BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SAM MURASKI, Claimant, v. TATES RENTS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	))))

2. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432;

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

4. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits.

Defendants requested in their post-hearing brief that the issue of temporary disability benefits be deferred because the record is not adequately developed with regard to Claimant's period of recovery or precise date of maximum medical improvement (MMI). Claimant opposes Defendants' request and points out that Defendants had the opportunity to cross-exam Christian Gussner, M.D., at his post-hearing deposition and/or present other evidence at hearing on the issue. Defendants' request is denied. The issue regarding TPD/TTD was identified in the March 2, 2009 Notice of Hearing and agreed upon by the parties at the outset of hearing.

The parties expressly reserve all other issues, including permanent disability.

CONTENTIONS OF THE PARTIES

This is a credibility case. Claimant contends that he injured his low back at approximately 4:00pm on January 12, 2008 while working for Employer. Claimant admits that he sought initial medical treatment on his own and that he declined to fill out injury reports or otherwise allege a work-related injury until January 17, 2008. He explains that he did not want to risk losing his job and planned to handle the matter outside of workers' compensation until he realized that he needed an MRI and other treatment that was beyond his financial means. Claimant had spinal surgery on February 13, 2009 as a result of his injury. He seeks medical benefits, TTD benefits from February 1, 2008 through April 8, 2009 and a PPI rating of 10%.

Defendants contend that Claimant has not met his burden of proof to establish that he sustained a work-related injury. The claimed injury was unwitnessed and Claimant did not attribute his symptoms to the incident until he found out that he needed an MRI. Defendants challenge Claimant's credibility for multiple reasons including his initial denial that his lumbar condition was work-related; inconsistent representations to co-workers on the date of the claimed injury and Claimant's failure to recall previous work-related back injuries during his recorded statement. In the event that Claimant is found to have sustained a compensable injury, Defendants assert that Claimant is not entitled to ongoing TTD benefits because he was terminated for reasons unrelated to his injury and because the evidence does not establish a date certain of MMI.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 20 admitted at hearing;

2. Defendants' Exhibits A through N admitted at hearing;

3. Testimony taken at hearing from Claimant, Claimant's co-workers Troy Allen and Michael Gilstrap, branch manager Tyler Haylett, store supervisor John Maxwell and safety and training director Eric Lowe;

4. The post-hearing deposition of physical medicine and rehabilitation physician Christian Gussner, M.D., taken on May 21, 2009, with one exhibit attached;

5. Claimant's Exhibit 21 admitted post-hearing[1]; and

6. The Industrial Commission's legal file.

[1] Claimant's Exhibit 21 consists of documentation of Claimant's post-injury earnings that was discussed at hearing but not available. The exhibit was admitted post-hearing without objection.

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 Michigan and graduated from high school in California in 1969. He was 58 years old at the time of hearing. Claimant relocated to Nampa, Idaho, in 1986 where he continues to reside. He has not earned a college degree but has taken multiple college level courses over the past 30 years.

2. Claimant joined the Army following high-school and was a helicopter mechanic and door gunner in Vietnam. Claimant did not suffer physical injury as a result of his military service, but experienced mental trauma for which he received psychological treatment.

3. Claimant has pursued multiple types of employment including furniture making, small business ownership, HVAC work, truck driving, computer repair and general construction. He enjoyed labor intensive work upon his return from Vietnam and put on additional weight when performing sedentary work and driving trucks. One reason he went to work for Employer was to increase his physical activity level.

4. Claimant's past medical history is positive for high blood pressure and bilateral carpal tunnel syndrome. Claimant underwent bilateral carpal tunnel surgery in the 1980s with a recurrence of symptoms in the early 1990s while working as a truck driver. With regard to his lower back, Claimant suffered a strain in 1992 while unloading a truck; a strain in 1998 when loading a recliner into a truck; and a strain in 2001when unloading carpet remnants from a van. Claimant reported right-sided radicular symptoms following his 2001 back injury. All three of

Claimant's previous back injuries resolved within a few months and did not necessitate MRI studies or ongoing treatment.

5. Claimant began working for Employer in October 2006. Employer is an equipment and tool rental company. Claimant's job duties included delivery/pick-up, servicing equipment and customer service in the rental yard. Prior to January 14, 2008, Claimant did not have physical limitations that impacted his ability to perform tasks assigned by Employer and was in good-standing with Employer.

