

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUAN HERNANDEZ-MUNOZ,)
)
 Claimant,)
)
 v.)
)
 IDAHOAN FOODS, LLC,)
)
 Employer,)
)
 and)
)
 ZURICH AMERICAN INSURANCE CO.,)
)
 Surety,)
 Defendants.)
 _____)

IC 2009-017095

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

Filed: January 11, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on October 1, 2010. G. Lance Nalder of Idaho Falls represented Claimant. David P. Gardner of Pocatello represented Defendants. Hugo Arias provided interpretation services. The parties submitted oral and documentary evidence. Following the hearing, Defendants filed a motion to admit new evidence, fully addressed below. Thereafter, the parties took five¹ post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on May 27, 2011 and is now ready for decision.

ISSUES

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

¹ The post-hearing depositions of Sheila Reyes, Garn Ray and Rolando Torres were taken pursuant to an order entered on October 22, 2010, limiting the admissibility of these witnesses' testimonies, as explained more fully herein below.

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Permanent partial impairment (PPI); and
 - c. Permanent partial disability in excess of impairment (PPD).

Claimant withdrew the issue of temporary total or temporary partial disability payments (TTD/TPD) at the hearing and did not address it in his brief. Defendants included the issue in their brief; however, the issue is not before the Referee and will not be addressed.

OBJECTIONS

Other than those objections specifically addressed herein, all pending objections are overruled.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant injured his back shoveling potatoes at work, or that he sustained a prior back injury at work. There is also no dispute that Claimant's request to renew his work permit from the Immigration and Naturalization Service (INS) was denied in December 2009, and that he believes he has exhausted all known means of reversing that decision, without success.

Claimant contends that he never had any back pain until late April 2009, when he injured himself trying to catch a falling fifty-pound bag, and that this pain worsened and has persisted after he injured himself again while shoveling potatoes on May 1, 2009. Relying upon his

medical records in evidence and the expert testimony of Robert Ward, M.D., D.C., Claimant maintains that his ongoing symptoms, necessitating a twenty-pound lifting restriction, are due to permanent aggravation of his preexisting lumbosacral spondylolysis. He argues he is entitled to permanent partial impairment (PPI) of 9% of the whole person, as well as benefits for total and permanent disability, because he is unable to obtain any gainful employment as a result of his medical and non-medical factors.

Defendants counter that Claimant had preexisting back pain that he reported in January 2009, and that he suffered only a temporary lumbar strain at work on May 1, which completely healed. They rely upon the opinions of Gary Walker, M.D., to support their position that Claimant suffered no PPI and, consequently, no permanent partial disability (PPD). Further, even if Claimant's condition may otherwise warrant PPD benefits, he is not entitled to such an award in this case because he is not authorized to legally work in the United States.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Claimant, taken on June 2, 2010;
2. The testimonies of Claimant and Sheila Reyes taken at hearing;
3. Claimant's Exhibits 1 through 14, admitted at the hearing;
4. Defendants' Exhibits 1 and 2, admitted at hearing;
5. The January 6, 2009 injury report, admitted post-hearing;
6. The post-hearing deposition testimonies of Garn Ray and Rolando Torres, both taken on December 13, 2010, admitted for limited purposes as set forth below;
7. The post-hearing deposition testimony of Sheila Reyes, taken on December 21, 2010, including exhibits, admitted for limited purposes as set forth below; and

8. The post-hearing depositions of Gary Walker, M.D., and Robert Ward, M.D., D.C., both taken on March 14, 2011.

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

CLAIMANT'S VOCATIONAL BACKGROUND AND WORK STATUS

1. Claimant was 41 years of age at the time of the hearing and resided in Idaho Falls. He was born in Mexico, but immigrated to the United States approximately twenty years ago. Claimant speaks little English and required the assistance of a Spanish-to-English interpreter at his medical appointments, his deposition, and at the hearing.

2. In Mexico, Claimant completed six years of school, then worked as a painter, pallet salesman, and cattle tender. Upon arrival in the United States, Employer hired him as a general laborer. After approximately eight years, Employer transferred Claimant to the plant where he was working at the time of his industrial injury. Claimant started there as a general laborer, then worked into his time-of-injury position as a flake additive operator. As a flake additive operator, Claimant was required to lift fifty-pound containers of additive, empty them into twenty-five-pound containers, and to lift the containers from the floor onto a scale. He was also required to shovel potatoes.

3. Following evaluation by a medical professional for his industrial injury, on or about June 26, 2009, Employer transferred Claimant to a potato sorting line where he was not required to do any heavy lifting. He worked at this job until December 2009, when Employer laid him off because his INS work permit expired, rendering him legally unemployable.

4. By the time of the hearing, Claimant had exhausted all known means of renewing

his work permit, to no avail. He has not had legal authorization to work in the United States since December 2009.

INDUSTRIAL ACCIDENTS AND INJURIES

Late April and May 1, 2009 Injuries

5. Claimant testified that he felt a “pop” in his back accompanied by pain a few days prior to May 1, 2009, when he tried to catch a bag of potato flake additive (Myverol) that fell off a pallet. He described sitting for twenty minutes waiting for someone to come by to help (but no one did). Claimant reported the incident to Garn Ray, his supervisor, and continued to work because the pain eventually dissipated and there was no one else available to do his job. On May 1, 2009, Claimant’s low back still hurt and, on that day, he sustained another low back injury while shoveling potatoes. He reported this injury to Mr. Ray and also told him he wished to obtain medical treatment. Claimant testified that these are the only times he has ever injured his back or had back pain, at work or otherwise.

6. Claimant testified that he did not fill out any paperwork with respect to the bag-catching injury. However, on May 1, 2009, Claimant and Mr. Ray prepared a Supervisor’s Incident Analysis Report after the shoveling injury. The report states Claimant was “shoveling potatoes and his back started hurting him. *Mussals [sic]* locked up,” and that his pain was located in his lower back. Cl. Ex., p. 83. Although the report indicates Isabel Segura witnessed the accident, Claimant testified that no one witnessed the accident, and that his supervisor listed Ms. Segura as a witness for reasons unknown to him. No evidence rebuts Claimant’s testimony on this point. Claimant’s testimony that no one translated the contents of the report to him is also unrebutted. This is the only incident report regarding Claimant’s back injuries on and before May 1, 2009, that Claimant recalls and describes. He denied that he had injured his back

in January 2009.

7. At the hearing, Defendants called one witness, Sheila Reyes, HR generalist, in rebuttal. Claimant objected to her testimony, on the grounds of unfair surprise and prejudice, because Defendants did not disclose Ms. Reyes as a witness in response to Claimant's discovery requests. Claimant explained that he had no opportunity to prepare for her testimony, through no fault of his own. The Referee allowed Ms. Reyes to testify, but limited the topics on which her testimony would be admissible:

REFEREE JUST: I think that Mr. Gardner is entitled to call witnesses by way of rebuttal. He has waived the right to call witnesses in the case in chief. And there is no requirement that rebuttal witnesses be disclosed because it's not always possible to know who the witnesses might be.

That being said, questions directed to Ms. Reyes are limited quite substantially to issues that were raised during the examination of the claimant and, I presume, are going to the issue of perhaps clarifying or disputing some very specific bits of information.

And when it comes time to write this decision, I'm going to be very careful about what, if any, information ends up in the decision, making sure that it is, in fact, in the way of rebuttal and not basically new evidence or a new case in chief. So I'm going to go ahead and allow it under those circumstances.

Tr., p. 62. Thereafter, Ms. Reyes produced a computer-generated document called an "OSHA" report. There was no evidence that the report was prepared pursuant to any particular law, and Employer did not file the report with OSHA. The report pertained to a "Juan Munoz" and Defendants had not disclosed the document during discovery. It bore information concerning a January 6, 2009, back injury. The Referee admitted this report into evidence over Claimant's objection, noting that she would determine the appropriate weight, if any, to be given to the document after reviewing the entire record.

