BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRAND POOLE, Claimant, v. DOUG ANDRUS DISTRIBUTING, INC., Employer, and CONTINENTAL CASUALTY COMPANY, Surety, Defendants.	**IC 2006-003863** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION**

FILED
AUG 23 2012
INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello, on February 18, 2011. Claimant, Trand T. Poole, was present in person and represented by Paul T. Curtis, of Idaho Falls. Defendant Employer, Doug Andrus Distributing, LLC, and Defendant Surety, Continental Casualty, were represented by Lora Rainey Breen, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The evidentiary record was reopened for the receipt of additional evidence, followed by supplemental briefing. The matter came under advisement on May 7, 2012.

ISSUE

The sole issue to be decided presently is whether Claimant's 2008 and 2009 lumbar surgeries are causally related to his 2006 industrial accident or are due to subsequent intervening causes. All other issues are reserved.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant suffered an industrial accident on March 26, 2006, resulting in L5-S1 disc herniation and necessitating L5-S1 surgery on June 14, 2006. Claimant experienced recurrent disc herniation at L5-S1 and underwent a second lumbar surgery in August 2008, after which he developed a MRSA infection. Claimant then underwent a third lumbar surgery in September 2008. Finally, in January 2009, Claimant underwent L5-S1 lumbar fusion surgery.

Claimant contends that his recurrent disc herniation with resultant need for his second, third, and fourth lumbar surgeries is causally related to his March 26, 2006 industrial accident and first surgery. Defendants accepted liability for Claimant's first lumbar surgery, but deny liability for the balance of his medical care, maintaining that Claimant's recurrent disc herniation and all subsequent surgeries are casually related to one or more subsequent intervening events.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken December 9, 2009, and admitted into evidence as Claimant's Exhibit 36 and Defendants' Exhibit 14;
3. The testimony of Claimant, Dawn Solum, Sharron Bloxham, and Barbara Gerber, taken at the February 28, 2011 hearing;
4. Claimant's Exhibits 1-33, 35-36 and Defendants' Exhibits 1-16, admitted at the hearing;
5. The post-hearing deposition of Michael O'Brien, M.D., taken by Claimant on March 9, 2011;

6. The post-hearing deposition of Clark Allen, M.D., taken by Claimant on April 14, 2011;

7. The post-hearing deposition of Lynn Stromberg, M.D., taken by Defendants on April 21, 2011;

8. Claimant's Supplemental Exhibits 1-5 filed on March 8, 2012, and hereby admitted; and

9. Defendants' Supplemental Exhibits A-D filed on March 23, 2012, and hereby admitted.

All objections posed during the depositions are overruled.

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

FINDINGS OF FACT

1. **Claimant's background.** Claimant was born in 1979. He was 31 years old and lived in Pocatello at the time of the hearing. Claimant completed the ninth grade and later obtained his GED. From approximately 1994 until 1996, he worked in a restaurant. In 1997, he worked refueling trucks. In approximately 1998, he moved to Salt Lake City where he worked for two years molding plastic bottles. In approximately 2000, Claimant moved back to Idaho and worked cleaning pools and hot tubs. In 2001, he returned to Salt Lake City and worked for two more years molding plastic bottles. In August 2003, Claimant obtained his CDL and began driving milk trucks. In 2005, Claimant commenced driving truck for Doug Andrus Distributing. His duties included driving flatbed trailers and refrigerated box trailers.

2. Prior to 2006, Claimant's health was generally good. Claimant has smoked approximately one pack of cigarettes per day since he was 16.

3. **Industrial accident.** On March 26, 2006, Claimant was driving a refrigerated box trailer from San Francisco to Ogden. While crossing over Donner Pass in a snowstorm, tire chains lost on the roadway from another truck tangled in Claimant's tire chains and blew one of his truck's tires. Claimant pulled his truck to the shoulder and attempted to remove the tangled chains. While pulling, the chains abruptly came loose and Claimant fell onto his back. He noted immediate back pain and subsequent left leg pain. Claimant delivered the load and sought medical attention after returning home.

