

2. Whether and to what extent Claimant is entitled to the following benefits:

- a. Medical care;
- b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
- c. Permanent partial impairment (PPI);
- d. Disability in excess of impairment; and
- e. Attorney fees.

3. Whether apportionment for a pre-existing or subsequent condition is appropriate pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is entitled to additional benefits as a result of his industrial injury and the treatment he received thereafter. In particular, Claimant asserts that the epidural steroid injection he received to treat his back pain caused side effects that necessitated substantial diagnostic work-up, and resulted in a number of chronic medical conditions which require on-going treatment. In addition, Claimant asserts that the work injury necessitated an L4-5 decompression and fusion that has left him with substantial disability.

Defendants do not deny that Claimant suffered injuries as a result of the work accident. This was an accepted claim and Surety paid for Claimant's medical care through April 2007. Defendants assert that they are not responsible for the extensive diagnostic work-up that Claimant received in the fall of 2007, because it was unreasonable and not related to his work injury. For the same reasons, Defendants deny any responsibility for any benefits related to Claimant's subsequent back surgery.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Maria Mora, and Wendy York, taken at hearing;
2. Joint Exhibits 1 through 24, admitted at hearing; and

3. The post-hearing deposition of Paul J. Montalbano, M.D., taken January 20, 2010.

Claimant's objections tendered during the deposition of Dr. Montalbano are overruled.

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

1. At the time of hearing, Claimant was fifty-one years of age. He lived in Nampa with his wife, his youngest child, and an adult daughter and her three children.

2. Claimant was born in Mexico and attended school there through the third grade. He speaks Spanish, and can read and write the language, but not as well as he can speak and understand it. He does not speak or read English, though he understands quite a bit of the spoken language.

3. Claimant immigrated to the United States in 1974, when he was about seventeen. He went to work as a laborer for a plant nursery in California and remained there for twenty-eight years, working his way up to foreman and truck driver. When the nursery changed hands, Claimant went to work for a start-up nursery business and stayed four years before moving to Idaho in 2005. Claimant's first job in Idaho was at Greenhurst Nursery, where he worked for about three months before going to work for Employer.

4. On April 17, 2006, Claimant went to work for Employer, a local large-scale cheese producer. On March 3, 2007, Claimant was working as a "palletizer," stacking boxes of finished product on pallets and wrapping the pallets with plastic to secure the boxes. Employer used forklifts to move and stack the completed pallets. In the course of his work that day, the forklift driver accidentally pinned Claimant to a wall with a load of empty boxes. Claimant was immobilized with his upper torso flexed forward over the top of the empty boxes so tightly that it

was difficult for him to breathe. Co-workers gained the attention of the forklift driver, who backed up, freeing Claimant. Claimant finished working his shift that day and in the days immediately following the accident.

MEDICAL CARE

Charles Frost, P.A.

5. Claimant first sought care on March 9, 2007. He was accompanied by family who assisted in translating for Claimant. Charles Frost, P.A., examined Claimant on that first visit. Claimant complained of left hip pain, low back pain, and pain in his left lateral calf. Claimant denied any prior history of low back or hip pain. The exam of Claimant's left hip was unremarkable except for some tenderness over his greater trochanter and in the upper iliotibial band. Claimant's range of motion in his lumbar spine was 80% of normal in all planes with no radicular component but tenderness at the left posterior superior iliac spine (PSIS) landmark. X-rays of Claimant's lumbar spine and right hip¹ were negative for acute injury. The lumbar spine films showed normal alignment and some early degenerative disc narrowing at L4-5. Mr. Frost diagnosed lumbosacral sprain with left SI component and a left hip contusion. Because Claimant reported some left calf pain, Mr. Frost was concerned about the potential for radicular symptoms and prescribed physical therapy to "try and get his pelvis straightened out a bit." Ex. 1, p. 02. Mr. Frost provided analgesics and muscle relaxers to help Claimant manage his discomfort.

6. Claimant participated in physical therapy through April 23, 2007. The chart note for that date records that Claimant's left SI complaints had resolved and his lumbosacral sprain

¹ It is unclear whether the radiology report is in error or whether the imaging was of the wrong hip.

was much improved. Claimant's range of motion was 90% in all planes, an improvement from his first visit. Mr. Frost released Claimant to full-duty work without restrictions.

Roman Schwartsman, M.D.

7. Claimant sought no additional medical care and continued to work at his regular job throughout the remainder of the spring and summer of 2007. In mid-September, Claimant saw Roman Schwartsman, M.D. How Claimant came to see Dr. Schwartsman is unclear, but the records imply that Employer or Surety made the referral. Claimant's presenting complaints were low back and left sciatic pain. Dr. Schwartsman reviewed Claimant's history, noting that he initially responded well to physical therapy, but following his discharge from care, he continued to complain of discomfort in the left leg. Of particular concern to Dr. Schwartsman was what seemed to be an "evolving numbness and tingling in the left leg along the L5-S1 dermatomal distributions." Ex. 3, p. 24. Dr. Schwartsman diagnosed lumbar strain with left-sided sciatica. Because of the numbness in Claimant's left leg, Dr. Schwartsman ordered a lumbar spine MRI, but released Claimant to return to work without restrictions.