8. A few days after the hearing, Ms. Reyes found another record pertaining to Juan Munoz and the January 6, 2009, incident. This record was an injury report form, completed in

handwriting, and signed by a supervisor (Garn Ray), the employee (Juan Munoz) and a translator (Rolando Torres). On October 13, 2010, Defendants filed a Motion to Produce Additional Evidence Discovered After Hearing by Employer, to which Claimant objected. On October 22, 2010, the Referee entered an order reopening the record for the limited purpose of admitting the January 6 report and testimony from the signatories to the document to prove or disprove its authenticity, all at Defendants' expense. Claimant also deposed Ms. Reyes, even though she is not a signatory to the document. Defendants produced Ms. Reyes without objection to any questions regarding the authenticity of the subject report, but specifically reserving objections to "any questions that will be outside the scope of what is intended by the order." Reyes Dep., p. 5. The Referee admits into evidence the deposition testimony of Ms. Reyes pursuant to the parties' stipulation, and sustains Defendants' objection.

AUTHENTICITY OF JANUARY 6, 2009 INJURY REPORT

Sheila Reyes

9. Employer hired Ms. Reyes as an HR generalist in February 2010. In March 2010, she took over the workers' compensation claims duties. Ms. Reyes was the key individual responsible for finding documents in the company files in response to Claimant's discovery requests.

10. Ms. Reyes explained that it was confusing, how the workers' compensation claim files were organized when she arrived:

Q. When you took over the workers' compensation responsibilities after February of 2010, can you tell me approximately when in time you received that assignment?

A. I believe it was end of March or April, beginning of April. Somewhere around that time.

Q. End of March, first of April 2010. And did you at that time go through the process of trying to figure out where the workers' compensation claim files were, where the documents relating to workers' compensation claims were, that sort of thing, or did you just deal with claims as the necessity arose?

A. He showed me how to file a claim on line.

Q. Rolando?

A. Rolando.

Q. Okay.

A. And that probably took about 15 minutes. And showed me where all the binders were for workers' comp claims and incident reports.

Q. Now, when you say the binders, were these blank forms in the binders or were there --

A. No.

Q. BY MR. NALDER: Well, what I'm trying to find out and what I'll be following up on is where did these documents that I've marked as exhibits come from, and so I'm trying to get an understanding of how broad that scope was, if you know.

A. It was probably about six thick binders of five-inch ones, and they were all full.

Q. And they would have contained incident analysis reports?

A. Uh-huh. Yes.

Q. Any other documents that they would have contained or been held within those binders?

A. Other documents were -- for example, if it became a recordable incident or if the employee went to -- for medical care or treatment, we had copies of all those documents.

Q. If the claim involved a complaint that was filed with the Industrial Commission, would it include those types of documents as well?

A. Yes.

Q. Okay. So was it your understanding that these bindings would hold or were supposed to hold all of the documents pertaining to an individual's particular workers' compensation claim?

A. Correct.

Q. And were they sorted by date of incident, by employee name, or do you know?

A. By employee name, by last name.

Q. Okay. For example, if Juan Hernandez Munoz in this case had two workers' compensation claims at two different times during the same year, would those be in different locations and potentially different binders or would they both be together under his name in one of the binders?

A. Separate. Because one -- it depends if it was just an incident report versus a workers' comp where they -- where they have -- seek medical attention and have become a -- sorry -- a recordable incident.

Q. And explain to me what, in your mind or understanding, makes it a recordable incident.

A. It makes it a recordable incident when they seek medical attention and they basically need more than stitches or Tylenol. When they're prescribed a medication or they need stitches or they need physical therapy or anything like that.

Q. And was there a separate binder for recordable workers' compensation incidents and a separate binder for nonrecordable incidents?

A. It was kind of messy. It had -- some binders had the incident reports and then alphabetized. And then behind it, it had like recordable incidents alphabetized, but we had like 2007, 2008 and some were divided by plant. So it was very confusing to find a document.

Reyes Dep., pp. 10-13.

11. The "OSHA report" that Ms. Reyes produced at the hearing became Defendants' Exhibit 2. No corollary report was created for the May 1, 2009, injury even though the company considered the January injury less serious ("nonreportable") than the May injury ("reportable").
See Id. at p. 13.

12. In her post-hearing deposition, Ms. Reyes explained that Defendants had not previously produced this document because it was created under the name “Juan Munoz” and Ms. Reyes was uncertain, until she heard Claimant’s testimony at the hearing, whether this document referred to Claimant. She did not specify what specific hearing testimony changed her uncertainty into certainty. When asked at hearing whether he uses any names other than Juan Hernandez-Munoz, Claimant replied, “Jose Hernandez Cerna and Jesus Hernandez.” Tr., p. 12. Notably, Claimant offered this testimony before Claimant or his attorney heard Ms. Reyes’s hearing testimony, where they first learned Defendants sought to attribute the January 6 report regarding Juan Munoz to Claimant. Like the OSHA report, the handwritten injury report located by Ms. Reyes after the hearing only bears the name Juan Munoz to identify the worker referenced therein.

13. Generally consistent with Claimant’s testimony, the other employment documents produced by Ms. Reyes at her deposition (which raised no authenticity objections) indicate Claimant has executed employment documents in names other than Juan Hernandez-Munoz, including “Juan Hernandez” and “Jesus Hernandez.” *See* Reyes Dep., Ex. 5. There is no evidence in the record that Claimant has ever used the name Juan Munoz.

14. With respect to Claimant, locating all of the documents related to his work incidents was complicated by Employer’s filing system and the possible variations on Claimant’s name, as well as the fact that Ms. Reyes was not employed at that company until approximately ten months following Claimant’s final (shoveling) injury:

Q. Let me ask you about a couple of documents in particular. I'm showing you a supervisor's incident analysis report with a date of May 1, 2009, on it that's Deposition Exhibit *-3 here today. Another one from January 6, 2009, that's Deposition Exhibit No. *-1 from today. Do you know where those particular documents were located at the time you assumed the responsibility to care for the workers' compensation matters for Idahoan Foods?

A. Do I know where --

Q. Well, let me ask it this way: Were both of these documents, Exhibits *-1 and *-3, in the binders --

A. Yes.

Q. -- at Idahoan Foods?

A. Yes.

Q. And did you locate both of these documents within the binders?

A. Yes.

Q. And did you locate them in the same binder or a different binder?

A. I don't remember.

Q. Do you recall locating them in a single location or in different locations, that is, you've told me that some incidents would be recordable, some would not, and that they would be kept in different locations.

A. The question's kind of confusing.

Q. I don't mean to confuse you. Let me ask you this: Do you have a memory of locating Exhibit No. *-1, which is the January 6, 2009, incident analysis report?

A. Yes.

Q. Can you tell me approximately when you located it?

A. I located it the day we came back from the hearing.

Q. Okay. The date where you testified previously?

A. Correct.

Q. Okay. And where was it when you located it?

A. In one of the workers' comp claim binders.

Q. Was it under the name of Juan Hernandez Munoz or was it under Juan Munoz's name?

A. Under Munoz.

Q. Okay. And did you locate Exhibit No. *-3?

A. I did.

Q. And when did you locate it?

A. I believe it was prior to the hearing.

Q. Do you have a recollection of whether it was located at a different location or in a different binder than Exhibit *-1?

A. I don't. I think it was a different binder, but I am not sure.

Q. Okay. And is the explanation for why Exhibit *-1 and Exhibit *-3 would have been in different locations because of the last name for Juan?

A. Correct. Last name and because this was -- this had medical documents behind it.

Q. By this you mean Exhibit *-3 --

A. Exhibit *-3.

Q. -- had medical documents?

A. Correct.

Q. All right. At the time of the hearing in this case, you had brought with you, as I understand it, Exhibit *-2 to this deposition, which was the two-page OSHA report.