4. Claimant's low back and left leg pain persisted. He eventually came under the care of orthopedic surgeon Lynn Stromberg, M.D., who ordered an MRI that revealed L5-S1 disc bulging. Dr. Stromberg recommended steroid injections. On May 11, 2006, Dr. Stromberg recorded that Claimant was improved after steroid injections and released Claimant to return to work. Claimant had to support his family and wanted to get back to work. Within two weeks Claimant returned to Dr. Stromberg after experiencing increased back pain while driving a load to Utah.

5. **First surgery and subsequent condition.** On June 14, 2006, Dr. Stromberg performed an L5-S1 laminotomy and diskectomy. On June 26, 2006, Claimant returned to Dr. Stromberg who recorded that Claimant's radicular pain was resolved or much improved. On July 25, 2006, Claimant presented to Dr. Stromberg who recorded that Claimant felt "wonderful" and was ready to get back to work. That day Dr. Stromberg released Claimant to full-duty work without restrictions. However, Dr. Stromberg rated Claimant's permanent impairment due to his low back at 10% of the whole person, and advised Claimant that his back would be weaker than before the injury and that Claimant would experience some ongoing back pain. At the time of his work release, Claimant was taking prescription hydrocodone for presumed gall bladder

symptoms. Dr. Stromberg did not know that Claimant was taking hydrocodone at the time of his release.

6. The Surety accepted liability for Claimant's 2006 surgery and permanent impairment rating.

7. Claimant testified that he experienced ongoing back pain and limitations after his June 14, 2006 surgery. He was often stiff in the morning and soaked in the tub and then did the exercises he had been given at prior physical therapy sessions. Sometimes his back pain was significant, but usually it was just moderate pain. After his June 2006 surgery, Claimant modified his activities to protect his back. He did not pick up his younger children and ceased wrestling with his sons. Claimant also stopped riding his four-wheeler. He still went camping; however, he did not hike as much.

8. Claimant testified that after June 2006, he called Dr. Stromberg's office several times, reported ongoing aching in his back, but was advised by Dr. Stromberg's staff that some back pain was to be expected even after recovering from back surgery and was something Claimant would have to get used to. Dr. Stromberg testified that his notes made no mention of Claimant making such calls to his office.

9. After the 2006 surgery, Claimant telephoned the Surety about his recurring back pain, but was advised that the Surety acknowledged no further responsibility for his condition and that his case was closed.

10. Following Claimant's unrestricted work release, he ceased long haul driving and began driving grain harvest trucks from the fields to the silos. The shorter runs were more comfortable because they provided opportunity for Claimant to get out of his truck and stretch his back often.

11. On August 15, 2006, Claimant rolled a grain truck over onto the passenger side because the truck had worn springs and was not evenly loaded. Claimant hurt his left arm, shoulder, and neck in the rollover. On August 15, 2006, Craig Bosley, M.D., examined Claimant and noted his back range of motion was mildly limited secondary to muscular discomfort. Dr. Bosley prescribed Vicodin. On August 16, 2006, Claimant returned to Dr. Bosley complaining of very dark stools. There is no mention of back symptoms.

12. Shortly after the rollover, Claimant was sufficiently concerned about his back to return to Dr. Stromberg, who ordered a lumbar MRI. The MRI revealed no new injury and confirmed that Claimant did not hurt his back in the rollover. His employment as a grain truck driver was terminated shortly thereafter. Claimant next worked as a telemarketer briefly and then as an attendant at a group home for the handicapped.

13. On September 1, 2006, Claimant reported to Pocatello Family Medicine that he had visited the emergency room and was told that "he might have 'inflamed the back.'" Claimant's Exhibit 6, p. 25.

14. Over the ensuing twenty months, Claimant sought medical attention more than 15 times. He treated with several doctors for chest pain, stomach pain, shoulder pain, neck pain, a panic disorder, and a cyst in his neck. He testified that he experienced ongoing back pain and reported his back pain, along with his other complaints, to these physicians but was consistently told to see his back specialist for back complaints.