Claimant's Testimony Regarding Accident, Initial Medical Treatment and Reporting

6. At approximately 4:00pm on Saturday, January 12, 2008, Claimant was assisting a customer in Employer's rental yard and attempted to start a log splitter. The log splitter had an engine cord similar to a lawn mower. During one of his attempts to start the engine, the cord pulled back and jerked Claimant backwards and forwards. He was not expecting the recoil and it almost pulled him off of his feet. He was unable to start the machine after multiple attempts. One or more of Claimant's co-workers attempted to get the log splitter started and were also unable to do so.

7. Troy Allen and Michael Gilstrap were Claimant's co-workers working in the rental yard at the time of his injury and Claimant recalls telling one of them what happened, but could not recall which one he told.

8. Claimant went inside to the counter and took it easy the rest of his shift. By the time Claimant left work at approximately 6:00pm, he felt searing pain in his back and down his left leg. When Claimant arrived home he needed his wife's assistance to get into the house. Claimant's regular days off were Sunday and Monday. Claimant was unable to do much of anything on Sunday and spent the entire day in bed or on a reclining chair.

9. On Monday, January 14, 2008, Claimant sought treatment with Thad Chandler, D.C., where he completed a patient intake questionnaire. Claimant indicated that his onset of symptoms occurred gradually on January 12, 2008. The form required Claimant to select the nature of his onset of symptoms from a list of: exertional, positional, automobile, work-related, trip/fall or other. Claimant circled the word "other" and did not elaborate further as to his mechanism of injury. Claimant's Exhibit 7, p.1. Claimant explained at hearing that he did not want to turn in his accident as work-related because he was afraid of losing his job.

10. Dr. Chandler treated Claimant on January 14, 2008 and gave him an off-work slip covering the next four days. Claimant took the off-work slip to Employer that day and gave it to John Maxwell who was working at the counter. Claimant told Mr. Maxwell that the work excuse was to be given to Tyler Haylett who was not working at the time. Claimant does not recall discussing the nature or cause of his problems with Mr. Maxwell. Claimant was under the impression that Mr. Maxwell was expecting him because Mr. Maxwell did not ask him any questions and did not appear to be surprised to see him on his day off.

11. Claimant was contacted by Tyler Haylett via telephone but does not recall precisely when or whether there was more than one phone conversation between the two. Claimant agrees that he initially told Mr. Haylett that he did not want to put the injury through as workers' compensation. Although Claimant declined to complete workers' compensation paperwork when offered by Employer, Claimant denies that he said the injury was not work-related.

12. Claimant received additional treatment from Dr. Chandler on January 15th and 16th. The treatment did not improve Claimant's condition. On January 17, 2008, Claimant discussed his condition with Dr. Chandler who recommended that Claimant undergo a lumbar

MRI. On that date, Claimant completed a workers' compensation injury report form at Dr. Chandler's office and thereafter maintained that his injury occurred at work on the afternoon of January 12, 2008 while attempting to start a log splitter. All medical records and injury reports generated after January 17, 2008 reflect the same mechanism of injury. The reason that Claimant decided to pursue a workers' compensation claim on January 17, 2008, in spite of previously declining to do so, was that he could not afford the costs associated with an MRI.

13. Claimant contacted Tyler Haylett via phone on the afternoon of January 17, 2008 to report his injury as work-related and initiate the necessary paper work. He described his injury as occurring when he attempted to start the log splitter.

Employer Testimony Regarding Accident and Reporting

Troy Allen

14. Troy Allen was Claimant's co-worker and worked on January 12, 2008. He does not socialize with Claimant outside of work. He did not witness Claimant's accident but was at work when it allegedly occurred. Claimant told that him that he injured himself pulling on the cord to the log splitter when it jerked back. Mr. Allen recalls that the injury happened at 3:30 or 4:00pm. Mr. Allen discussed the incident with John Maxwell within a day of its occurrence. Mr. Allen provided a recorded statement on April 10, 2008 that was consistent with his testimony at hearing.

Michael Gilstrap

15. Michael Gilstrap was Claimant's co-worker and also worked on January 12, 2008. He did not witness Claimant's accident but was at work when it allegedly occurred. Mr. Gilstrap was aware that Claimant experienced difficulty starting a log splitter and Mr. Gilstrap attempted

to start the machine after Claimant was unable to do so. The machine would not start and they ended up giving the customer a refund and sending him to a different store.

