BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW DAVIDSON, Claimant, v. IDAHO ELKS REHABILITATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-022463** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 24, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters who conducted a hearing in Boise on August 14, 2014. Clinton Miner represented Claimant. Joseph Wager represented Defendants. The parties presented oral and documentary evidence. After an extended period, post-hearing depositions were taken. The parties submitted briefs after repeated deadline extensions. Referee Marsters recently left the Industrial Commission. The case came under advisement on September 15, 2015. The matter was reassigned to Referee Doug Donohue. Referee Donahue authored proposed Findings of Fact and Conclusions of Law and submitted the same, together with the record, to the Commission for its review and decision as anticipated by the provisions of Idaho Code § 72-717. Pursuant to Idaho Code § 72-506(2), the Commission is authorized, indeed, required, to approve and confirm a proposed decision before it can be deemed a finding order, decision or award of the Commission. The statute was recently construed in Lorca-Merono v. Yokes Washington Foods, Inc., 137 Idaho 446, 50 P.3d 461 (2002). There, the issue before the

Commission was whether claimant's pre-existing cervical spine condition was aggravated by her industrial accident. The Referee to whom the case was assigned concluded that the most persuasive medical evidence was that endorsing a causal relationship between claimant's condition and the accident, and wrote a decision awarding benefits to claimant for her permanent aggravation. The Commission declined to adopt the proposed decision and authored its own decision in which it denied benefits based on other medical evidence of record which it found more persuasive. On appeal, claimant argued that the Commission was not authorized to "simply reject" the findings and conclusions proposed by the Referee. Treating this assertion, the Court stated:

> The findings of fact made by the referee were merely recommendations to the Industrial Commission. Upon reviewing those findings, it could either adopt them or enter its own findings. Idaho Code §§ 72-506(2) & 72-717 (1999). The Commission need not explain why it did not adopt certain findings recommended by the referee. The Industrial Commission, as the factfinder, is free to determine the weight to be given to the testimony of a medical expert. (Citations omitted)
>
> Lorca-Merono v. Yokes Washington Foods, Inc., 137 Idaho 446, 50 P.3d 461 (2002).

Here, the Commission has reviewed the proposed Findings of Fact and Conclusions of Law authored by Referee Donahue, and declines to adopt the same. As explained below, the Commission believes that this case turns on the threshold issue of whether or not Claimant has met his burden of proving, by a preponderance of the evidence, the existence of a causal relationship between the subject accident and the claimed injuries. Referee Donohue found that Claimant failed to establish a causal connection between the subject accident and the surgery recommended by Dr. Manos because Claimant was relatively symptom free for a significant period of time following his date of medical stability, and because Dr. Manos relied on an incorrect medical history in formulating his opinion on causation. While the Commission agrees with the Referee's ultimate conclusion, we arrive there by a slightly different path.

ISSUES

Per the Notice of Hearing filed June 6, 2014, the following matters are at issue:

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

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

2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

At hearing, after these issues were recited by Referee Marsters, Claimant's counsel stated his intention to withdraw the claim of an award of attorney's fees under Idaho Code § 72-804. Defense counsel then noted that the parties dispute whether Claimant is entitled to the lumbar spine fusion recommended by Dr. Manos. Defendants' counsel stated that should the Commission determine that more care is required, it is obvious that the issues of PPD cannot be reached by the Commission. This discussion does nothing to support a conclusion that the issue of Claimant's impairment and disability would be altogether deferred for a future proceeding. Rather, this colloquy only reflects that the issue of impairment and disability would not be reached only if it was determined that Claimant was in need of future medical care. However, there is additional discussion in the record which seems to reflect that Claimant's counsel (at least) assumed that the issues of impairment/disability were removed from this proceeding altogether:

> Mr. Miner:
>
> One last thing I will add into this. He is no longer working for the employer and we'll talk about that. He was discharged from the employer while doing one of his duties. They felt like he didn't do it right and he's no longer working there. He has sought additional work and we will talk about that, but I am not going to go into a lot of detail about that, because I think at this point, since we have

> reserved the disability aspect of this matter, we can touch on it, but leave it for a later date. Okay.
>
> HT, 15/4-13.

This statement resulted in protest neither from Defendants' counsel nor the Referee assigned to the case. It is also notable that while Defendants' counsel contends in his opening brief that the issues of impairment and disability are before the Commission for determination, neither Defendants nor Claimant incorporated any discussion of the issues of impairment and disability in post-hearing briefing.

While we question the method by which the bifurcation of issues was accomplished in this case, it nevertheless seems to be the desire of the parties to withhold consideration of the issues of impairment and disability even if the Commission determines that Dr. Doerr's opinion should be elevated over that of Dr. Manos. Accordingly, we conclude that the issues of impairment and disability are reserved for further hearing, if necessary.