15. On January 29, 2007, Claimant presented to Benjamin Blair, M.D., with left shoulder and neck complaints. Dr. Blair recorded: "He underwent a lumbar diskectomy by Dr. Stromberg and has progressed." Claimant Exhibit 8, p. 3. Thus, per Dr. Blair's note, Claimant's lumbar condition—then seven months post-surgery—was worsening.

16. In May 2007, Claimant commenced driving cement trucks for Castle Concrete. His duties included delivering concrete. This required him to lift, position, and spray off 25 to 40-pound metal chutes. Claimant worked at Castle Concrete for approximately one year. His back pain continued. He occasionally missed work due to back pain, and he worked through the pain on some days. He did not seek further medical attention for his continuing back pain because he had already been told to expect some ongoing back pain following his first surgery.

17. On May 25, 2007, Claimant presented to Portneuf Medical Center emergency room with chest pain. Upon examination he had no back tenderness and his back inspection was normal.

18. On July 9, 2007, Claimant presented to Derek Wright, M.D., complaining of knee pain. Dr. Wright noted that Claimant had a history of herniated lumbosacral disc and that Dr. Stromberg was managing that issue.

19. On August 22, 2007, Claimant presented to Portneuf Medical Center emergency room with left shoulder symptoms. Upon examination he had no back tenderness and his back inspection was normal.

20. On August 23, 2007, Claimant presented to Courtland Carbol, M.D., with left shoulder pain. Dr. Carbol's notes make no mention of back pain. However, Dr. Carbol recorded that Claimant was reluctant to go to orthopedics for further treatment of his shoulder pain because he had no insurance. An MRI ultimately disclosed a small left shoulder rotator cuff tear.

21. On September 16, 2007, Claimant presented to Portneuf Medical Center emergency room with acute bronchitis. Upon examination he had no back tenderness and his back inspection was normal.

22. On April 20, 2008, Claimant presented to the emergency department at Health West complaining of low back and left leg pain. The record of his visit indicates: "Unsure of mode of injury, but may have hurt it 2 days ago lifting tires while on the job. States 'yesterday was just low back pain, today it radiates down the left leg and to the foot.'" Defendants' Exhibit 6, p. 147. By this time, Claimant was at least somewhat familiar with the reporting requirements for industrial accidents, having reported his 2006 industrial accident with Employer herein. Presumably Claimant understood that failure to report and claim a tire lifting injury at Castle Concrete, had one occurred, would have been against his best interest. Claimant testified at hearing that he did not lift the tires himself, but that he had been driving a front-end loader at Castle Concrete to lift and move tires. Claimant affirmed that nothing unusual happened and he had no new or unusual back pain that day. The Referee finds Claimant's testimony on this issue credible. Claimant received pain medications from Health West and continued working.

23. Approximately May 20, 2008, Claimant awoke with significant back pain. As was his practice when experiencing increased back pain, he soaked in the tub before going to work at Castle Concrete. His first delivery assignment was to a farm approximately 30 miles from the concrete plant. Upon arriving at the farm, Claimant experienced excruciating back pain when attempting to get out of his cement truck and stand upright. The customer noted Claimant's distress and put the chutes on for him. From the truck cab, Claimant operated the controls to pour the concrete. The customer then sprayed off the chutes and replaced them on the cement truck. Claimant reported his back pain to Castle Concrete's dispatcher and later discussed it with the owner of Castle Concrete, who encouraged Claimant to see a chiropractor. Claimant testified that he had no accident, no unusual event, and no work injury that day. He

made no claim for workers' compensation benefits from Castle Concrete, as he believed that he suffered no accident that day.

24. On May 22, 2008, Claimant presented to H. Dewain Lee, D.C., for chiropractic adjustment of his back. Dr. Lee recorded Claimant's report of his accident years earlier, but no recent accident. Claimant returned to Dr. Lee several times for chiropractic adjustments, but received no relief.