8. Dr. Schwartsman saw Claimant again on September 27 to review the results of the MRI. Two of the MRI findings are relevant to the issues before the Commission. First, the imaging showed broad-based disc bulging at L3-4 with a *right side* disc protrusion and mild to moderate *right neural foraminal stenosis* with *possible* mass effect on the exiting *right L3 nerve root*. Second, at L4-5, there was a broad-based disk bulge with mild central canal stenosis, mild *bilateral* lateral recess narrowing and mild to moderate *bilateral* neural foraminal stenosis, right worse than left. Dr. Schwartsman found the results of the MRI corresponded with the anatomic

distribution of Claimant's pain complaints.² Dr. Schwartzman recommended a series of epidural steroid injections (ESI), noting that he would consider a neurosurgical consult if injections did not improve or worsened Claimant's condition.

Christian Gussner, M.D./St. Luke's Meridian Medical Center (SLMMC)

9. Dr. Gussner performed Claimant's first epidural on October 1, 2007. Claimant testified:

[a]s soon as I received the injection I started with a headache. The doctor said it was normal. I arrived home. And, then, it was getting worse and worse. And, then, my skin color was becoming yellow or pale. My tongue became like a stone, like a rock. It was dry. I couldn't feel any flavor [*sic*]. There was no flavor. So, we called the doctor to tell him about the symptoms that I had.

Tr., p. 46. Initially, Dr. Gussner told Claimant's daughter that the symptoms were normal and would resolve within twenty-four to forty-eight hours. When the symptoms did not improve, Claimant testified that Dr. Gussner told him to go to the emergency room. Claimant's testimony is corroborated by Dr. Gussner in a letter dated October 8, 2007 to Dr. Schwartzman in which he states:

I spoke with his daughter several times last week and based on her information regarding these symptoms, I recommended he be seen in the emergency room immediately to rule out the possibility of a stroke.

Ex. 4, p. 36.

10. Claimant presented at SLMMC Emergency Department (SLMMC-ED) on the afternoon of October 5, 2007 with a constellation of symptoms. The following intake note is pertinent:

Daughter reports the patient having L4/L5 back problems for several days and was referred to the Spinal Center by Dr. Schwartzman [*sic*]. He went in 4 days

² This was to become a matter of dispute, in view of the predominately right-sided disc pathology and Claimant's purely left-sided symptoms.

ago, had an epidural with steroid shots prior to the procedure. Later than [sic] night he developed a severe headache that has persisted. His follow up appointment was with Dr. Gussner, daughter called him the next morning, told they [symptoms] were normal and would resolve in 24-48 hours. After seeing no improvement, she called Dr. Gussner this morning and was advised to come here.

Ex. 8, p. 58. Emergency department staff ordered a battery of diagnostic tests, all of which were normal. The emergency department doctor could not identify the etiology of Claimant's complaints, but reported that consultation with the physician on call for Dr. Gussner suggested the symptoms were most likely side-effects of the ESI, though both physicians considered it unusual for such symptoms to last so long. The emergency department discharged Claimant later that day.

11. Claimant returned to Dr. Gussner on October 8, 2007. The visit focused on the symptoms Claimant experienced following the ESI, most of which were still bothering him. Secondly, Claimant reported no improvement of his low back and left hip pain from the ESI. With conservative treatment ineffective, Dr. Gussner gave Claimant a full release to return to work and referred him to Dr. Montalbano for a surgical consultation.

12. Claimant did return to work on October 9, and by 1:40 p.m. was on his way to SLMC-ED *via* ambulance, complaining of dizziness, nausea, and headache. Emergency department doctors were aware of Claimant's previous visit on October 5 with similar complaints. While in the emergency department, Claimant underwent a plethora of diagnostic tests, a number of which duplicated earlier testing. Among the new diagnostic tests was a lumbar puncture. The emergency department notes describe a myriad of differential diagnoses:

meningitis versus postprocedural complication versus viral illness versus anxiety versus pericarditis versus cerebrovascular accident. Other issues considered include pulmonary embolism versus acute coronary syndrome.

Ex. 8, p. 83. Once again testing failed to pinpoint the source of Claimant's complaints and once again the emergency department discharged Claimant.

Paul Montalbano, M.D.

13. On October 11, 2007, Claimant saw Dr. Montalbano pursuant to Dr. Gussner's referral. Claimant's presenting complaints again fell into two categories—the low back and left hip pain that followed the industrial accident and the symptoms that occurred after the ESI. Dr. Montalbano reviewed the MRI images from September 19 and Dr. Gussner's chart notes. Dr. Montalbano agreed with the radiologist that the MRI showed no canal/foraminal stenosis, no disc herniation, and no acute findings. Nothing on the MRI explained Claimant's low back and left hip pain. Dr. Montalbano ventured no opinion as to the cause of Claimant's other symptoms (dizziness, nausea, headache, etc.), but noted (incorrectly) that, by his reading of the medical records, those symptoms had not appeared until a week after the ESI. Dr. Montalbano found Claimant medically stable and released him to return to work without restrictions.