16. Mr. Gilstrap encountered Claimant soon after the incident and Claimant mentioned that he was sore. Mr. Gilstrap observed that Claimant did not look well and Claimant mentioned feeling a little bit light headed. Claimant did not tell him that he was injured at work and left Mr. Gilstrap with the impression that his soreness was not the result of a recent event. Claimant mentioned that he thought he had taken too much Motrin because he had been in a lot of pain.

17. Mr. Gilstrap was working at the counter on the following Monday, January 14, 2008, when Claimant came in and spoke to John Maxwell. Claimant told Mr. Maxwell that he had been to the doctor and had been advised to go on bed rest for a while. Mr. Maxwell informed Claimant that he needed to fill out a report if he hurt himself at work and Claimant declined to do so. Mr. Maxwell contacted Tyler Haylett by phone to discuss the situation.

18. Prior to Claimant coming into the store on January 14, 2008, Mr. Maxwell asked Mr. Gilstrap about the log splitter incident. Mr. Gilstrap confirmed problems with the machine but explained that he was unaware that Claimant had been injured. Mr. Gilstrap believed that Mr. Maxwell had already discussed the issue with Troy Allen.

19. Mr. Gilstrap gave a recorded statement on April 10, 2008 that was consistent with his testimony at hearing.

John Maxwell

20. John Maxwell is the store supervisor for Employer at the location where Claimant worked. Mr. Maxwell was not at the store on January 12, 2008 but worked on January 13, 2008 with Troy Allen and on January 14, 2008 when Claimant brought in an off-work slip. On

January 13, 2008, Mr. Allen told Mr. Maxwell that Claimant was hurting the day before. Mr. Maxwell asked what happened, but testified that Mr. Allen did not provide additional information. Mr. Maxwell had no recollection of problems with a log splitter either from a service stand point or as the cause of an injury and could not recall discussing it with anyone.

21. Because of his conversation with Mr. Allen, he was not surprised when Claimant came in with an off-work slip. He asked Claimant whether his condition was work-related and Claimant said that it was not. Since Claimant indicated that his condition was not work-related, Mr. Maxwell was not sure whether any type of paperwork needed to be completed and contacted Tyler Haylett by phone to inquire about the correct procedure. Mr. Haylett requested to speak to Claimant and Mr. Allen put Claimant on the phone.

Tyler Haylett

22. Tyler Haylett is a branch manager for Employer. He received a call from John Maxwell on January 14, 2008 inquiring as to whether paperwork needed to be completed regarding Claimant's back condition and need for time off. Mr. Haylett had Mr. Maxwell put Claimant on the phone. Claimant did not mention anything about the log splitter and Claimant advised that his condition might be related to 50 years of working but was not the result of a recent injury. Mr. Haylett concluded that paperwork did not need to be initiated because Claimant was not alleging a work-related injury.

23. Mr. Haylett was contacted by Claimant by telephone on the morning of Friday, January 18, 2008 at which time Claimant explained that he needed to complete an accident report and submit his injury as work-related. Claimant described the log splitter incident. He explained that he did not initially report the injury because of the delayed onset of symptoms which he

likened to whiplash. Claimant told him that he needed to pursue the injury as work-related because he could not otherwise afford the recommended MRI.

24. On January 18, 2008, Mr. Haylett spoke to Troy Allen and asked if anything had happened on January 12, 2008. Mr. Allen confirmed that Claimant told him that he hurt himself.

Eric Lowe

25. Eric Lowe is the safety and training director for Employer. He received a phone call from Tyler Haylett on or about January 14, 2008 to discuss Claimant's comment that there had not been a work-related incident. He was subsequently contacted by Mr. Haylett on January 18, 2008 to indicate there had been further developments in the matter. Mr. Lowe initiated an accident investigation in accordance with company policy.

26. Claimant was referred to Saltzer Medical Group (Saltzer) by Employer and Mr. Lowe met with Claimant at his initial appointment on January 19, 2008. Claimant told Mr. Lowe that he did not remember the log splitter incident until he was told he would need an MRI and was faced with significant costs.

27. Mr. Lowe interviewed Troy Allen and Michael Gilstrap via telephone on January 21, 2008. Both Mr. Allen and Mr. Gilstrap provided information consistent with their recorded statements and testimony at hearing. Mr. Allen confirmed that Claimant complained of back pain after helping a customer with a log splitter and explained that the log splitter recoiled unusually hard when he tried to start it. Mr. Gilstrap heard Claimant talking about taking too much Motrin but did not know anything about Claimant being injured by the log splitter.