25. On June 10, 2008, Claimant presented to Health West. Notes from that visit record: "Had low back surgery—diskectomy 2005 [sic] w/ Dr. Stromberg. Only minimal problems w/ back since then. Pain off and on last month worse last 4 days. Ø injury–drives truck—pain w/ prolonged sitting/standing." Defendants' Exhibit 8, p. 155. An MRI was ultimately ordered that revealed an acute free fragment disc rupture at L5-S1. Claimant was referred to neurosurgeon Clark Allen, M.D., who prescribed epidural injections, which were ineffective.

26. **Second and third surgeries.** On August 25, 2008, Dr. Allen performed a redo L5-S1 microdiscectomy. Shortly after surgery, Claimant noted drainage from the incision cite. He became very ill with vomiting and severe headaches. He returned to Dr. Allen and was found to have a dural tear and a Methicillin-resistant Staphylococcus aureus (MRSA) infection. On September 3, 2008, Dr. Allen performed another lumbar surgery. Claimant remained hospitalized for approximately 10 days treating for the MRSA infection. Thereafter, Claimant was discharged home, but spent several months receiving antibiotics through a PICC line until the infection was eliminated. Dr. Allen released Claimant from work during his MRSA infection. Dr. Allen advised Claimant that his disc was damaged by the MRSA infection.

27. After recovering from the MRSA infection, Claimant returned to work for Castle Concrete but worked only three days per week for four hours per day. He continued this work schedule until early 2009 when he experienced increased back pain and sought medical care from Joshua Beck, M.D.

28. **Fourth surgery and subsequent condition.** On July 21, 2009, Dr. Beck performed an L5-S1 posterior decompression and fusion with pedicle screw and rod instrumentation. On August 19, 2009, Dr. Beck noted that Claimant's back pain was "tremendously improved, leg pain almost completely gone at this point." Claimant's Exhibit 26, p. 14.

29. On September 7, 2009, Claimant presented at the Portneuf Medical Center reporting low back pain after helping his grandfather onto his bed. At hearing Claimant explained that he and another helped lift his brother in law's double amputee father from a wheelchair into his bed.

30. On September 16, 2009, Dr. Beck noted that Claimant was doing much better and walking without any assistive devices. However, on November 6, 2009, Brian Harder, P.A., recorded that Claimant was experiencing increased back pain after slipping and falling on some stairs about three weeks earlier.

31. At the hearing on February 18, 2011, Claimant walked with a cane. He explained that he used a cane to walk because he lacked feeling in his left leg and often stumbled. He testified at hearing that he had continuous back pain and had not been back to work since his fourth surgery in July 2009. At hearing, Claimant repeatedly affirmed that he had no other accident between his June 2006 and August 2008 surgeries.

32. On April 26, 2011, Jake Poulter, M.D., examined Claimant and recorded that he walked with a cane. On July 11, 2011, Dr. Poulter placed a trial spinal cord stimulator which Claimant later reported provided "quite a bit of pain relief initially." Defendants' Exhibit B, p. 20. Dr. Poulter recorded Claimant's report that his pain relief was at least 50%, and noted he was able to move about with less pain and his function had also increased.

33. Surveillance videos taken of Claimant on October 13, 15, and November 1, 2011, show Claimant walking without a cane, bending over approximately six or eight times within two minutes to pick up trash and place it on a trailer, entering and exiting a convenience store with little apparent difficulty, riding in a vehicle, and walking briskly beside and steering a vehicle at a gas station.

34. On January 30, 2012, Dr. Poulter noted that Claimant was using a cane.

35. **Credibility**. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds that Claimant is generally a credible witness. Over the previous two years, Claimant has walked with a cane, then without a cane, and then with a cane again. These variations in his presentation generally correspond with fluctuations in his physical condition and mobility, however, they also suggest that from time to time Claimant may project an image of greater limitation, when he perceives it is to his immediate advantage to do so. Claimant's friend, Dawn Solum, his twin sister, Sharron Bloxham, and his mother, Barbara Gerber, are all generally credible witnesses in their testimony that Claimant consistently limited his activities after his 2006 surgery due to professed ongoing back symptoms.