A. Yes.

Q. And that OSHA report was in the name of Juan Munoz, correct?

A. Correct.

Q. And that related to the January 6, 2009, incident?

A. Correct.

Q. And did you ever before the day of the hearing look for any workers' compensation incident analysis report for a Juan Munoz for this date of injury or illness represented on Exhibit *-2, which is January 6, 2009?

A. I did.

Q. And did you look in the binders for that?

A. I did.

Q. And, apparently, you weren't able to locate it?

A. Correct.

Q. Were you looking under M for Munoz at that time?

A. No.

Q. Could you explain to me why you wouldn't have been looking under M for Munoz if Exhibit *-2 had the name of the employee as Juan Munoz?

A. I looked under Hernandez.

Q. Okay. Just an oversight?

A. Uh-huh. Yes.

Q. Okay.

MR. GARDNER: And I'd just point out for the record, just so we're clear, Exhibit *-2, you did not bring that with you to the hearing, correct?

THE WITNESS: I did not.

MR. GARDNER: And that was something that I requested at the hearing.

THE WITNESS: Correct.

MR. GARDNER: And we had to have that faxed to us.

THE WITNESS: During our break, yes.

MR. GARDNER: So that wasn't something that you had found prior to the hearing, correct.

THE WITNESS: Correct.

Reyes Dep., pp. 13-18.

15. Ms. Reyes did not work for Employer when the January 6 report was generated or filed; she did not believe it referred to Claimant before the hearing and, therefore, she did not produce it until afterward. The reason she finally did produce the report was because of the OSHA report regarding Juan Munoz, which report was never authenticated nor shown to be related to Claimant. Ms. Reyes's testimony is inadequate to establish by a preponderance of the evidence that the January 6 report pertains to Claimant.

Rolando Torres

16. Mr. Torres, bilingual in Spanish and English, has worked for Employer in a number of different capacities, from sanitation worker to supervisor to product tester to procedure manual writer ("document control") and others, for over thirty-three years. *See* Torres Dep., pp. 9-10. In 2007, following the sale of the company, Mr. Torres became a human resources generalist, primarily responsible for administration of employee health and life insurance benefits. In August 2009, following Claimant's industrial injuries, Mr. Torres also became responsible for processing workers' compensation claims. Mr. Torres made sure incidents were reported, logged, and – if the employee lost time from work – recorded and noticed to Surety. By the time of the hearing, Mr. Torres was no longer working in the human resources department, having been transferred to the receiving warehouse.

17. Mr. Torres signed the January 6 report as the translator. Mr. Torres was not formally designated as an interpreter by Employer, but provides this service when requested.

18. Mr. Torres testified that he remembered serving as the interpreter for Claimant and reading the document to him, but he did not recall any of the substantive content, whether Claimant had already signed the document before he interpreted it, or whether he interpreted every word verbatim.

19. Documentary evidence in the record, Reyes's Dep. Ex. 4, establishes that on December 18, 2008, fewer than three weeks prior to the January 6 accident report, Mr. Torres provided interpretation services for Claimant in completing his I-9 form. The I-9 clearly identifies Claimant by name (Juan Hernandez-Munoz), address, work permit number, social security number and other information consistent with information in the record concerning Claimant. Mr. Torres's testimony does not rule out the possibility that he translated the January 6 report for another individual named Juan Munoz.

20. The evidence establishes that it is equally likely that Mr. Torres recalls translating the I-9 for Claimant as it is that he recalls translating the January 6 injury report.

21. Mr. Torres's testimony is inadequate to establish by a preponderance of evidence that the January 6 report pertains to an injury reported by Claimant.

Garn Ray

22. Mr. Ray has worked for Employer in various capacities for over twenty-eight years. Since sometime prior to 2009, Mr. Ray has been a shift supervisor in the production plant, where Employer processes raw potatoes into dehydrated potatoes. He was Claimant's supervisor at all relevant times. Mr. Ray testified that he regularly utilized an interpreter to communicate with Claimant because Mr. Ray does not speak Spanish. At times, Claimant would communicate in broken English; if Claimant believed the two understood each other, they did not usually use an interpreter:

Q. What I'm trying to figure out is you've told me that you had Mr. Hernandez Munoz look at this supervisor's incident analysis report, and you asked him if he understood it and what was on it, and you told him -- he told you apparently he did.

A. Yes.

Q. Correct? And then he signed it?

A. Yes.

Q. What I'm trying to figure out is how do you know from that conversation that he, in fact, understood what was written at the time that you wrote it and told him about it?

A. Because I've dealt with him on many things in the plant. And if he doesn't understand it, he tells me right then I need an interpreter, and I find somebody to interpret for me at that time. And he didn't ask for an interpreter on this one.

Q. Okay. But there have been incidents preceding this when Mr. Hernandez Munoz has tried to communicate with you or you with him and he's said I need an interpreter, correct?

A. If I try to communicate with him, he needs an interpreter. If he wants to tell me something, he doesn't need an interpreter. But it's never been on an accident or anything. Like on days off or he wants to do something different or he would -- you know, he wants to have a day off and he needs to go to Boise or he needs -- if he doesn't think I understand, he'll bring -- he'll ask for an interpreter too. But if he thinks we -- when we have a conversation if he thinks we understand each other, we don't usually get an interpreter.

Q. And help me understand. I don't want to put words in your mouth. You're saying that the only time an interpreter would be used is if Mr. Hernandez Munoz requested one?

A. Or if I request one. If he wants to ask me something and I don't understand it, I'll get one so that I understand what he's asking me. But I'd say over 50 percent of the time we don't need an interpreter. We can talk back and forth on questions. Most of it is pertaining to his job, and I know what he's -- he understands when I tell him something what he needs to do and what he doesn't.

Ray Dep., pp. 45-46.

23. Mr. Ray said he recalled the gist of what Claimant reported to prompt the January 6, 2009, injury report. He testified that Claimant hurt his back while lifting a box of potato flake additive (Myverol) and twisting. "I don't remember exactly what was said, you know, per se. I just remember he came to me and then said that he had lifted a box and he had twisted wrong, and he had hurt his back." *Id.*, p. 15.

24. Mr. Ray testified that he, alone, completed the substantive portion of the written

report by writing down what Claimant said. He was confident that Claimant and he mutually verbally agreed about the contents of the report, but he was unsure whether Claimant actually read it. Mr. Ray said he signed the report, watched Claimant sign it, then gave it to Claimant, who took it to the HR department.

25. Mr. Ray did not see Mr. Torres sign the report, but he testified Mr. Torres must have executed it after he and Claimant did. Mr. Ray did not arrange for Mr. Torres to interpret; HR or Claimant must have arranged this.

26. Mr. Ray's testimony about Claimant's report of an injury involving a *box* contravenes his corresponding written report, which does not refer to any boxes but, in two places, refers to "bags." In addition, he testified that Claimant hurt himself lifting and twisting, while the report says Claimant hurt himself lifting and slipping. Specifically, Mr. Ray wrote that Juan Munoz's injury occurred when he was "[l]ifting bag of Myverol and slipped and hurt back," and that he should "[b]e more careful when lifting heavy bags." Ray Dep., Ex. 1.

27. The circumstances under which the January 6 report was suddenly found, after Defendants failed to discover and disclose the document during the pendency of the discovery period and after having received the benefit of Claimant's hearing testimony, warrant heightened scrutiny of its provenance.

28. Even in light of these circumstances, Mr. Ray's testimony establishes that he recalls filling out an injury report for Claimant in January 2006. There is inadequate evidence in the record to establish that Mr. Ray ever supervised anyone else answering to the name Juan Munoz or that he intentionally provided false or misleading testimony. There is also inadequate evidence to establish that someone fabricated the January 6 report.

29. Although his recall of the details does not completely match up with those he

reported, Mr. Ray's testimony is adequate to support the proposition that the January 6 report pertains to a back injury reported by Claimant.

Claimant

30. Although Claimant was specifically provided the opportunity (via the October 22, 2010 order), at no cost to himself, to rebut the authenticity of the January 6 report, he did not elect to do so.