28. As part of Mr. Lowe's investigation, he determined that the log splitter did not start because there was water in the carburetor. He also concluded that Claimant failed to follow company procedures with regard to reporting his injury and obtaining medical care.

Medical Care and Evaluation

29. Claimant's chiropractic treatment the week following his injury did not alleviate his symptoms. Employer referred Claimant to Saltzer once he alleged a work-related injury.

30. Claimant was treated by a physician assistant at Saltzer on January 19, 2008 where he described pain is his lower back and left-sided radicular symptoms. Claimant provided a history of a work-related injury while pull-starting an engine. Claimant was prescribed medication and consideration was given to obtaining an MRI or initiating physical therapy. Claimant returned to Saltzer on January 21st and 28th for evaluation by Ben Terry, D.O. Lumbar x-rays performed on January 21, 2008 were negative for fracture or acute injury.

31. Claimant underwent a lumbar MRI on January 30, 2008 and met with Shane Andrew, D.O., with Saltzer on January 31, 2008 to discuss the results. Dr. Andrew diagnosed a herniated disc at L3-4 with extruded fragment and recommended surgery. Dr. Andrew also identified a large facet cyst at L5-S1 that was unrelated to the injury and an incidental finding.

32. Claimant had an L4 hemilaminectomy with diskectomy performed by Dr. Andrew on February 13, 2008. The extruded disc fragment was removed. Claimant reported resolution of his radicular symptoms following surgery and had an uneventful course of post-operative care.

33. On April 4, 2008, Claimant was evaluated by physical medicine and rehabilitation physician Rodde D. Cox, M.D., at the request of Surety. Dr. Cox reviewed Claimant's medical records, obtained a history from Claimant and performed an examination. Dr. Cox also reviewed witness statements from Troy Allen and Michael Gilstrap. Claimant provided a history to Dr. Cox that was essentially consistent with his testimony at hearing. Claimant described his onset

of pain as occurring approximately two hours after the log splitter incident and explained that it was only in retrospect that he attributed his pain to the incident.

34. Dr. Cox concluded that Claimant's subjective symptoms were consistent with objective findings and that Claimant did not demonstrate pain behaviors or signs of symptom magnification. He determined that it was not possible to determine causation on a more probable than not basis as to whether Claimant's need for back surgery was related to any particular injury. He indicated that Claimant had not yet reached MMI and did not address permanent impairment. He concurred with Dr. Andrew that Claimant's lumbar cyst was not related to the January 12, 2008 injury.

35. Dr. Andrew reviewed Dr. Cox' report and indicated his disagreement with Dr. Cox' conclusion that it is not possible to say on a more probable than not basis whether Claimant's back injury and need for surgery were related to the January 12, 2008 injury. Dr. Andrew explained that Claimant has some degree of arthritis and a facet cyst that contribute to his back pain and are unrelated to his industrial injury, but that the need for surgery was entirely related to the acute disc herniation and not a chronic condition.

36. He continued to see Dr. Andrew for his spinal treatment and treated with Elaine M. Davidson, M.D., for personal health matters. There is some degree of overlap and Dr. Davidson referred Claimant to neurologist James M. Harrold, M.D., for consultation related to both Claimant's back condition and his other personal medical issues.

37. Claimant last treated with Dr. Andrew on June 19, 2008. Dr. Andrew recommended follow-up treatment for his facet cyst but did not identify additional treatment needed for the industrial injury.

38. Dr. Davidson evaluated Claimant on July 18, 2008 for issues unrelated to his back but noted that Claimant was seeking information as to the permanency of his post-surgical medical restrictions.

39. Dr. Harrold evaluated Claimant on August 19, 2008. He indicated that Claimant did not have complaints of significant low back pain or lumbar radicular symptoms. Claimant reported left lateral thigh numbness that worsened with prolonged standing or walking but did not demonstrate neuralgia or dysesthesia of the left thigh. Dr. Harrold suspected meralgia paresthetica but did not recommend medication or other treatment for the condition.

40. On April 8, 2009, Claimant was evaluated by physical medicine and rehabilitation physician Christian G. Gussner, M.D., at the referral of his attorney. Dr. Gussner reviewed medical records, obtained a history from Claimant, examined Claimant and performed an impairment rating evaluation.