SLMMC/Dr. Gussner

14. On the afternoon of October 12, 2007, SLMMC admitted Claimant, who was complaining of nausea, dizziness, and exertional chest pressure. The chart note describes Claimant as a “[f]airly thin Hispanic male appearing his stated age who is miserable.” Ex. 8, p. 103. Susan Blough, M.D., took Claimant's intake history and physical. She considered the possibility that the symptoms were the result of the epidural, but opined that timing, severity, and progressive symptoms were at odds with such a diagnosis. She thought that viral meningitis was a possible cause of Claimant's complaints. Claimant again had a battery of tests, all of which were normal.

15. Deric W. Patterson, M.D., supervised Claimant's care while at SLMMC, and summarized his thinking regarding Claimant's symptoms in his discharge note dictated on October 14:

Given the timing of his epidural steroid injection and onset of his extensive symptoms, it is difficult to exclude the possibility that he suffered a CSF leak. In addition, although his symptoms are extensive, his headache, nausea, vomiting, dizziness, dysgeusia, are all well documented side effects of a low CSF pressure, and I suspect some of the clamminess, generalized weakness, and chest pain could be in part due to vagal response to his severe pain which was incapacitating on presentation. I consulted Dr. Voulelis with anesthesia to perform blood patch and this was done on October 13. The patient had improvement in pain that very night and today he is doing markedly better. He is now ambulating, taking in orals, and has had a shower. Although he still feels somewhat worn out and weak, his headache has disappeared for the moment, and he is having no nausea or vomiting. In addition, he has had no further chest pressure or other worrisome symptoms. At this time, he is safe for discharge to home, although he continues to suffer from some chronic left radiculopathy which was not addressed.

Ex. 8, pp. 107-108.

16. Claimant did not return to work after October 12, 2007, although he remained on the books as Employer's employee until his long-term disability ran out and Employer laid him off in April 2008.

17. Following his discharge from SLMMC, Claimant returned to see Dr. Gussner. Dr. Gussner noted that both Claimant and his daughter "seemed very upset with me." Ex. 4, p. 45. Claimant recounted the symptoms that had sent him to the hospital on three occasions and indicated that those symptoms were "improving." Claimant reported no improvement of his low back, left hip, and left leg pain. With respect to the March 2007 industrial accident, Dr. Gussner found Claimant to be medically stable, and released him to full work without restrictions. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th ed. (*AMA Guides*, 5th), Dr. Gussner determined that Claimant was DRE Lumbar Category II (Table 15-3, p. 384) and awarded Claimant a 5% whole person impairment. Dr. Gussner found no basis to conclude that

Claimant had ever had low back or leg pain prior to the industrial accident, and so did not recommend apportionment for a pre-existing condition.

Robert H. Friedman, M.D.

18. At the request of Surety, Robert H. Friedman, M.D., reviewed the medical records related to Claimant's three visits to SLMMC and opined that the treatment received was related to the ESI—either a reaction to the steroids used in the ESI, or else a complication of the ESI. He noted that Claimant's initial headache and dizziness complaints pre-dated the lumbar puncture, which was the most likely cause of Claimant's need for the blood patch.

George A. Nicola, M.D.

19. On November 6, 2007, at Defendants' request, orthopedic surgeon George A. Nicola, M.D., conducted an independent medical evaluation (IME) of Claimant. Dr. Nicola questioned the original diagnosis of lumbosacral sprain, because Claimant did not seek treatment until a week following the accident. In his report he stated, “[c]ertainly, a lower lumbar sprain should have presented in that amount of time with more significant difficulties . . .” Ex. 15, p. 202. Dr. Nicola's interpretation of Claimant's MRI was that the changes were chronic degenerative changes, and not the result of an acute injury. The annulus tear at L3-4 was not consistent with Claimant's reported symptoms, suggesting it was not the source of Claimant's complaints.

20. Dr. Nicola also discounted any relationship between Claimant's industrial injury and his dizziness, nausea, and headaches. He based his conclusion on his understanding that the symptoms did not manifest until a week after the ESI. The record is uncontroverted that the complaints actually began the evening of the procedure, and that Claimant's daughter contacted

Dr. Gussner twice before taking Claimant to the hospital on the fourth day following the procedure.

21. Dr. Nicola did not recommend any further treatment for Claimant's low back and left lower extremity complaints and opined that there was no reason that Claimant could not return to work without impairment and without restrictions.

Richard W. Wilson, M.D.

22. On November 14, 2007, Claimant saw Richard W. Wilson, M.D., a neurologist, on referral from Mr. Frost. Dr. Wilson determined that Claimant's initial industrial injury was a lumbosacral muscle strain which overlaid degenerative lumbar disc disease. The doctor was at a loss to explain the left-sided buttock and leg symptoms in light of the MRI which showed predominantly right-side foraminal abnormalities and exclusively right-sided intervertebral disc abnormalities. Neither could Dr. Wilson explain Claimant's headache, nausea, and dizziness. He opined that while it would not be unusual for Claimant to have a spinal headache following the ESI, the blood patch should have completely resolved the problem. Claimant reported that, following the ESI, additional left leg symptoms of numbness and burning appeared, but Dr. Wilson was unable to find an explanation for these new symptoms, either. He ordered EMG studies of the left leg, which were normal, and testing to rule out vestibular dysfunction as the cause of Claimant's vertigo and nausea, which was also negative. Finally, Dr. Wilson suggested some blood work to rule out temporal arteritis as a contributing factor in Claimant's headache complaints. Dr. Wilson opined that if the blood tests were negative, Claimant should return to light-duty work after Christmas for a couple of weeks before resuming unrestricted work.