31. The Referee finds that the January 6, 2009, injury report pertains to Claimant and evidences that Claimant reported a back injury on that day.

MEDICAL RECORDS

Community Care

32. On June 26, 2009, nearly two months after his May 1 shoveling injury, Claimant obtained his initial examination and x-rays at the Community Care medical clinic in Idaho Falls. The corresponding chart note² indicates Claimant injured his back when a bag he was lifting at work during the beginning of May fell: "Hurt his back in the beginning of May. He was lifting a bag at work & it fell. He tried to catch it, bent over and felt it pop. Pain has not gone away. Worse today." Cl. Ex., p. 37. Claimant's lumbar spine x-rays revealed 12 millimeters of anterior subluxation (spondylolisthesis) at L5 on S1, and evidence of spondylolysis.³ There was specifically no other evidence of instability, malalignment or abnormal motion on either the flexion or extension views. The physician assistant (PA) diagnosed a lumbar strain, prescribed medications, icing and light exercise, and issued work restrictions.

² The Community Care chart notes are hand-written and, in places, illegible.

³ Also referred to herein as a pars defect.

33. Claimant followed up on July 10, 2009, reporting slight improvement in his low back pain, but also (apparently) complaining of leg symptoms. The PA diagnosed lumbar strain and right-sided sciatica. He prescribed medications and issued work restrictions, including a general lifting restriction of ten pounds or up to twenty pounds when pushing or pulling; a reaching restriction pertaining to movements extending away from the body; and prohibited crawling, bending, stooping, squatting, twisting, and climbing. In addition, the PA noted that Claimant should continue his light-duty work.⁴

34. On July 22, 2009, Claimant returned to Community Care. He reported doing a little better, but he still had pain with certain movements. Claimant denied radicular symptoms, and the care provider (different from before) diagnosed lumbar pain. Again, the provider prescribed medication and ordered work restrictions nearly identical to the previous ones. This time, Claimant was not restricted from twisting or climbing. On August 4, 2009, Claimant was (apparently) again seen at Community Care. Work restrictions, identical to those assessed on July 22, were imposed.

35. Claimant next presented to Community Care on August 26, 2009. The chart note indicates Claimant had been attending physical therapy and was doing a little better. On exam, Claimant exhibited right-sided paraspinal spasm and right-leg weakness on straight-leg raise. In addition, the care provider observed a guarded gait. The provider diagnosed lumbago, recommended an MRI, prescribed medication, and issued work restrictions. This time, Claimant's lifting restriction was relaxed to twenty pounds generally and thirty pounds with pushing or pulling and the prohibitions on twisting were reinstated.

⁴ Following his June 26, 2009, medical appointment, Employer provided light-duty work on the potato-sorting line. Claimant worked at this job until he was laid off in December 2009 following INS's determination not to renew his work permit.

36. Claimant's last appointment at Community Care apparently took place on October 2, 2009. A partial note from that date indicates Claimant would be referred to a back specialist, pending Surety's approval.

37. On September 15, 2009, Claimant had an MRI of his lumbar spine. The report identified Grade 1 anterolisthesis of L5 on S1 (secondary to bilateral pars defects at the same level), moderate facet spondylolysis, and uncovering of the disc as a result of the listhesis as contributors to mild bilateral foraminal stenosis at that level.

Channing Physical Therapy

38. Claimant attended physical therapy three times per week, from August 6, 2009 through September 16, 2009, for a total of seventeen visits. At his initial visit, he had a bilingual friend with him who translated. He complained of back pain at the lumbosacral level that remained steady throughout the day with, notably, no pain radiating into his legs. No neurological motor or sensory deficits were detected, but it is unknown what, if any, tests were performed to support this conclusion. The physical therapist noted that Claimant was tender to palpation at L5-S1, which she distinguished from mild paravertebral muscle tenderness demonstrated by Claimant at the same level.

39. The physical therapist noted Claimant's signs and symptoms were consistent with a lumbar sprain/strain and initiated treatment with ultrasound, soft tissue mobilization, manual stretching, and home exercises to restore motion and decrease focal inflammation. Chart notes indicate that, at all but three visits, Claimant reported he was improving. When he did not report improvement, it was because he felt exertional soreness from his prior visit. At his final visit, the physical therapist noted that Claimant was awaiting MRI results, and that she would not be treating Claimant again unless he received another medical referral.

Shane Mangrum, M.D., Physiatrist

40. On October 14, 2009, Dr. Mangrum evaluated Claimant for low back pain and a few prior episodes of referred right leg pain. Dr. Mangrum's note indicates symptom onset with the bag-falling incident: "Inciting event: work related incident – stack of product fell, trying to catch, back popped." Cl. Ex., p. 64. Claimant reported that standing, walking, and bending (either forward or backward) worsened his symptoms, and sitting improved them. He denied numbness, tingling, and weakness.

41. Dr. Mangrum observed Claimant had a nonantalgic gait and was able to stand on heels and toes without difficulty. Claimant was also able to fully flex, extend, and side-bend at the waist, though he experienced discomfort with full flexion and extension. In addition, Claimant was tender to palpation in his lumbar spine area. Otherwise, his exam produced normal findings.

42. Dr. Mangrum also reviewed Claimant's imaging studies, including his x-rays taken in June 2009 and his lumbar spine MRI performed September 2009. Dr. Mangrum diagnosed low back pain, possibly due to lumbar facet arthralgia, related to the work injury:

The patient has subacute to chronic low back pain. He has findings on history and examination suggestive of lumbar facet arthralgia (likely referable to the L5-S1 segment). The symptoms are primarily extension-based in nature and reproduced with loading of the posterior elements. He has spondylolisthesis of L5 on S1 with bilateral pars defects. The patient's reported symptoms seem causally and temporally related to the described work incident in 5/2009. He has attempted interventions to date, including: PT and medication management of symptoms.

Cl. Ex., p. 65. Dr. Mangrum recommended facet injections, a lumbar support brace, and additional physical therapy. He also maintained Claimant's lifting, bending, and twisting restrictions.

43. On October 23, 2009, Dr. Mangrum administered a steroid injection into

Claimant's spine at L5-S1 for back pain. On December 4, 2009, he repeated the procedure. Claimant testified that these injections relieved his back pain for a week or so at a time. Medical records do not indicate whether any of Dr. Mangrum's opinions changed following these treatments.

INDEPENDENT MEDICAL EVALUATIONS

Gary C. Walker, M.D., Physiatrist

44. On October 28, 2009, while Claimant was still working for Employer in his light-duty potato sorter position, Dr. Walker performed an independent medical evaluation (IME) at Surety's request. Dr. Walker reviewed Claimant's medical records from Community Care and Dr. Mangrum; his physical therapy records; his lumbar spine MRI films and report; his x-ray fluoroscopy report; and Employer's incident report dated May 1, 2009. He also interviewed and examined Claimant.

45. Dr. Walker understood that Claimant had sustained the bag-catching injury, then the shoveling injury, on and around May 1, 2009. He had no knowledge of a possible injury in January 2009, but he testified that, even if Claimant did sustain a low back injury during that time frame, this fact would not change his opinions.

46. In his report and at his deposition, Dr. Walker maintained that Claimant's MRI evidenced no *acute* injury.⁵ This MRI interpretation is undisputed.⁶ He also acknowledged fluid in the right L5-S1 facet joint, opining it was the result of a degenerative process.

⁵ There is no dispute that Claimant's MRI evidences bilateral pars defects and spondylolisthesis, but Dr. Walker opines these occurred at least one year prior to the MRI study taken on September 15, 2009, rendering its etiology unrelated to any of the work-related injuries at issue in this case.

⁶ Dr. Ward does dispute, however, that the failure of the MRI to detect an acute injury is adequate to rule out such an injury.