41. Dr. Gussner concluded that Claimant's extruded disc fragment at L3-4 and need for surgery was causally related to the January 12, 2008 industrial injury. He also determined that Claimant's current complaints of left thigh numbness are related to the industrial injury. In his post-hearing deposition, he elaborated on the causation issue and explained that Claimant's mechanism of injury was consistent with disc herniation.

42. Dr. Gussner was aware that Claimant did not initially report his injury as work-related. Based on his review of the medical records and conversation with Claimant, he accepts the history provided by Claimant. Information provided by Claimant was confirmed by the records he reviewed and Dr. Gussner felt that Claimant was believable. If Claimant's history was inaccurate, it would impact his opinions. It is Dr. Gussner's understanding that Claimant's onset of pain was within two hours of pulling the cord on the log splitter.

43. According to Dr. Gussner, Claimant's edema and leg swelling are more likely the result of his obesity and not related to the industrial injury. It is established that obesity can lead to hip arthritis and knee problems but obesity has not been established as a direct cause of disc herniations.

44. Dr. Gussner utilized the 6th Edition of the *AMA Guides to the Evaluation of Permanent Impairment* (*Guides*) to calculate Claimant's PPI at 10% of the whole person. Dr. Gussner determined that Claimant's condition was best described as a single level disc herniation with medically documented findings, surgery and documented radiculopathy at the time of examination. He did not apportion any of Claimant's PPI to pre-existing conditions and noted that Claimant's previous episodes of back pain were self-limited and resolved within a few months.

45. Dr. Gussner noted that Claimant had reached MMI at the time of his evaluation, but did not specify the date on which MMI was reached.

Post-Injury Return to Work

46. Claimant was placed in a no-work status by Dr. Chandler on January 14, 2008 and was released to sedentary work on January 19, 2008 by the physician assistant at Saltzer. Ben Terry, D.O., at Saltzer released Claimant to light-duty work on January 21, 2008 and Claimant continued to have light-duty restrictions until his surgery on February 13, 2008.

47. Employer made an offer of modified duty employment to Claimant on January 22, 2008 via phone call from Tyler Haylett. The offer was for Claimant to work at the rental counter on a full-time basis and earn his usual wage of $9 per hour. Claimant declined the offer and requested an additional week off from work without pay which was approved by Employer.

48. Claimant returned to work for Employer in the modified duty position for a day or two at the end of January 2008 but was terminated on February 1, 2008 for two days of no call/no show on January 31, 2008 and February 1, 2008.

49. Claimant recalls that there was only one day that he failed to call and explained that he missed a day of work because of a rescheduled medical appointment and because of issues with sleep and medication.

50. In March 2008, Claimant re-started his computer repair business that he operated immediately before going to work for Employer. Claimant continued to perform computer repair work through at least early December 2008. His earnings have been irregular and fluctuate from week to week. Claimant charges by the job and his overall earnings are less than his pre-injury wage of $9 per hour on a full-time basis.

51. Dr. Andrew released Claimant to return to light-duty work on April 17, 2008 with a 20 pound lifting restriction that he felt could be increased to 50 pounds in mid-May 2008. Permanent restrictions assigned by Drs. Cox and Gussner are very similar - lifting up to 50 pounds on an occasional basis and avoidance of repetitive bending, twisting and stooping.

52. Availability of modified duty work with Employer is determined on a case by case basis. Tyler Haylett was unable to say to what extent ongoing modified duty work would have been available to Claimant if he had not been terminated for no call/no show in February 2008.

DISCUSSION AND FURTHER FINDINGS

Credibility and Causation

53. A claimant must prove that he or she was injured as 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). To prevail on a worker's compensation claim, a claimant must establish that an accident happened by a preponderance of the evidence. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008).

54. Claimant experienced the onset of low back pain on January 12, 2008 within two hours of being jerked by the recoil of a log splitter at work and decided to seek workers' compensation benefits for his condition on January 17, 2008 upon learning that he would need an MRI costing more than he was willing or able to fund out-of-pocket or through private health insurance. Claimant explained that he initially wanted to handle the matter outside of the workers' compensation system and opted not to pursue his condition as work-related because he feared adverse action from Employer and because he was not entirely certain that the log splitter incident was the cause of his pain. Claimant hoped for a quick resolution of his symptoms and that there would not be a need to make a claim for benefits through Employer.