DISCUSSION AND FURTHER FINDINGS

36. The provisions of the Idaho 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).

37. **Causation.** The primary issue is whether Claimant's second, third, and fourth surgeries were caused by his industrial accident and resulting first surgery. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Hence, a claimant must prove not only that he suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). 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). The claimant must establish a probable, not merely a possible, connection between the injuries alleged and the industrial accident. Dean v. Drapo Corporation, 95 Idaho 958, 511 P.2d 1334 (1973).

38. In the present case, the pivotal inquiry is whether Claimant's 2008 reherniation is causally related to his 2006 accident. Defendants have enumerated several incidents which they assert may have caused Claimant's L5-S1 reherniation in 2008. These include: rolling over a grain truck in August 2006, riding in a jarring cement truck for a year while working for Castle Concrete, climbing up and down the stairs into and out of the cement truck, lifting tires at work in April 2008, and standing up out of his cement truck in May 2008. Claimant asserts that Defendants have failed to show by expert medical evidence that Claimant sustained any trauma that can be characterized as a subsequent intervening accident that caused his recurrent L5-S1 disc herniation. However, it is not Defendants' burden to prove that Claimant's reherniation was not work-related. Rather, Claimant bears the burden of proving that his reherniation and subsequent surgeries were work-related.

39. Three medical experts have addressed the causation question: Dr. Stromberg, Dr. Allen, and Dr. O'Brien. The opinion of each is examined below.

40. Dr. Stromberg. Defendants presented the deposition testimony of Dr. Stromberg, who performed Claimant's first surgery in 2006. By letter dated February 4, 2010, Dr. Stromberg commented that after his 2006 surgery, Claimant continued to perform physical labor "until he had a new injury of 4/21/08." Defendants' Exhibit 3, p. 139. Dr. Stromberg's letter contains no description of the "new injury." Dr. Stromberg further commented that even in 2006, Claimant had substantial degenerative disease at L5-S1 and the natural history regardless of his original herniation would be of continued degeneration. Dr. Stromberg opined that two years was too long a time to relate Claimant's second surgery to his industrial accident and first surgery. Dr. Stromberg opined that Claimant's "second surgery was a natural progression of degenerative disease of the spine." Stromberg Deposition, p. 14, ll. 17-18. However, Dr.

Stromberg acknowledged that disc herniation, or repair of a disc herniation, at one level would make that level weaker and more susceptible to reherniation later, thus being one factor of many constituting the cumulative trauma effect of a degenerative disc condition. Stromberg Deposition, p. 18.

41. A close review of Dr. Stromberg's deposition suggests that the foundation and origin of his causation opinion are open to question. Near the conclusion of his deposition, the following exchange ensued:

> Q. (by Mr. Curtis) Let me ask you this to make it clear: The incident that you're stating—whether the date is wrong or right—on April 21st of 2008 in your letter is the incident described starting on page 50 of the [Claimant's] deposition; correct, standing up in his truck or climbing in or out of his truck?
>
> A. (by Dr. Stromberg) Avoiding mention of any date, this document relates to the incident which led to him having surgery by Dr. Allen.
>
> Q. What if there was no incident?
>
> A. (Witness shrugs shoulders.)
>
> Q. Doctor, what I'm trying to get to is—I want you to look at a record that's Claimant's Exhibit 14.
>
> A. I think you're asking the wrong guy.
>
> Q. Who would I ask?
>
> A. I don't know. You guys go sort it out with the Industrial Commission or somebody. I was told this guy had a second surgery and there was some getting out of the truck incident that lead to it. This is what I'm referring to. Whatever you guys work out as the dates is fine with me. I don't care.
>
> Q. Okay. Doctor—
>
> A. It doesn't affect me. I'm not the one to make this determination.
>
> Q. Well, you know, Doctor, I've been to your deposition before—or one before, and you said, "I don't make opinions on causation or apportionment," at the deposition. And I can't remember whose side you said that to, but you refused to

make an opinion on causation or apportionment; is that true? Do you remember doing that or saying that?