47. Dr. Walker's examination of Claimant revealed a normal gait and normal neurological responses. Tests putting the nerve (Dr. Walker did not specify which nerve) on tension to elicit a pain response were negative. Dr. Walker found no evidence of lumbar radiculopathy, which he defined as pain or tingling and numbness radiating down a leg in a specific nerve root distribution. Specifically, Dr. Walker found no abnormalities in Claimant's leg reflexes or sensation, and no shooting pain or weakness on straight leg raises. Claimant's deep tendon reflexes at the ankles were brisk, but Dr. Walker did not believe these were significant findings because Claimant's Babinski and Hoffman tests were normal.

48. Claimant did, however, report pain with movement, particularly with extension of his low back. In addition, he was tender to touch in the L5-S1 area.

49. Dr. Walker opined that Claimant's pain symptomatology was due to a lumbosacral strain caused by his initial industrial injury, worsened by a further strain caused by his second industrial injury. Dr. Walker also diagnosed pre-existing L5-S1 spondylolisthesis. Dr. Walker opined that Claimant's industrial lumbosacral strain did not result in any permanent condition and, specifically, that it did not permanently aggravate his pre-existing spondylolisthesis.

50. Dr. Walker recommended an epidural spine injection, after which he considered Claimant to have reached maximum medical improvement (MMI) from his industrial injury regardless of whether or not that injection proved effective. Subsequently, as set forth above, Dr. Mangrum administered spine injections, on October 23, 2009 and December 4, 2009. These injections each provided pain relief for about a week.

51. Regarding Claimant's restrictions, Dr. Walker opined that a lifting limit of twenty pounds was reasonable; however, following the recommended epidural injection – again,

regardless of its efficacy – Dr. Walker opined that no permanent work-related medical restrictions were indicated. As a result, he recommended a 0% PPI rating. Dr. Walker is not a certified independent medical examiner, but he has experience in developing PPI assessments. In this case, Dr. Walker did not consult any references before determining whether a PPI rating was warranted because he had already determined that Claimant's work-related injury had healed.

52. Dr. Walker further surmised that Claimant may require surgery to correct his spondylolisthesis, which constitutes a material weakness in his spine, setting him up for future injury. However, this would be “entirely non-work related [*sic*].” Cl. Ex., p. 4.

53. Dr. Walker described spondylolisthesis, its relation to a pars defect, and why he does not believe Claimant’s MRI evidences an acute change:

Q. Okay. When you say no acute appearing abnormality, just explain that in laymen’s terms.

A. Well, what a spondylolisthesis is is it’s a shifting of one vertebral body beyond the bounds of the normal spine alignment so that one vertebral body slides forward of another vertebral body. So that is the definition of a spondylolisthesis.

A common reason for that is what is called a pars defect, which is a defect in the bony ring of the vertebral body, which allows the front or the body of the vertebrae to slide forward with the back part of the vertebrae, which we call the posterior elements, to stay put.

When you look at an x-ray, all you can see is the shift or the listhesis. And on what we call oblique x-rays you can oftentimes see a defect in the pars. What you cannot generally tell on a plain x-ray is whether or not it is new or old. And so on an MRI scan, we can see the shift, but, particularly, on what’s called STIR images – S-T-I-R, which is a specific series on MRI – it highlights activity in bone where there’s acute or active bony change.

Walker Dep., pp. 11-12. Dr. Walker goes on to explain that the highlighting on an MRI demonstrating acute or active bony change in adults is visible as a signal change on the STIR images for about a year after the injury. Claimant’s MRI, taken approximately four-and-a-half

months post-injury, showed no such signal change.

54. Dr. Walker also acknowledges that bone scans are useful in dating bone injuries. He explained that bone scans used to be the gold standard for diagnosing and dating pars defects. However, while they have good acuity for dating an injury, they are less specific than MRIs in determining the location of an injury. He further opined, without elaboration, that MRIs had surpassed bone scans as the preferred imaging process within the past five years among Idaho Falls radiologists.

Robert Ward, M.D., D.C.

55. Dr. Ward is a licensed chiropractor with a medical degree; however, he is not licensed to practice medicine in Idaho and has not practiced medicine outside those practice activities required of him to achieve his doctorate. Dr. Ward is also certified by the American Board of Independent Medical Examiners. Dr. Ward's relevant medical knowledge and his understanding of the proper application of relevant guidance from the *American Medical Association Guides to Permanent Impairment, 6th Edition* (6th Edition), was evident from his deposition testimony and his reports.

56. At Claimant's request, Dr. Ward reviewed Dr. Walker's report and recommendations, then performed an IME. Dr. Ward ultimately produced two written opinions: In the first, dated June 9, 2010, he criticized Dr. Walker's failure to assess PPI after finding Claimant had suffered an aggravation⁷ of his spondylolisthesis; and, in the second, dated July 23, 2010, he reported the results of the IME he performed. In preparing his opinions, Dr. Ward

⁷ Dr. Ward correctly described the difference between a permanent aggravation and a temporary exacerbation, as noted in the 6th Edition. Dr. Walker had used the term "aggravation" in his report; however, at his deposition, he very clearly testified that he had not used this term as defined in the 6th Edition and that he, by no means, intended to imply that he believed Claimant had suffered an industrial permanent aggravation of his spondylolisthesis.

reviewed Claimant's relevant medical records, interviewed Claimant, and performed an examination.

57. During his examination, Dr. Ward conducted a monofilament test on Claimant's legs in an effort to bridge the language gap and determine whether or not Claimant manifested any paresthesias. Based upon Claimant's responses, Dr. Ward opined that Claimant evidenced leg paresthesia consistent with the nerve distribution affected by spondylolisthesis at L4-5. (Recall, Drs. Mangrum and Walker found evidence of spondylolisthesis at L5-S1, consistent with that identified on the MRI.) Dr. Ward also opined, based upon Claimant's questionnaire answers, that he was depressed due to his inability to return to work.

58. Dr. Ward disagreed with Dr. Walker's conclusions, opining that Claimant's industrial bag-catching and shoveling injuries *did* permanently aggravate his pre-existing spondylolisthesis, at L4-5. He specifically rejected the lumbosacral strain diagnosis, for the reason that Claimant's symptoms did not resolve within six months or so. He opined that Claimant had reached MMI as of the date of the examination and assessed 9% PPI of the whole person. Neither Claimant's leg paresthesia, nor his depression were included in Dr. Ward's 9% assessment.

59. Dr. Ward opined that a bone scan is the best test for dating an injury such as a pars defect. However, Claimant never underwent a bone scan.

CLAIMANT'S CREDIBILITY

60. A claimant's credibility is always a factor that must be considered in a workers' compensation proceeding. Here, the scrutiny is heightened because Claimant testified that he had never experienced any back pain prior to his bag-catching injury in April 2009; however, it was determined, above, that he did report a back injury at work on January 6, 2009. Further,

given Claimant's job, in which he lifted and poured fifty-pound containers and shoveled potatoes on a daily basis, for years, it is difficult to believe that he did not, at times, experience some backaches and pains. In addition, Claimant's responses at the hearing and at his deposition, at times, seemed unresponsive or oddly focused. The primary issue to be determined with respect to Claimant's credibility is whether Claimant's testimony as to the new pain he suffered due to his industrial injuries is credible.

61. Along these lines, none of the physicians who have evaluated Claimant, including Dr. Walker, have averred that he has exaggerated his pain responses or that he evidences secondary gain motives. In fact, Dr. Walker opined that a twenty-pound lifting restriction is appropriate and that Claimant may require surgery in the future to treat his spondylolisthesis, among other opinions that confirm his belief that Claimant suffers persistent moderate back pain. However, he attributes this pain neither to a recent permanent aggravation of Claimant's spondylolisthesis, nor to his May 1 back strain, which he opined should have healed within a few months. He does not say it in so many words, but Dr. Walker implies that Claimant must have been experiencing back pain all along from his preexisting spondylolisthesis.

62. Dr. Ward countered by opining that Claimant's spondylolisthesis could have been asymptomatic until he injured his low back at work, so Claimant's testimony on this point is believable. He recalled a professional football player who played for years with a spondylolisthesis; however, he did not know whether this person was asymptomatic, as Claimant claims, or actually had pain and just played through it, as Defendants claim.