Joseph M. Verska, M.D.

23. On December 21, 2007, Claimant saw Joseph M. Verska, M.D., upon referral by his attorney. Dr. Verska agreed with Dr. Friedman that Claimant's nausea, headache, and dizziness were, more likely than not, caused by the ESI. He also opined that Claimant's symptoms were, more likely than not, the result of his work injury. Dr. Verska disagreed with Dr. Nicola's opinion and assessment in its entirety and with portions of Dr. Montalbano's report. It was Dr. Verska's opinion that Claimant's low back and left leg pain was coming from the L4-5 disc injured in the work accident. Dr. Verska believed that a discogram could help determine if Claimant's symptoms were originating at L4-5, and if that was the case, thought a fusion might provide relief. Dr. Verska acknowledged that provocative discograms were controversial, but recommended that Claimant proceed with the discogram and a bone scan of the lumbar spine.

24. The bone scan confirmed that the changes in Claimant's lumbar spine were degenerative. The discogram results were interpreted as confirming that neither L3-4 nor L5-S1 contributed to Claimant's low back pain, but that the injection at L4-5 replicated his low back symptoms.

Lawrence E. Green, M.D.

25. Pursuant to a referral by Mr. Frost, Claimant saw Lawrence E. Green, M.D., a neurologist, on January 14, 2008. Mr. Frost made the referral to see if Dr. Green could find a cause of Claimant's headaches. Dr. Green's differential diagnosis was migraine versus chronic intracranial hypotension possibly caused by the ESI. He ordered an MRI with contrast to rule out hypotension. He posited that if the MRI was normal, then somehow the ESI had triggered the development of a migrainous pattern in Claimant, though he could not say why or how this

had happened. If the MRI were normal, he proposed to treat Claimant with standard migraine medications.

26. On January 15, 2008, Claimant had an MRI without contrast. When Dr. Green saw the MRI, he sent Claimant back for a second MRI with contrast. Claimant had a repeat MRI on January 22, 2008. There was no sign of intracranial hypotension. On January 24, Dr. Green opined that because of the negative MRI, neither the ESI nor the blood patch was causing Claimant's headaches, though he had no idea what was causing them. He opted to delay starting Claimant on amitriptyline pending recovery from spinal surgery, which was imminent.

Dr. Verska

27. With the discogram as confirmation of his diagnosis, Dr. Verska took Claimant to surgery on January 28, 2008 for a decompression and fusion at L4-5 with instrumentation.

28. Six weeks after the surgery, Claimant saw Dr. Verska for a follow-up appointment. The chart note states that Claimant was feeling much better than before surgery, and "a lot of his preoperative pain is now gone." Ex. 10, p. 150. X-rays showed a solid fusion and well-positioned hardware. Dr. Verska advised Claimant to increase his activities, decrease his pain medications, and start looking for work.

29. Claimant returned for a second surgical follow up on April 24, 2008. At that time, he complained of left hip, buttock and leg pain, and was unable to bend over to put on his socks or tie his shoes. Imaging confirmed a solid fusion and good placement of hardware. Lower extremity exam was normal except for tenderness noted over the left SI joint. Dr. Verska diagnosed residual left leg and hip pain following a posterior laminectomy interbody fusion and sacroiliitis on the left. He recommended conservative treatment, in particular an ESI of the left SI joint. Dr. Verska referred Claimant to Beth Rogers, M.D., for further evaluation and

treatment recommendations. This is the last medical record from Dr. Verska in the hearing record.

Physical Therapy

30. From February 20, 2008 through May 20, 2008, Claimant participated in physical therapy as part of his recovery from the fusion. The physical therapy notes are informative in two respects. First, they record very few complaints about low back pain. Second, they reveal that most of Claimant's loss of range-of-motion is due to tight hamstring and hip flexor muscles that limit his flexibility.

Social Security Disability

31. On May 14, 2008, the Social Security Administration approved Claimant's application for social security disability benefits.

Beth Rogers, M.D.

32. There is only one medical record from Beth Rogers, M.D., dated February 9, 2009, in the hearing record. At hearing, the parties indicated their intent to supplement the record with Dr. Rogers' complete file, but neither party did so. On February 9, 2009, Dr. Rogers declared that Claimant was medically stationary. Using *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed. (*AMA Guides*, 6th), Dr. Rogers rated Claimant's whole person impairment at 12%. Permanent restrictions were no lifting greater than fifty pounds occasionally and twenty-five to thirty pounds frequently.

VOCATIONAL EVIDENCE

33. Both parties retained vocational experts to assist in this proceeding. Claimant retained Barbara K. Nelson, M.S., C.R.C. Her report, dated April 14, 2009, appears as Exhibit

23. Defendants retained Douglas N. Crum, C.D.M.S. Mr. Crum's report is not a part of the record, nor was he deposed.

34. The scope of Ms. Nelson's services was limited to formulating an opinion as to Claimant's post-injury employability and vocational earning potential as compared to his pre-injury capacities in those areas. Ms. Nelson reviewed pertinent medical and earnings records and conducted a vocational diagnostic interview with Claimant with the assistance of Claimant's adult daughter, Margarita, as translator.