A. Not specifically.

Q. Is that your general policy?

A. It depends.

Q. You do that sometime and sometimes not?

A. Yeah.

Q. And in this case you chose to make a decision—an opinion on causation; correct?

A. Correct.

Q. And why did you do that in this case and you wouldn't do it in other cases?

A. Just in the right mood, I guess.

Stromberg Deposition, p. 33, l. 1 through p. 34, l. 18 (emphasis supplied).

42. Dr. Stromberg's comment, emphasized above, attributes Claimant's reherniation to his "getting out of the truck incident" which occurred May 20, 2008. However, the record establishes that Claimant experienced significant low back and left leg pain over one month earlier—symptoms consistent with lumbar disc herniation at that time. Dr. Stromberg's testimony does not support a causal connection between any incident in April 2008 and Claimant's current complaints.

43. Dr. Allen. Dr. Allen, board certified neurosurgeon, performed Claimant's second and third lumbar surgeries. Dr. Allen testified that disc reherniations were a very common part of his practice. Dr. Allen testified that he was not aware of any data documenting that the risk of disc herniation was greater in patients having had prior disc herniation and surgery at the same level as compared to those never having had back surgery. Dr. Allen's testimony apparently

assumes that patients with prior disc herniations abide by reasonable physician-imposed lifting and other work restrictions. To assert that patients having undergone surgery for prior disc herniations who do not abide by lifting restrictions experience no increased risk of further disc injury would fly in the face of the accepted justification for assignment of permanent impairments and permanent work restrictions to those sustaining disc injuries.

44. Dr. Allen testified that when Claimant presented to him in July 2008, Claimant reported doing well after his 2006 surgery until a month or two before July 2008, when he had developed back and leg symptoms. Dr. Allen confirmed that low back and leg pain symptoms are consistent with lumbar disc herniation. Dr. Allen did not have the benefit of reviewing all of Dr. Stromberg's notes regarding Claimant's first surgery. Dr. Allen testified that he did not document any report of an accident or injury that prompted Claimant to seek his medical attention, and that had Claimant reported such, Dr. Allen would have almost certainly documented it. Dr. Allen opined that Claimant's disc reherniation was acute when he examined Claimant in July 2008. Dr. Allen performed a redo lumbar microdiscectomy. Dr. Allen testified that generally speaking, "people, who have an accident, herniate their disc and get a surgery, have continued problems at that same segment", Allen Deposition, p. 33, ll. 13-14, and that in general "patients who have one inciting event, tend to deteriorate and require future surgeries at that same level." Allen Deposition, p. 38, ll. 21-23. Contrary to Dr. Stromberg's position that two years was too long of a time to relate Claimant's L5-S1 reherniation to his original herniation, Dr. Allen testified that "two years is not that long of a time to reach a point—where they have a reherniation of their disc" and require further surgery. Allen Deposition, p. 33, ll. 17-18. Dr. Allen testified that if there is not another inciting event, it is reasonable to relate the reherniation back to the first surgery.

45. Dr. O'Brien. Neurologist Michael O'Brien, M.D., examined Claimant, reviewed his medical records, and testified regarding the causation of his recurrent disc herniation. Dr. O'Brien testified that a significant percentage, perhaps as high as 20 or 30% of back surgeries result in recurrent disc herniations. He testified that there is a risk of reherniation in releasing back surgery patients to return to work without restrictions. Dr. O'Brien testified that an individual having had back surgery, should thereafter be restricted to lifting no more than approximately 50 pounds occasionally, 30 pounds frequently, and 10 pounds continuously. Dr. O'Brien explained the scarring and weakening of the disc caused by surgery. He testified that he did not recall Claimant reporting very many back symptoms between his 2006 surgery and his 2008 surgery. Dr. O'Brien characterized Claimant's first surgery in 2006 as a failed back surgery thus necessitating the August 2008 surgery. He summarized:

> [T]here is a risk in releasing people to go back to work with no restrictions after surgery and the risk is, of course, reherniation. .... But the whole thing boils down to this: If you're going to put somebody back to work full time without any restrictions, then, you're going to put him in jeopardy of reherniating the disk, which is what happened here.