63. It appears likely from the evidence in the record that Claimant probably exaggerated his pre-industrial injury wellness. This is not to say that he was intentionally misleading; stoicism and a high tolerance to discomfort are positive traits in our society and

Claimant, who has also presented with a strong work ethic, may see himself and his physical symptoms in this light. Also, in retrospect, Claimant may very well recall his condition prior to his industrial injury as symptom-free by comparison. Nevertheless, the Referee finds Claimant's testimony on this point is not credible, and he most likely did experience backaches and pains that did not interfere with his ability to work as a flake additive operator, prior to his industrial injury on or around May 1, 2009.

64. The Referee further finds, however, that Claimant's complaints of increased pain that persisted following his May 1 injury are credible. Consistent with his apparent tendency to underplay his discomfort level, he did not immediately seek medical attention. However, nearly two months later his pain became so intense that he did obtain treatment. There is no evidence of any other reason why Claimant, at that time, went to the doctor and admitted that he could no longer do his regular job.

65. Claimant's responses to some queries, as is often the case where an interpreter is necessary, seemed odd or unfocused. One example is when he was asked how often he had numbness in his legs, and Claimant responded "eight times":

Q. Since the date that you first injured your back catching this bag of product, have you had any leg pain?

A. Pain, no. What happens is that my leg goes to sleep.

Q. Which leg goes to sleep?

A. The right one.

Q. And how frequently does that happen?

A. From the time that I have the incident with the shovel, it's been eight times.

Q. Eight times total?

A. Yes.

Tr., p. 38.

66. Claimant's response in the above example seems awkward, only because there was an expectation of some other measure, such as "once a week" or "whenever I sit for too long" built into the question, which sought frequency, not total number of times. Nevertheless, the response is not inconsistent with Claimant's other testimony on this point. Viewing the entirety of the record, the Referee finds Claimant's testimony is generally internally consistent, and lacks indications of an intent to mislead.

67. Claimant's recollection of dates was occasionally inconsistent with information in the record from contemporaneously maintained documents. The Referee does not find that such instances demonstrate dishonesty or ill intentions on Claimant's part. Nevertheless, where Claimant's testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the Referee will adopt the date referenced in the document as being more reliable.

DISCUSSION AND FURTHER FINDINGS

68. The provisions of workers' compensation law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

CAUSATION

69. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain

workers' compensation benefits, a claimant's disability must result from an injury, caused by an accident, and arise out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967). The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

70. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

71. Here, Defendants do not dispute that Claimant suffered a low back injury at work on or about May 1, 2009 (the shoveling injury), or that he suffered another work-related low back injury at some point prior to that date. The seminal causation question in this case is whether Claimant has adduced adequate evidence to prove that the low back pain he continues to suffer is causally related to his work injury, and is not instead the sole result of his spondylolisthesis, which Defendants argue is a preexisting condition. The record in this proceeding includes three medical causation opinions.

Dr. Mangrum

72. Dr. Mangrum was Claimant's treating physiatrist from October through December 2009. On October 14, 2009, he reported: "The patient's reported symptoms seem causally and temporally related to the described work incident in 5/2009." Cl. Ex., p. 65. Dr. Mangrum opined that Claimant's presentation was consistent with lumbar facet arthralgia.

Dr. Walker

73. The IME physician retained by Defendants, Dr. Walker, opined that Claimant incurred a temporary lumbar strain at work, which was entirely independent of his preexisting spondylolisthesis. Dr. Walker's explanation as to why he did not believe Claimant suffered any PPI illuminates his causation opinion:

Q. And did you determine that there was any impairment for Mr. Juan Hernandez Munoz?

A. No. I did not think he had an impairment.

Q. And why is that?

A. His diagnosis was lumbar strain and so the only way to rate him is based on a lumbar strain. Again, the spondylolisthesis is irrelevant. This is – you know, to include the spondylolisthesis in any kind of a consideration would be like a 70-year-old with arthritis in his ankle spraining a ligament in his ankle and rating his ankle ligament based on arthritis in his ankle. It's irrelevant.

And so the injury had nothing to do with his listhesis. His diagnosis was a sprain.

Walker Dep., pp. 24-25.

74. Dr. Walker based his opinion largely upon his inability to detect any MRI evidence of acute injury to Claimant's spine, even after a "curbside consult" with Peter Vance, M.D., a radiologist. *See* Walker Dep., pp. 39-40. The evidence Dr. Walker sought, but did not find, was a "hot spot" in the MRI indicating that Claimant's listhesis had changed within the past

year. Dr. Walker admitted that he had missed a hot spot on an MRI in a previous case, and that a bone scan can detect such an artifact, even when an MRI cannot. Dr. Walker did not request a bone scan; nevertheless, he remained confident that the evidence in this case is adequate to establish that Claimant's work-related injuries did not worsen his spondylolisthesis.

Dr. Ward

75. Dr. Ward provided an IME opinion at Claimant's request. In opposition to Dr. Walker's diagnosis, Dr. Ward opined that Claimant's persisting low back pain is the result of a permanent aggravation of Claimant's preexisting spondylolisthesis. Dr. Ward agreed with Dr. Walker's assessment that Claimant's MRI does not evidence an acute pars defect and, in fact, Dr. Ward was very clear in stating that the evidence in this case is inconclusive as to whether Claimant sustained either a pars defect or his listhesis as a result of his industrial injuries.

76. Unlike Dr. Walker, Dr. Ward posited that the MRI is inconclusive. Dr. Ward opined that Claimant's MRI cannot rule out an acute injury or a permanent aggravation of his spondylolisthesis, for two reasons. First, a bone scan, not an MRI, is the gold standard⁸ for detecting these acute changes. Since Claimant did not undergo a bone scan, an acute pars defect injury cannot be ruled out based upon imaging evidence alone. Second, Claimant's pain may not be emanating from a new displacement or injury to the bones of his spine. Instead, it could be due to an injury to the surrounding ligaments or related nerve roots, which would not show up on an MRI:

Q. ...but what was the specific injury?

A. The best I can – the best way I can explain that is saying that it was an aggravation of that area because it was weaker than another area. You and

⁸ Dr. Walker opined without elaboration that, among physicians in the Idaho Falls area, MRI has surpassed bone scan over the past five years as the gold standard for locating acute changes.

I might be able to do the same thing and never have that problem. Or if he had that – of course I'm taking the assumption he had it before. Let's take that assumption, that it did not cause it. Let's say that you have a spondylolisthesis and I don't and we both do what Mr. Munoz did. Your back starts hurting. Mine doesn't. Then I would ascribe the fact that you had that weakness or that [*sic*] there prior, and because it couldn't sustain the stress upon the area, that's where it's coming from.

Spondylolisthesis is an odd entity in that you can do surgery on them and reconstruct them and people still have the same pain, but then so does back surgery with disks. So it's – I'm not sure that anybody knows the exact mechanism of where the pain comes from or what it is. I'm not sure that you can pinpoint it and say, oh, it's this disk pushing right here or we've strained this particular ligament, which is more probable than not what it is. It's more of a ligamentous soft tissue type continuous injury.

Q. And that type of injury would get better?

A. Not necessarily.

Ward Dep., pp. 50-51. Later, Dr. Ward again described the potential sources of pain from spondylolisthesis, including nerve and ligament damage:

There's some that believe that it's the ligament, it could be ligamentous pain. There are others that [*sic*] it's stretching of the nerve root through the canal because the body is moving forward putting pressure on it. There's another set that believe it's not caused by the spondylo at all, but are [*sic*] caused by the segment above and the segment below because of the added stress on them. So there's a myriad of theories. It's one of the – it's a back doctor/surgeon's nightmare is the best way to put it.