55. Employer agrees that it was the cost of the MRI that triggered the reporting of a work-related injury and maintains that Claimant decided to pursue workers' compensation benefits for his condition out of financial necessity and not because the condition is causally related to an injury that resulted from the recoil of the cord on the log splitter. Employer e-mail correspondence reflects a hunch that it was Claimant's chiropractor who steered Claimant towards filing a claim.

56. It is undisputed that there was a problem with getting the log splitter to start on the afternoon of January 12, 2008. The credible testimony from Troy Allen corroborates Claimant's testimony that he injured his back when he attempted to start the log splitter. The testimony of Michael Gilstrap regarding Claimant's representations following the claimed injury neither corroborate nor refute the existence of an injury.

57. Claimant's recorded statement reflects his belief that employers do not want employees to make reports of or seek benefits for minor injuries, in spite of official company policy to the contrary. Defendants' Exhibit D., p.12. Medical records reflect that Claimant has obtained treatment on his own and did not pursue workers' compensation benefits for at least one other minor injury sustained at work when he fell into a ditch in May 2007. Claimant's Exhibit 7, p.1.

58. There is no indication that Employer made efforts to dissuade Claimant from filing a workers' compensation claim. To the contrary, Employer informed Claimant of his option to make a report and was quick to pursue Claimant's report once he advised Employer of the work-related nature of his injury. Overall, testimony from Employer witnesses was credible. One exception is the testimony of John Maxwell regarding his lack of recollection of problems with the log splitter and denial that Troy Allen told him that Claimant may have hurt himself attempting to start the log splitter. Based on the credible testimony of Claimant, Troy Allen and Michael Gilstrap, Mr. Maxwell likely knew by January 14, 2008 that there had been an incident with the log splitter and that Claimant may have been injured as a result.

59. Claimant was observed and his credibility was assessed during hearing. Claimant was opinionated and fluctuated between being slightly defensive and slightly aggressive in demeanor. Although Claimant was sometimes brusque in his testimony and during his recorded statement, Claimant gave no indication that his testimony was fabricated or inaccurate. Once Claimant opted to pursue his injury as work-related, he remained consistent. Claimant's reasons for not initially claiming a work-related injury reflect his own perceptions but are believable.

60. The undisputed evidence that Claimant had difficulty with a log splitter; credible testimony of Troy Allen that Claimant mentioned within a couple of hours that he hurt himself;

Claimant's report of a work-related injury less than a week after its occurrence; and objective findings of an injury are sufficient to overcome the representations Claimant initially made to his chiropractor and to Tyler Haylett.

61. Defendants identified *Neufeld v. Browning Ferris Industries*, as a factually similar case in which a claimant failed to establish an accident arising in the course of his employment. 109 Idaho 899, 712 P.2d 600 (1985). The *Neufeld* case includes an accurate pronouncement of Idaho workers' compensation law and shares factual similarities with the present case. The case was considered and the relevant law applied. However, all cases involving issues of credibility are fact-specific and the evidence in the present case, as outlined above, is sufficient to overcome Claimant's initial inconsistent representations.

62. Claimant met his burden of proof to establish that he injured his back at work on January 12, 2008, as he alleged at hearing. In hindsight, Claimant's decision to initially attempt to handle his back injury without Employer's involvement was a poor one. Employer's dispute of the claim is understandable and Claimant's failure to comply with company policy necessitated formal adjudication of the issue.

Medical Care

63. 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 his or her 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).

64. 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.

65. In the present case, the reasonableness of Claimant's medical treatment is not in dispute. Rather, entitlement to medical benefits is disputed based on credibility and causation issues that are a threshold requirement to establishing entitlement to medical benefits. Because the issues of credibility and causation are resolved in Claimant's favor, Claimant is entitled to medical benefits.

66. The medical opinions of Dr. Andrew and Dr. Gussner support a causal link between Claimant's industrial injury of January 12, 2008 and his disc herniation at L3-4. Dr. Cox' opinion that a causal relationship could not be established on a more probable than not basis is overcome by the unequivocal opinions of Drs. Andrew and Gussner.

67. Claimant has met his burden to prove that he is entitled to reasonable and necessary care for his industrial injury of January 12, 2008, including costs associated with Claimant's lumbar surgery. Defendants are not liable for medical expenses incurred at Saltzer that are related to personal illness treated by Dr. Davidson.

Temporary Disability

68. 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).