O'Brien Deposition, p. 22, l. 19 through p. 23, l. 11. Dr. O'Brien noted the absence of any catastrophic intervening event and opined that Claimant's recurrent disc herniation in 2008 was a natural progression and result of his original 2006 accident and surgery. Dr. O'Brien further testified that Claimant's subsequent surgeries related back to his first injury and surgery.

46. It is unlikely that Claimant had continuous significant back pain from September 2006 through May 2008 without seeking medical attention for it. However, there are at least three medical records during this period that clearly document the continuation of moderate back pain. Furthermore, as Dr. Allen affirmed, although back surgery improves many patients' symptoms, it usually does not resolve all back symptoms. Rather, the usual experience is that

symptoms of decreased back pain continue even after recovery from back surgery. Claimant's report of ongoing back pain after recovering from his first surgery is consistent with Dr. Allen's testimony.

47. Defendants' assertion that the May 20, 2008 onset constitutes a potentially compensable industrial accident which breaks the chain of causation between Claimant's 2006 accident and his current condition overlooks clear medical evidence that Claimant's low back and leg pain prompted him to present to Health West on April 20, 2008—one month earlier. Defendants very nearly suggest that the "tire lifting" incident and the "getting out of the truck" incident are likely one and the same. Defendants thus maintain that after a period of more than a year without back symptoms, Claimant suffered a singular event in the spring of 2008 causing an acute disc reherniation and producing immediate symptoms. However, Claimant's credible testimony and corroborating medical records establish that his back symptoms did not fully resolve between 2006 and 2008. Moreover, the record does not establish that his back symptoms came on suddenly at one specific moment in the spring of 2008. Rather, the medical records reveal that between mid and late April 2008, Claimant developed low back and leg pain without any inciting event that he could identify. He noted only that his symptoms came on a couple of days after he used a front end loader to move tires. On May 20, 2008, Claimant experienced similar symptoms while attempting to exit the cab of his cement truck. This second onset of symptoms, while sufficiently specific to arguably constitute an accident, fails to establish an intervening event sufficient to break the chain of causation. For although the subsequent MRI disclosed an acute disc reherniation, no evidence refutes the logical conclusion that the acute reherniation predated the May 2008 incident. Claimant had low back and leg symptoms not associated with any inciting event the month prior to May 20, 2008.

48. The totality of the record confirms that Claimant's low back pain persisted and worsened after his recovery from his first surgery in July 2006. Claimant's back condition

worsened substantially in April 2008 without any specific intervening injury and compelled him to seek medical attention for low back and left leg pain. From May through July 2008, his back and leg pain continued to worsen. Dr. Stromberg's opinion ignores Claimant's back and left leg pain that were medically documented a month before the incident that Dr. Stromberg opined caused Claimant's L5-S1 disc reherniation. The opinions of Dr. Allen and Dr. O'Brien are more persuasive than that of Dr. Stromberg. Claimant has proven that his L5-S1 disc reherniation and resulting need for his second surgery was caused by his industrial accident. Claimant has also proven that his subsequent lumbar surgeries relate to his first injury and surgery.

CONCLUSION OF LAW

Claimant has proven that his L5-S1 disc reherniation and resulting medical treatment, including subsequent surgeries, are causally related to his industrial accident.

RECOMMENDATION

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

DATED this 21st day of August, 2012.

INDUSTRIAL COMMISSION

Alan Reed Taylor, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRAND POOLE, Claimant, v. DOUG ANDRUS DISTRIBUTING, INC., Employer, and CONTINENTAL CASUALTY COMPANY, Surety, Defendants.	**IC 2006-003863** **ORDER** FILED AUG 23 2012 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion 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 conclusion of law as its own.

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

1. Claimant has proven that his L5-S1 disc reherniation and resulting medical treatment, including subsequent surgeries, are causally related to his industrial accident.

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

DATED this 23rd day of August, 2012.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PAUL T CURTIS
598 N CAPITAL AVE
IDAHO FALLS ID 83402-3555

LORA RAINEY BREEN
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sb