Ward Dep., p. 54. He also described how an aggravation of a ligamentous injury can constitute a permanent worsening of that condition, as well as how tractioning on a nerve root from a listhesis can cause persistent pain:

Well, anytime you have any kind of an injury – let's say you're rear-ended by a car and get whiplash, which we're all familiar with. And I don't know if any of you have suffered that, as I have, but you have a certain amount of laxity in the ligaments that will never go back like it was. And I go out and get hit again, my injury then – I had the injury previously, now it's aggravated, and I don't go back to at least as – the state I was at prior to the second injury, that's an aggravation of my first one. It wasn't

the cause – my total cause of the injury, but it's an aggravation of that first injury.

Ward Dep., p. 55.

...One of the things that we really haven't looked at particularly was the fact that as that moves forward, you're also tractioning the nerve root somewhat. That's what a neurosurgeon looks at when they look at doing surgery on a spondylo. They usually don't like to do a surgery on one just so that they don't have the listhesis. They do it because there's tractioning on the nerve root and they're trying to relieve either a verifiable paresthesia or radiculopathy when a patient can't walk or can't move, more so than [*sic*] they're working [*sic*] at, gee, let's just reduce this thing and make it strong again.

Id., pp. 56-57.

77. Dr. Ward also opined that the industrial injuries Claimant described are consistent with permanent aggravation of spondylolisthesis:

Q. Okay. Now, what would be the mechanism that would precipitate the pain that Mr. Hernandez Munoz experienced upon catching the bag? Would it be a shift or movement, that is, a further shift and movement of the listhesis? Would it be stretched ligaments? Would it be pressure – or increased pressure above or below? That's what – I think that's what Mr. Gardner was trying to ascertain as well.

A. Because it's such a complex system and because of the aspect of the spondylo, it can be any and all of those things – or all of those things involved.

Id., p. 56.

78. Even supposing Claimant's spondylolisthesis is a preexisting condition, Dr. Ward opined it did not become symptomatic until aggravated by his workplace injuries. Dr. Ward lacks definitive objective evidence directly linking Claimant's pain complaints to his spondylolisthesis. Therefore, he relied heavily on the accuracy of Claimant's reports of pain, starting after the late April 2009 bag-catching injury, and nerve symptomatology, starting after the May 1 shoveling injury, in forming his opinion:

Q. In reviewing all of the medical records and reports and information in this case, did it appear to you that Mr. Hernandez Munoz ever recovered from the first incident where he was catching a bag and claimed to have felt low-back pain?

A. No.

Q. Is it your opinion that the shoveling incident was an aggravation or an exacerbation?

A. On a more probable than not basis, I would say it was an additional aggravation, as he had the radicular pain afterwards. And to the best of my knowledge, has not gotten any better since that time.

Ward Dep., p. 17.

79. The Referee concluded that Claimant's testimony as to the absence of any back pain *before* his industrial injuries is unreliable. However, his testimony as to the increased severity of his pain *after* those injuries is credible. Radiographic image testing confirms that Claimant's spondylolisthesis is located in the same lumbosacral area where he has consistently reported back pain since his workplace injury.

80. Dr. Ward provides a plausible physiological explanation for Claimant's symptom onset except for one important point. He attributes Claimant's pain and paresthesias (which other physicians could not detect, possibly because they were investigating a different nerve root) to spondylolisthesis at L4-5, one level above where x-ray and MRI imaging confirms Claimant's listhesis is actually located (at L5-S1). There is no evidence in the record to explain this discrepancy, which may reflect a minor typographical error, or just as possibly, may represent a gross misinterpretation of Claimant's exam findings.

81. Dr. Walker, on the other hand, completely fails to address why, if not due to his industrial injury, Claimant's pain substantially worsened around the end of April 2009.

82. Dr. Ward's opinion that Claimant's pain is likely the result of a ligamentous injury related to spinal weakness from his spondylolisthesis is consistent with the medical evidence in the record, as well as Claimant's testimony concerning his industrial injuries. Further, although he may have been referring to L4-5, Dr. Ward's testimony on this point is equally applicable to Claimant's low back pain, established by Drs. Mangrum and Walker to have originated at L5-S1. The Referee finds Claimant sustained a permanent aggravation of his spondylolisthesis due to his industrial injuries.

83. However, the x-ray and MRI evidence is more persuasive than Dr. Ward's opinion regarding the *location* of Claimant's listhesis. Therefore, Dr. Ward's neuropathy findings attributable to L4-5 are unpersuasive to establish that Claimant's listhesis, or his industrial aggravation of that condition, caused his paresthesias as noted by Dr. Ward. No other physician was able to verify Claimant's radiculopathy complaints related to L5-S1.

MAXIMUM MEDICAL IMPROVEMENT

84. There is no dispute among the IME physicians in this case that Claimant has reached MMI, though it is unclear from the record when, precisely, Claimant achieved MMI. Dr. Walker estimated, on October 28, 2009, that Claimant would reach MMI after receiving a steroid injection. Claimant received an injection on December 4, 2009, but Dr. Walker did not examine Claimant after the injection to determine whether Claimant had, in fact, achieved MMI. Dr. Ward, on July 23, 2010, opined that Claimant had, by then, reached MMI. Since the evidence fails to prove that Claimant was medically stable at any point prior to Dr. Ward's exam, the Referee finds Claimant reached MMI on July 23, 2010.

REASONABLE MEDICAL CARE

85. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). “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).

86. Claimant is entitled to future medical care pursuant to the provisions of Idaho Code § 72-432.

PPI AND APPORTIONMENT

87. “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 on 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).

88. Idaho Code § 72-406 provides for apportionment of benefits where a Claimant's industrial injury was worsened by a preexisting or subsequent condition.

89. Dr. Ward opined that Claimant sustained 9% whole person PPI, without apportionment, as a result of his industrial lumbar spine injury. Dr. Ward based his assessment on the facts that Claimant only became symptomatic after his industrial injury, that his preexisting spondylolisthesis was now permanently painful as a result of his industrial injury, and that he complained of paresthesias consistent with the level of his spondylolisthesis. As determined above, however, Claimant was not entirely pain-free before his industrial injury, and Dr. Ward, for unknown reasons, referred Claimant's paresthesia complaints to L4-5, one level above his established spondylolisthesis.

90. Dr. Ward relied upon guidance from the Lumbar Spine Regional Grid: Spine Impairments (Table 17-4, at page 571) from the *6th Edition*, to reach his assessment. The suggested PPI assessments for Class 1 injuries on that grid range from 1% to 9%. Class 1 injuries are defined as, "Spondylolisthesis with medically documented injury; with or without surgery *and* with documented **resolved radiculopathy or non-verifiable radicular complaints** at clinically appropriate level, present at the time of examination." (Emphasis in original.) It is undisputed that Claimant has spondylolisthesis with a medically documented injury (lumbar sprain/strain). However, the evidence regarding Claimant's radicular complaints bears a closer look.

91. As discussed, above, Dr. Ward's examination apparently pertained to the wrong vertebral level, so his findings are insufficient to satisfy the grid criteria.

92. Dr. Walker testified at his deposition that Claimant's radiculopathy complaints did not correspond to the L5-S1 level of his spondylolisthesis and opined they were "nonphysiologic": "...-- he had symptoms that were nonphysiologic, including episodes of the entire right leg going numb, both anteriorly, posteriorly, which has no dermatomal pattern to it, so it's very nonphysiologic. *It's not only non-verifiable, it's nonphysiologic.*" Walker Dep., p. 25. However, in his report prepared contemporaneously with his examination of Claimant, Dr. Walker did not rule out the possibility that Claimant's full right leg numbness may be due to inflammation around his listhesis at L5-S1:

...He has had facet injections without relief. These were done for possible aggravation of his pre-existing facet change. He has a normal neurologic examination. He has no radicular symptoms other than three or four episodes of numbness down the right leg. On the MRI scan there is no evidence at all that there is any nerve root compression of the L5 or the S1 nerve roots. The only other thing worth consideration would be that of an interlaminar L5-S1 epidural steroid injection to see if that would calm down any inflammatory process at this L5-S1 level...