Generally, a claimant's period of recovery ends when he or she is medically stable. *Jarvis v. Rexburg Nursing Ctr*., 136 Idaho 579, 586, 38 P.3d 617, 624 (2001). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, they are 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. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

69. Claimant was initially taken off of work on January 14, 2008, released to sedentary work on January 19, 2008 and to light-duty work on January 21, 2008. Claimant is entitled to TTD benefits from January 14, 2008 through January 22, 2008 when he was offered a modified duty position by Employer. Claimant opted to defer his return to work until the next week. Claimant then accepted the offer of modified duty employment but was terminated for two consecutive days of no call/no show on January 31, 2008 through February 1, 2008.

70. Claimant re-established entitlement to TTD benefits when he was taken off of work for surgery on February 13, 2008.

71. Claimant began earning wages on March 19, 2008 at which time he established entitlement to TPD benefits because he continued to be in a period of recovery, had not been released to return to his pre-injury type of work and was earning less than his pre-injury wage. Neither documentary evidence nor testimony establishes that Claimant's modified duty position with Employer would have continued to be available following surgery, but for his termination for cause.

72. MMI is not an issue on which the parties requested a determination. However, it is necessary to determine the date on which Claimant ceased to be in a period of recovery in order to establish an end date to TTD/TPD benefits. According to Dr. Cox, Claimant had not reached

MMI as of April 4, 2008 and according to Dr. Gussner, Claimant had achieved MMI by April 8, 2009.

73. The medical evidence, taken as a whole, establishes that Claimant's condition plateaued and that he ceased to be in a period of recovery on June 19, 2008 when he was evaluated for the last time by Dr. Andrew. The medical records do not reflect improvement of Claimant's condition between June 19, 2008 and Dr. Gussner's evaluation of April 8, 2009.

74. Claimant has met his burden to establish that he is entitled to TTD benefits from January 14, 2008 through January 22, 2008 and from February 13, 2008 through March 18, 2008 and that Claimant is entitled to TPD benefits from March 19, 2008 through June 19, 2008.

75. Claimant provided copies of detailed invoices reflecting gross wages earned performing post-injury computer repair work. His earnings from March 29, 2008 through June 19, 2008 totaled $4,405. The evidence establishes that Claimant was proactive in finding work that was within his restrictions and that his self-employment maximized his earning potential during his period of recovery.

76. It is noted that Claimant's period of temporary disability falls within the maximum range of 112 to 156 days, as Defendants point out in their post-hearing brief, is the standard according to *The Medical Disability Advisor*, 6th Edition (The *Disability Advisor*). The treatise was not referenced in the evidence and no request was made for official notice to be taken of *The Disability Advisor*. Findings regarding TTD/TPD are based on the other evidence as enumerated above.

Permanent Impairment

77. "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 nonprogressive at the time of the 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 worker'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, 755, 769 P.2d 1122, 1127 (1989).

78. The 10% PPI rating assigned by Dr. Gussner is supported by the evidence and adopted. There are no contrary opinions in evidence.

CONCLUSIONS OF LAW

1. Claimant sustained an injury caused by an accident arising out of and in the course of employment.

2. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including costs associated with his February 13, 2008 lumbar surgery.

3. Claimant is entitled to TTD benefits from January 14, 2008 through January 22, 2008 and from February 13, 2008 through March 18, 2008. Claimant is entitled to TPD benefits from March 19, 2008 through June 19, 2008.

4. Claimant is entitled to PPI benefits based on a rating of 10%.

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 ___31___ day of __August_____, 2009.

INDUSTRIAL COMMISSION

_/s/_____
Susan Veltman, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31___ day of __August_____, a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

KENT W DAY
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

SAM MURASKI, Claimant, v. TATES RENTS, INC., Employer, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-003010** **ORDER** August 31, 2009

Pursuant to Idaho Code § 72-717, Referee Susan Veltman 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. Claimant sustained an injury caused by an accident arising out of and in the course of employment.

2. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including costs associated with his February 13, 2008 lumbar surgery.

3. Claimant is entitled to TTD benefits from January 14, 2008 through January 22, 2008 and from February 13, 2008 through March 18, 2008. Claimant is entitled to TPD benefits from March 19, 2008 through June 19, 2008.

4. Claimant is entitled to PPI benefits based on a rating of 10%.

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

DATED this __31___ day of _August_____, 2009.

INDUSTRIAL COMMISSION

_/s/_____
R. D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __31___ day of _August_____, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

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

jkc _/s/_____