Pre-injury Factors

35. Ms. Nelson determined that, at the time of his industrial injury, Claimant was working ten hours per day in a job categorized as "very heavy," due to the frequency of lifting boxes weighing in excess of forty pounds. Claimant was physically healthy with no history of any serious disease or condition. He had an excellent work history, having only worked for four different employers over a period of more than thirty years. Claimant's 2006 combined wages (Greenhurst and Employer) were \$18,781. Claimant's 2007 earnings from Employer through October 9 were \$17,225.

36. Prior to his industrial injury, Ms. Nelson determined that there were no medical factors that would affect Claimant's vocational opportunities. Non-medical factors that affected his pre-injury vocational options included his age, his limited education, and his lack of fluency in English.

Post-injury Factors

37. Post-injury medical factors that would affect Claimant's employability varied from none (Drs. Nicola, Montalbano, Gussner and, possibly, Wilson) to the restrictions imposed by Dr. Rogers.

38. The only non-medical factors that changed following the injury were Claimant's age (he was two years older) and the changes in the economic climate of Claimant's labor market. The physical area of Claimant's labor market had not changed, but the unemployment rate had skyrocketed to the highest rate of unemployment in twenty-one years, and Ms. Nelson opined that the industries where Claimant was mostly likely to find work were the hardest hit.

Vocational/Disability Analysis

39. Ms. Nelson used Dr. Rogers' restrictions in her analysis of Claimant's post-injury disability. She acknowledged that using the opinions of Drs. Gussner, Montalbano, and Nicola would have resulted in no disability finding for Claimant. She discounted those opinions because each of those physicians had offered their opinion *prior* to Claimant's back surgery.

Labor Market Access

40. Using Dr. Rogers' restrictions, Ms. Nelson determined there would be jobs that Claimant could perform that were within his capabilities, but the economic situation would make those jobs more difficult to get. Before his industrial injury, Claimant had access to about 16% of the jobs (not job openings) in his labor market. With the restrictions imposed by Dr. Rogers, Claimant would have access to only 7% of the jobs (not job openings) in his labor market. This constitutes a 56% loss of access to the labor market.

Earning Capacity

41. Ms. Nelson compared Claimant's time-of-injury wage of \$9.45 per hour plus benefits to what he could expect to make, given his restrictions—something around \$7.50 per hour. The difference constitutes a 21% comparative wage loss, excluding benefits.

Disability Rating

42. Ms. Nelson averaged the percentage loss of access and loss of earning capacity, and concluded that Claimant's total permanent disability, inclusive of impairment, was not less than 38.5%.

Chronic Pain

43. In concluding her report, Ms. Nelson opined:

[Claimant] obviously suffers from chronic pain syndrome. His entire life has deteriorated to the point of being dependent on others for most of his needs. He is not particularly angry or vindictive—just helpless. Although his pain is subjective, it does not mean he is lying or malingering. It just means that what he perceives to be real is that his pain is completely debilitating.

Ex. 23, p. 463. Ms. Nelson concluded by stating:

[i]n my opinion, a reasonable evaluator could view Mr. Mora as totally and permanently disabled under the odd lot doctrine due to the combination of his physical limitations, chronic pain syndrome, and the non-medical factors of his case.

Id. at pp. 463-464.

DISCUSSION AND FURTHER FINDINGS

44. A claimant in a worker's compensation case has the burden of proving that he is entitled to benefits. The claimant must prove not only that he was injured, but also that his injury was the result of an accident arising out of and in the course of his employment. His proof must establish a probable, not merely a possible, connection between cause and effect to support his contention that he suffered an accident. *Neufeld v. Browning Ferris Industries*, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985). Here, there is no dispute that Claimant suffered an injury as the result of an accident. Rather, this case centers on the nature and extent of the injury that Claimant sustained.

MEDICAL CARE

45. In addition to proving the accident and injury, a claimant must also prove medical causation:

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

46. Defendants do not dispute that Claimant was entitled to medical care from the date of his injury until Mr. Frost released him to return to work in April 2007. Defendants do dispute that they are liable for much of Claimant's subsequent medical care, including the multiple diagnostic procedures performed by SLMMC on his three visits, and the care provided by Dr. Verska. Claimant's complaints fall into two general categories and each is addressed separately.

Low Back/Left Hip/Left Leg

Drs. Schwartzman, Gussner, and Montalbano

47. Claimant saw Dr. Schwartzman in September—four months after Mr. Frost released Claimant and returned him to work without restrictions. Such a break in care could be indicative of a break in the causal chain or raise the possibility of doctor shopping; however,

Claimant did not seek out Dr. Schwartzman. Claimant saw Dr. Schwartzman upon referral by one of the Defendants in this proceeding when he reported that his symptoms had returned in the months following his initial treatment and release. Dr. Schwartzman ordered medical imaging and recommended conservative care—referring Claimant to Dr. Gussner for an ESI.