Cl. Ex., p. 4.

93. Dr. Walker's testimony at his deposition was apparently embellished for advocacy purposes. Dr. Walker's report is more credible. It indicates Claimant's non-verified radicular complaints were more likely than not related to the clinically appropriate level of his listhesis at Dr. Walker's examination. If this were not the case, and Dr. Walker believed his radicular symptoms were either nonphysiologic or were related to another level of Claimant's spine, he would have said so in his report.

94. Otherwise with respect to Claimant's PPI assessment, Dr. Walker explained that he hadn't consulted any authority before determining Claimant's condition did not merit any PPI:

Q. What education have you received concerning the AMA Guides to Evaluating Permanent Impairment, 6th Edition?

A. I've read it. I've done many ratings through the years, almost 20 years of doing ratings through all the different guidebooks, and I've been rating in the 6th Edition Guidebook since it's been out.

Q. In light of your opinions in this case, am I accurate that you didn't even attempt to rate the impairment of Mr. Hernandez Munoz?

A. I didn't think he had an impairment rating.

Q. Right. So as a consequence you didn't delve into the AMA Guides or anything like that to –

A. No.

Q. –try and see where he stood?

Walker Dep., p. 27. Dr. Walker went on to acknowledge that pain, alone, can suffice to support a PPI assessment, and that Claimant's pain never completely resolved after his industrial injury. Dr. Walker did not explain why, or if, he found such an assessment inappropriate in Claimant's case.

95. Claimant credibly testified that his back pain after his industrial injury limits his ability to work, to hunt, and to perform other tasks he was previously able to do.

96. The Referee finds Claimant has proven he meets the criteria for a 9% whole person PPI rating as set forth in the 6th Edition and that this assessment appropriately captures Claimant's loss of function due to aggravation of his spondylolisthesis. As respects the apportionment of PPI, the record suggests a basis for apportionment, since the Referee concludes that Claimant's spondylolisthesis is a pre-existing condition which was aggravated by the subject accident. However, there is no medical evidence establishing a rationale for how the PPI rating should be apportioned. In the absence of such proof, the impairment will not be apportioned. Surety is responsible for the payment of the entire 9% PPI rating.

PPD

97. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

98. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425, *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

99. “The Commission, on occasion, encounters circumstances where a claimant suffers permanent impairment from an industrial accident, but the impairment does not cause any actual reduced earning capacity. Thus, there is no permanent disability beyond impairment.” *Diaz v. Franklin Building Supply*, 2009 IIC 0652. Along those lines, ineligibility to legally work in the United States has been held to constitute an overriding factor that supersedes industrial-related limitations for purposes of assessing whether a claimant has suffered any permanent disability beyond impairment. *Id.*

100. At the time of his industrial accidents, Claimant, a Mexican citizen, was legally employed through the authorization of an INS work permit. On September 21, 2009, that permit

expired, but Claimant continued working until December 7, 2009, when Employer laid him off due to his illegal status. At his deposition on June 2, 2010, Claimant expected his legal work status would be restored; but, by the time of the hearing, on October 1, 2010, he had not obtained new work authorization and, apparently, did not expect to in the future. Claimant explained, “They did not renew [my permit]; so I will not be able to work legally here.” Tr., p. 18. When asked whether he was in the process of renewing his permit, Claimant answered, “No.” Tr., p. 19. He further testified that he cannot renew his permit, so he cannot work:

Q. Would you agree that you are currently unemployed because of your expired work permit?

A. For the time being, yes.

Q. And you tried to renew that permit?

A. Yes.

Q. And they denied it; correct?

A. Yes. Correct.

Q. So you cannot renew that permit?

A. No.

Q. Is that correct, that you cannot?

A. Correct, I cannot.

Tr., pp. 54-55.

101. Claimant believes he could return to work as a painter or cattle tender in Mexico.

102. Permanent disability is assessed at the time a claimant reaches MMI. On the day Claimant reached MMI, his work permit had expired and he was not legally employable. For unknown reasons, however, Employer kept him on until December 7, 2009, three days after he reached MMI. Even if Claimant had been working legally through December 7, however, his

permanent disability is assessed as if he were unauthorized to work in the U.S. on December 4, 2009. This is because Claimant's legal access to the job market on the day he reached MMI was functionally equivalent to the legal access he had three days later, when his authorization to work was revoked. No employer could be expected to hire Claimant for a permanent, legal position, knowing that he would no longer be employable in a few days.

103. Claimant argues that his non-legal work status constitutes a non-medical factor contributing to his disability, which should be determined to be total and permanent. Claimant's immigrant employment status is, instead, a factor which bars Claimant from any legal labor market in the United States including, of course, Claimant's local labor market. Although Claimant's current limitations are probably sufficient to otherwise reduce his ability to gainful activity, and hence his access to the labor market, it is his inability to legally work in the United States that controls the outcome of the disability analysis in this case. Although Claimant had legal access to the labor market prior to the accidents, he has no such access now, and this fact overrides any consideration of injury-produced disability. While Claimant arguably does have access to gainful employment through illegal labor markets, the Commission has declined to consider illegal work as a legitimate basis on which to establish entitlement to permanent disability benefits:

The foundational assumption implicit in all of the Commission's permanent disability determinations is that future earning capacity is evaluated according to a claimant's ability to engage in lawful – rather than unlawful – gainful activity. Past Commission decisions do not discuss any claimant's earning capacity by means of shoplifting, drug trafficking, identity theft, illicit gambling, internet [*sic*] fraud, poaching, Ponzi schemes, or similarly illegal but potential gainful activities – all of which the Commission recognizes exist. The Commission does not evaluate permanent disability based upon presumptions of future illegal conduct. To do otherwise would offend justice, condone illegal activity, and dramatically alter the meaning and evaluation of disability.

Id. Accordingly, the Referee declines to consider Claimant's potential access to any illegal labor markets in determining his eligibility for PPD benefits.

104. Also, as in *Diaz*, the Referee declines to consider any Mexican labor markets in determining whether Claimant is entitled to permanent disability benefits for the reason that such markets are not "within a reasonable geographical area" of the market in which Claimant resides, as required by Idaho Code § 72-430.

105. For all of these reasons, the Referee finds Claimant has failed to establish any entitlement to permanent disability benefits.

CONCLUSIONS OF LAW

1. Claimant has proven his lumbosacral back pain symptoms were caused by an industrial accident.

2. Claimant is entitled to such future medical care for his low back as may be required under Idaho Code § 72-432.

3. Claimant has proven that he is entitled to PPI of 9% of the whole person.

4. Claimant has failed to prove he is entitled to PPD benefits.

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 13 day of December, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUAN HERNANDEZ-MUNOZ,)

)

Claimant,)

)

v.)

IC 2009-017095

)

IDAHOAN FOODS, LLC,)

)

ORDER

Employer,)

)

Filed: January 11, 2012

and)

)

ZURICH AMERICAN INSURANCE CO.,)

)

Surety,)

Defendants.)

_____)

Pursuant to Idaho Code § 72-717, Referee Rinda Just 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 has proven his lumbosacral back pain symptoms were caused by an industrial accident.
2. Claimant is entitled to such future medical care for his low back as may be required under Idaho Code § 72-432.
3. Claimant has proven that he is entitled to PPI of 9% of the whole person.
4. Claimant has failed to prove he is entitled to PPD benefits.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 11 day of January, 2012.

INDUSTRIAL COMMISSION

/s/ _____

Thomas E. Limbaugh, Chairman

/s/ _____

Thomas P. Baskin, Commissioner

/s/ _____

R.D. Maynard, Commissioner

ATTEST:

/s/ _____

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of January, 2012, 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:

G LANCE NALDER

591 PARK AVE STE 201

IDAHO FALLS ID 83402-3573

DAVID P GARDNER

PO BOX 817

POCATELLO ID 83204-0817

djb

/s/ _____

ORDER - 3