of the injury he sustained at Personnel Plus.

46. Emergency room records from August and September 2007 do not address Claimant's work status. Claimant was first taken off of work following his Clear Springs injury on September 11, 2007 by Dr. Nofziger. He was released to return to full duty work by Dr. Verst on March 12, 2008.

47. Claimant returned to work at Clear Springs during March 2008, following his initial cervical surgery. Claimant walked off of the job on April 7, 2008 without notifying a supervisor. On April 9, 2008, Claimant tendered a letter of resignation. He explained that his co-workers presented an attitude and demeanor towards him that was hostile and unacceptable. Claimant made no effort to resolve conflicts at work through a supervisor prior to abandoning his job.

48. Clear Springs' operations manager, Jeff Jermunson, followed up with Claimant by phone on April 10, 2008 and confirmed that Claimant voluntarily left the job without making contact with a supervisor or lead person. Claimant's resignation was accepted.

49. Claimant found alternate work after he resigned from Clear Springs and began working at Wendy's in August 2008. Claimant stopped working by October 2008, but the medical records do not specifically place him in an off-work status prior to his second cervical surgery on November 4, 2008. As of the date of hearing, Claimant had not been released to return to work.

### **Claimant's Credibility**

50. Claimant provided varying degrees of inaccurate information regarding the sequence of events surrounding his injuries. With regard to the Personnel Plus injury, Claimant represented to Dr. Stagg that he reported an industrial injury to his employer and sought medical treatment in the emergency room on April 19<sup>th</sup>, the day after his injury. Claimant testified in his April 2008 deposition that he reported the injury to his supervisor and sought medical treatment on the same day that the injury occurred. Neither is accurate. With regard to the Clear Springs injury, Claimant maintained that the injury occurred on August 24<sup>th</sup>, 2007 which would be two days prior to initiation of medical treatment rather than the actual nine day gap between injury and treatment. During his testimony at hearing and in a "change sheet" submitted with his deposition transcript, Claimant conceded that the dates reflected in medical records and other contemporaneous documentation are probably more accurate than his best recollection. The most likely sequence of events is provided in the preceding findings of facts.

51. Although Claimant was a poor historian, there is no evidence to indicate that Claimant staged either of his injuries or that he exaggerated the impact of the injuries.

Claimant's testimony regarding the absence of neck problems prior to April 2007 is credible and supported by the other evidence. Claimant's testimony that he did not initially realize his fall at Clear Springs re-injured his neck is credible and consistent with the other evidence.

## **DISCUSSION AND FURTHER FINDINGS**

### **Causation and Medical Care**

52. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

53. Idaho Code § 72-432(1) mandates that an employer provide reasonable medical care that is related to a compensable injury. The claimant bears the burden of proving that medical expenses were incurred as a result of an industrial injury. *Langley* at 785. The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson V. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury

aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

54. Common sense should never be thrown out the window when analyzing causation. However, application of common sense to the facts of this case is not black and white. On one hand, the fact that Claimant had no pre-existing neck symptoms and ended up requiring cervical surgery after two separate industrial injuries can lead to a conclusion that one or both of the industrial injuries must have caused Claimant's condition. On the other hand, the history provided by Claimant during his multiple emergency room visits does not include information about the industrial injuries. Rather Claimant mentioned moving to Idaho from Las Vegas and possibly sleeping wrong. Cervical involvement is more clear in the medical reports following the Personnel Plus injury than the Clear Springs injury but there is strong evidence that Claimant experienced a near full recovery from the Personnel Plus injury prior to falling onto his knee and outstretched hands at Clear Springs.

55. Based on the multiple and conflicting common sense explanations regarding causation along with Claimant's lack of accuracy in reporting the post-injury sequence of events, the most reliable evidence in this case comes from medical experts. The outcome of the causation issue depends on which expert opinions are adopted. All of the medical opinions in evidence regarding causation are reasonable and are supported by at least some of the other evidence.

56. Although Dr. Stagg is not an orthopedic surgeon, his observations and opinions are given significant weight because he was the only physician to evaluate Claimant both prior to and following the Clear Springs injury. Dr. Stagg concluded that Claimant's symptoms were changed and that Claimant had not been a surgical candidate in April or May 2007.

57. The opinions of Dr. Verst are given significant weight because he served as the treating surgeon and evaluated Claimant on multiple occasions. He concluded that Claimant required surgery as a result of the Clear Springs injury. His expert opinion regarding Claimant's delayed onset of cervical symptoms following the Clear Springs injury is credible and overcomes the opinions of other physicians that Claimant would have experienced an immediate onset of pain at the time of the Clear Springs injury if the Clear Springs injury caused a cervical disc herniation of the magnitude demonstrated on Claimant's MRI.