48. Dr. Gussner administered the ESI that Dr. Schwartzman had recommended. Dr. Gussner's treatment of Claimant was limited to the epidural and follow-up care.

49. Dr. Gussner referred Claimant to Dr. Montalbano when it was clear that the epidural provided no relief from Claimant's original industrial complaints. Dr. Montalbano reviewed relevant medical records and saw Claimant on one occasion. He concluded there was no evidence of any lumbar pathology that would account for Claimant's symptoms. He recommended continued conservative treatment and said there was nothing neurologically that would prevent Claimant from returning to work without any restrictions.

50. The care and treatment provided by Drs. Schwartzman, Gussner, and Montalbano began with Defendants' referral, constituted a continuous chain of referral related to Claimant's industrial injury, was reasonable, and is compensable.

Dr. Nicola

51. Claimant saw Dr. Nicola at the behest of Surety for an IME. Defendants are responsible for the costs of the IME.

Dr. Wilson

52. Claimant saw Dr. Wilson upon referral from Mr. Frost. It is unclear why or when Claimant returned to Mr. Frost or why Mr. Frost made the referral to Dr. Wilson, especially in light of the opinions of Drs. Schwartzman, Gussner, Montalbano, and Nicola that Claimant could return to work without restrictions. However, the referral was from Mr. Frost, the first person to

treat Claimant's industrial injuries. Defendants presented no evidence challenging the compensability of Dr. Wilson's care as it pertained to Claimant's original industrial complaints. The Referee finds that, as to the original industrial complaints, the referral to Dr. Wilson was reasonable, related, and compensable.

Dr. Verska

53. Claimant saw Dr. Verska upon referral from legal counsel, outside the medical chain of referral. That fact, standing alone, is insufficient to relieve Defendants of their obligation to provide the care recommended by Dr. Verska. *See, Jones v. Star Falls Transportation*, 2006 IIC 0520. However, the provisions of Idaho Code § 72-432(4) would require Claimant to make written demand upon Employer to authorize a change of physician before Employer would incur any obligation for the payment of such care. Although the record does not disclose whether the written notice anticipated by Idaho Code § 72-432(4) was made in this case, Defendants have not raised lack of written demand as a defense to the claim for Dr. Verska's care. Let it be assumed, for the sake of discussion, that the requirements of this subsection were met. If so, there is nothing untoward about Claimant reserving his petition for change of physician until the date of hearing on the case in chief. *See, Seward v. Pacific Hide and Fur Depot*, 138 Idaho 509, 65 P.3d 531 (2003). Therefore, assuming, as seems likely, that Claimant did make an initial demand upon Employer to authorize the care recommended by Dr. Verska, the Commission is free to address the question of whether or not Claimant is entitled to the payment of the medical bills incurred in connection with the treatment he sought from Dr. Verska.

54. Under Idaho Code § 72-432, as construed in *Sprague v. Caldwell Transportation Co.*, 116 Idaho 720, 779 P.2d 395 (1989), it is up to the physician to determine whether the care

recommended for Claimant is “required,” and it is up to the Industrial Commission to determine whether the required care is “reasonable.” Here, it is clear that Dr. Verska evidently “required” the care that was recommended since he actually performed an instrumented L4-5 fusion on Claimant.

55. Under the facts before it, the *Sprague* Court determined that in order to make the judgment as to whether or not the care required by the treating physician in that case was “reasonable,” it was important to consider the fact that claimant had made a gradual improvement as a result of the treatment, that the treatment was required by the physician and that the treatment was received within the physician’s standard of practice, the charges for which were fair, reasonable and similar to charges in the same profession. Although the record would seem to support the conclusion that Dr. Verska required the surgery, and although there is nothing in the record to suggest that his charges were anything other than reasonable, there is little to no evidence supporting the proposition that Claimant enjoyed any permanent improvement in his condition following the L4-5 fusion. Indeed, Claimant’s testimony would seem to suggest that he is more impaired and debilitated now than he was prior to the fusion surgery.

56. However, as *Sprague, supra*, makes clear, the considerations that were at issue in that case were unique to that case, and do not constitute a litmus test for assessing the “reasonableness” of the care required by a treating physician. Indeed, the most important consideration in this case is one of causation. As stated above, Claimant bears the burden of proving, by a preponderance of the evidence, a causal connection between the subject accident and the claimed need for care.

57. Claimant bears the burden of demonstrating not only that the surgery was needed, but also that it was needed as a consequence of a work-related incident. Here, Claimant's proof fails to clear the first hurdle, since the more persuasive medical evidence establishes that the surgery was not necessary. With the exception of Dr. Verska, the medical records and testimony in this case uniformly support the proposition that surgical intervention was not warranted. As explained by Dr. Montalbano, one could not entertain surgery for Claimant absent some correlation between his reported symptoms and the objective findings on exam and testing. Prior to the surgery performed by Dr. Verska, Claimant had no objective evidence of neurological deficit. MRI evaluation of Claimant's lumbar spine performed in September 2007 demonstrated that his most significant findings were right-sided in nature. However, Claimant's symptomatology has always involved only the left lower extremity. It is true that the MRI report reflects that Claimant did have some mild to moderate bilateral neuroforaminal stenosis at L4-5, but Dr. Montalbano convincingly explained that, in his review of the actual films, no neurological compromise was seen in any of the neurological structures of Claimant's lumbar spine. The Commission finds this testimony persuasive. It is also significant that electrodiagnostic testing performed prior to the L4-5 surgery demonstrated no evidence of neurological compromise or injury, further supporting Dr. Montalbano's review of the relevant films. Based on the fact that Claimant's subjective complaints could not be correlated with any physical finding, all of the physicians who evaluated Claimant, except Dr. Verska, concluded that he was not an appropriate candidate for the proposed lumbar spine fusion.

58. For his part, Dr. Verska relied heavily on the results of a January 10, 2008 discogram to support his decision to perform the L4-5 fusion. Pressurization of the L4-5 disc produced back pain concordant for Claimant's typical back pain. It is notable, however, that the

discogram did not appear to provoke any of the left lower extremity symptoms that figure in Claimant's typical complaints prior to surgery.

59. Dr. Montalbano rejected the discogram results, testifying that discograms are not favored by the neurological community as a means of supporting a surgical decision. Dr. Montalbano noted that the false positive rate for discography is as high as 35%. Even Dr. Verska appears to acknowledge the shortcomings of discography in this context. *See*, Exhibit 10 at 139.

60. Finally, and perhaps most importantly, Claimant did not enjoy any permanent improvement in his symptomatology as a result of the L4-5 surgery. Although Dr. Verska's last note of April 24, 2008 does suggest that Claimant's pain was "much improved" since surgery, it is clear that Claimant continued to complain of left hip and left posterior leg pain as of that date. More importantly, as explained by Claimant at hearing, the surgery marks a significant worsening of his condition. Prior to the surgery Claimant was able to work, albeit with pain. He has not worked since the surgery, due to a recalcitrant and unrelenting low back and left lower extremity pain.

61. Based on the foregoing, the Commission concludes that the Claimant suffered a lumbar sprain/strain as a consequence of the subject accident, and that the conditions imaged at the time of the September 2007 MRI were degenerative in nature, and long-standing. Finally, the Commission adopts the views held by Drs. Wilson, Gussner, Schwartzman and Nicola, that surgery was not indicated and is, therefore, not reasonable.

Headache, Dizziness, Nausea

62. The etiology of Claimant's headache and vertigo-like symptoms was a puzzle for the treaters who addressed the issue. Confusion about the chronology caused some of the

confusion. The record establishes the following chain of events:

October 1	ESI and onset of headache;
October 2	Daughter calls Dr. Gussner; told symptoms should resolve within forty-eight hours;
October 5	Forty-eight hours and Claimant no better; daughter calls Dr. Gussner again; advised to take Claimant to ER;
October 5	First visit to ER; primary concern is to rule out a stroke;
October 9	Office visit with Dr. Gussner. Claimant dizzy, headache, short of breath, complains of chest pressure; Dr. Gussner sends to primary care provider (Mr. Frost) and urgent care clinic sends Claimant to ER in ambulance;
October 9	Second visit to ER; rule out cardiac event, infectious agent;
October 12	Claimant admitted to SLMMC;
October 13	Anesthesiologist performs blood patch; Claimant has immediate relief.

The physician on call for Dr. Gussner on October 5 suspected that the symptoms were a spinal headache, but he was misled by their duration. In fact, most of the doctors who treated Claimant during his three visits to SLMMC, or opined on causation after the fact, were misled in one way or another by timing. The doctors who discounted the notion that Claimant's symptoms had any relation to the ESI were under the mistaken impression that the symptoms did not appear until a week *after* the ESI. The doctors who suspected spinal headache or CFS leak questioned their diagnoses because the symptoms *persisted longer* than they would have expected. The fact that Claimant's symptoms subsided immediately following the administration of the blood patch supports the theory that Claimant's initial complaints of headache, dizziness and nausea were directly related to the ESI, which was directly related to his industrial injury.

63. Defendants assert that the ER doctors' attempt to sort out differential diagnoses such as head lesions, cardiac events, and meningitis in light of a "definitive diagnosis of a lumbar strain defies credibility." Defendants' Post-hearing Brief, p. 18. Defendants' assertion grossly oversimplifies the problem. The question is not what symptoms were attributable to the lumbar sprain, the question is what symptoms were attributable to the *treatment* for the lumbar sprain. Claimant received an invasive treatment that has known risks and documented side effects.

Defendants provided no medical evidence regarding known or potential risks, complications, or side effects of an ESI. From the current vantage point, some of the testing may *seem* excessive, but this Referee is not going to assume that to be the case. Absent any evidence on the subject of ESI side effects, complications and contraindications, the Referee will not second-guess the ER personnel.

64. The Referee agrees that additional work-ups regarding Claimant's symptoms of vertigo and headache *following the blood patch administered on or about October 13, 2007* were unrelated to Claimant's lumbar sprain. There is nothing in the medical records that connects the two different sets of complaints, and no physician opined that such symptoms were related to Claimant's original industrial injury once any effects of the intervening ESI were attenuated by application of the blood patch. Thus, Defendants are not liable for charges incurred in the audiology tests or the CBC ordered by Dr. Wilson to rule out temporal arteritis as a cause of Claimant's headaches. Neither are Defendants responsible for services provided by Dr. Green relating to Claimant's headache complaints.