58. The opinions of the Panel support the ultimate conclusion of Dr. Verst that the Clear Springs injury resulted in an aggravation to Claimant's cervical condition that necessitated surgical intervention. Such a determination is also consistent with the undisputed evidence that established Claimant experienced a near complete resolution of symptoms from the Personnel Plus injury by May 2007.

59. Claimant has met his burden of proof to establish that his August 18, 2007 injury while working for Clear Springs aggravated his cervical condition and necessitated his cervical surgery on December 7, 2007. Claimant's subsequent November 4, 2008 surgery was necessitated because of the 2007 surgery as explained by Dr. Verst.

#### **TTD**

60. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such

evidence is presented that he has been released for work, or light duty work and the employer makes light duty work available to him. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

61. Claimant has met his burden of proof to establish that Personnel Plus is liable for TTD benefits from April 28, 2007 through May 8, 2007, subject to the five day waiting period as articulated in Idaho Code § 72-402.

62. Claimant has met his burden of proof to establish that Clear Springs is liable for TTD benefits from September 11, 2007 through March 24, 2008. Claimant is not entitled to TTD benefits from April 7, 2008 through November 3, 2008 because Claimant voluntarily terminated his employment with Clear Springs and did not re-establish disability until the date of his second cervical surgery at which time Claimant became unable to work in any capacity.

63. Claimant has met his burden of proof to establish that Clear Springs is liable for TTD benefits from his surgery on November 4, 2008 through the date of hearing and continuing in accordance with Idaho Code § 72-408.

### **Apportionment**

64. Clear Springs' argument that medical and temporary disability benefits should be apportioned between Defendants is rejected. Although Idaho Code § 72-406 provides for apportionment of permanent disability benefits, there is no statutory authority that either requires or precludes apportionment of medical and temporary disability benefits. The Industrial Commission has permitted the apportionment of medical benefits when medical evidence establishes that the need for treatment is directly related to two compensable industrial injuries. *See Keison*, 1996 IIC 1087 on reconsideration of *Keison*, 1996 IIC 0803. However, the Commission has more frequently determined that neither medical nor temporary benefits are

apportioned when a compensable injury includes the aggravation or acceleration of a pre-existing condition and is the basis for the immediate need for surgery. *See Terry*, 2008 IIC 0699 and *Rupp*, 2006 IIC 0422.

65. Claimant's Clear Springs injury aggravated his cervical condition to the point that surgical intervention was necessitated. These facts do not support an apportionment of medical or temporary disability benefits. This determination is not intended to be construed as a ruling or an indication of the outcome of the apportionment issue pertaining to either permanent impairment or permanent disability benefits, which are issues reserved by the parties.

### **CONCLUSIONS OF LAW**

1. Claimant sustained an industrial injury on April 18, 2007 in the form of a cervical strain and mild disc bulge with radicular symptoms. The April 18, 2007 injury did not cause Claimant's need for either of his cervical surgeries.

2. Personnel Plus is liable for necessary and reasonable medical treatment for Claimant's cervical spine and radicular symptoms from April 18, 2007 through May 14, 2007.

3. Personnel Plus is liable for TTD benefits from April 28, 2007 through May 8, 2007, subject to the five day waiting period as articulated in Idaho Code § 72-402.

4. Claimant sustained an industrial injury on August 17, 2007 which aggravated Claimant's cervical disc condition at C5-C6 and necessitated two cervical surgeries. Claimant did not sustain an injury on August 24, 2007.

5. Clear Springs is liable for necessary and reasonable medical treatment for Claimant's cervical spine from August 17, 2007 through the date of hearing and continuing in accordance with Idaho Code § 72-432, including costs associated with the surgeries performed on December 7, 2007 and November 4, 2008.

6. Clear Springs is liable for TTD benefits from September 11, 2007 through March 24, 2008 and from November 4, 2008 through the date of hearing and continuing in accordance with Idaho Code § 72-408.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 25 day of July 2009.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Susan Veltman, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1 day of July a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

L CLYEL BERRY  
P O BOX 302  
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
P O BOX 1368  
BOISE ID 83701-1368

E SCOTT HARMON  
LAW OFFICES OF HARMON, WHITTIER & DAY  
P O BOX 6358  
BOISE ID 83707-6358

/s/ \_\_\_\_\_