TTDs/TPDs

65. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Here, Claimant seeks TTD benefits from October 9, 2007, until Dr. Rogers declared him at maximum medical improvement on February 10, 2009. The Referee has determined that the lumbar fusion performed by Dr. Verska was not medically necessary. Prior to seeking care from Dr. Verska, Claimant had been found medically stable *vis a vis* his low back, left hip and left leg injuries by:

- Charles Frost, P.A. (April 23, 2007);
- Dr. Montalbano (October 11, 2007);
- Dr. Gussner (October 18, 2007); and
- Dr. Nicola, Defense IME (November 6, 2007).

The Referee finds that Claimant reached medical stability on November 6, 2007, and is entitled to TTD benefits for the period from October 9 to November 6, 2007, a period of four weeks and six days. Claimant's average weekly wage (AWW) was \$378.00, which places him at a compensation rate of 67% AWW or \$253.26 per week. Claimant is entitled to TTD benefits of \$1,230.12 (253.26 x 4.857142).

IMPAIRMENT

66. "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 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 non-specialized 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).

67. On October 18, 2007, Dr. Gussner awarded Claimant 5% whole person impairment based on the *AMA Guides*, 5th. On November 6, Dr. Nicola declined to award Claimant any PPI. On February 9, 2009, Dr. Rogers awarded Claimant a whole person PPI of 12%, based on the *AMA Guides*, 6th. Dr. Rogers based her PPI rating on the results of Claimant's lumbar fusion, a procedure the Referee found unnecessary. Averaging the PPI

ratings of Dr. Nicola and Dr. Gussner results in a whole person PPI rating of 2.5% or 12.5 weeks. The PPI rate for Claimant in 2007 is \$321.20 for a total PPI owed of \$4,083.83.

DISABILITY

68. Under the Idaho worker's compensation law a "disability" is defined 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." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425.

69. Ms. Nelson performed the only disability analysis that is a part of the record in this proceeding. She based her analysis on the impairment rating and restrictions that Dr. Rogers imposed following Claimant's lumbar fusion. Because the Referee has determined that the fusion was not necessary, Ms. Nelson's analysis somewhat overstates Claimant's disability. No physician who declared Claimant medically stable prior to his lumbar fusion imposed any work restrictions. Removing Dr. Rogers' permanent restrictions from the equation, there is no medical evidence remaining that supports any loss of access to the labor market or earning capacity. Claimant has failed to prove that he sustained disability in excess of his impairment.

70. Ms. Nelson concluded her report with her view that Claimant suffered from chronic pain syndrome which, together with his physical restrictions and other non-medical factors, rendered him an odd-lot worker. Ms. Nelson may be right—Claimant does present as an invalid—but no medical professional has made such a diagnosis. At worst, according to Dr. Rogers, Claimant could still lift up to fifty pounds occasionally and up to thirty pounds frequently. At best, he could have returned to his time-of-injury position with no restrictions.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 27

71. The Referee understands Ms. Nelson's effort to award Claimant some disability benefits. He clearly was a loyal and hard-working employee most of his life, and now presents as a broken man, unable to tie his shoes without assistance. The Referee is not suggesting that Claimant is malingering or untruthful, just that he has become what he believes himself to be. Claimant has failed to establish that he is entitled to any disability in excess of his impairment.

APPORTIONMENT

72. Idaho Code § 72-406 provides for the apportionment of disability when an injured worker has pre-existing physical impairments that contribute to his disability. Here, there is no evidence that Claimant had any pre-existing physical impairments that affected his ultimate disability. Moreover, since Claimant sustained no disability beyond his impairment as a result of the industrial accident, there is nothing to apportion.

ATTORNEY FEES

73. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. Generally, those circumstances include unreasonable denial or contest of a claim, neglect or refusal to pay compensation owing, or discontinuing benefits without reasonable grounds. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

74. Although attorney fees were an issue at hearing and identified again in Claimant's briefing, Claimant did not argue the matter. The Referee finds no basis to make an award of attorney fees on the facts before the Commission.

CONCLUSIONS OF LAW

1. Claimant is entitled to medical care through November 6, 2007, including his two emergency room visits and his October 12-14, 2007 hospital stay.
2. Claimant is entitled to TTD payments of \$1,230.12 for the period from October 9 through November 6, 2007.
3. Claimant is entitled to PPI benefits of \$4,083.83.
4. Claimant has failed to prove an entitlement to disability benefits in excess of his permanent impairment.
5. Apportionment of disability pursuant to Idaho Code § 72-406 is not appropriate.
6. Claimant has failed to prove he is entitled to attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 29 day of June, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

4. Claimant has failed to prove an entitlement to disability benefits in excess of his permanent impairment.

5. Apportionment of disability pursuant to Idaho Code § 72-406 is not appropriate.

6. Claimant has failed to prove he is entitled to attorney fees pursuant to Idaho Code § 72-804.

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

DATED this 27 day of July, 2010.

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 27 day of July, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS**, and **ORDER** were served by regular United States Mail upon each of the following persons:

SAM JOHNSON
405 S 8TH ST STE 250
BOISE ID 83702

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

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djb

/s/ _____