CONTENTIONS OF THE PARTIES

Claimant contends that on or about September 12, 2011, he suffered an accident giving rise to a low back injury, as the result of transferring a very large patient from a bed to a gurney. Claimant acknowledges that he had some pre-existing symptomatic low back problems prior to the date of the subject accident. However, he contends that the subject accident caused additional injury to his lumbar spine, specifically, a small annular tear at L5-S1 which permanently aggravated his low back condition. Claimant contends that as the result of the subject accident he has required and received medical treatment for his condition and that he also requires additional medical treatments, to include an L5-S1 fusion surgery, as proposed by Dr. Manos.

Defendants concede that Claimant sustained an injury of some type to his low back on September 12, 2011. (*See* Defendants' Response Brief, p. 2). Defendants accept responsibility for medical expenses incurred to date in connection with Claimant's treatment. However, Defendants contend that Claimant reached a point of medical stability in February of 2012, and that he is entitled to no further treatment for his lumbar spine condition. Defendants contend that Claimant has not met his burden of proving, by a preponderance of the evidence, that future surgical treatment is indicated, or if so, that the need for such future surgical treatment is causally related to the subject accident. In this regard, Defendants assert that the medical opinions auguring in favor of a conclusion that Claimant requires further medical treatment related to the subject accident are based on the faulty assumption that Claimant had no low back problems which pre-dated the subject accident.

In response, Claimant argues that his pre-injury low back problems were temporary and self-limiting, and were of a different nature altogether than the complaints from which he has suffered since the subject accident. Claimant argues that the only pre-existing objective deficit from which he suffered was facet arthritis at L5-S1. Claimant contends that the subject accident caused an annular tear at L5-S1 which has since progressed to cause disk degeneration/desiccation at the L5-S1 level. This is proved by the fact that the initial MRI, performed on November 2, 2011, less than two months after the alleged accident, did not demonstrate any disk desiccation or degeneration at the L5-S1 level. Claimant contends that Defendants attach too much significance to the fact that Claimant has limited clinical, and no radiological, evidence of neurological compromise. As explained by Dr. Manos, even if Claimant's pain generator is limited to the L5-S1 disk, fusion surgery is still appropriate for Claimant's intractable mechanical low back pain. Dr. Manos believes that the need for such

surgery is causally related to the subject accident since Claimant's symptomatology, while temporary and self-limiting on a pre-injury basis is now chronic and non-responsive to conservative treatment.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits A through O admitted at hearing;
3. Defendants' exhibits 1 through 15 admitted at hearing;
4. Post-hearing depositions of Drs. Gussner, Manos and Doerr; and
5. By agreement of the parties, an audio version of Defendants' exhibit 11 was designated Defendants' exhibit 16 and provided after the hearing.

FINDINGS OF FACT

1. Claimant worked as a certified nurse's assistant (CNA). On September 12, 2011, a large female patient, although capable of changing positions from bed to standing to sitting and back on her own after a one-knee replacement, refused to cooperate. During a transfer she suddenly shifted. Claimant immediately bore her entire weight which he estimated at 260 to 300 pounds. Within one-half to one hour he began to experience burning low back pain which increased in intensity.

2. On December 4, 1997, Claimant suffered an injury to his low back while employed by Elmore Medical Center in Mountain Home, Idaho. His symptomatology was in the same general area as the symptoms from which he currently suffers. He received chiropractic care for a "compressed disk" but his symptoms resolved within a month or so. (Defendants' Exhibit 11, 178-180; Claimant's Exhibit N).

3. As developed infra, Claimant denied anything but this remote history of low back complaints to the physicians with whom he treated/consulted as a result of the subject accident.

However, certain of the medical records that have been admitted into evidence belie the history given to these physicians.

Simmer Chiropractic Records

4. Simmer Chiropractic records reflect that Claimant was first treated on January 28, 2011. (*See* Claimant's Exhibit B, 1). However, Claimant testified that he had treated with chiropractor Simmer for at least one year prior to January 28, 2011, on average, about once a month. (HT, 62/22-64/12). Between January 28, 2011, and the date of the subject accident, Simmer Chiropractic records in evidence reflect that Claimant treated on the following occasions: January 28, 2011; April 4, 2011; April 5, 2011; April 6, 2011; April 13, 2011; and August 31, 2011. On each of these visits, Claimant presented with complaints of low back pain of varying degrees of severity, and received treatment for this problem, among others. Over the course of these visits, Claimant's subjective level of low back pain ranged from 3 to 7. The objective finding, vis-à-vis Claimant's low back, are very similar for all of these pre-injury visits. Claimant was found to have decreased lumbar extension and right lateral flexion. He was noted to have biomechanical joint dysfunction at the L5 vertebral segment. These pre-injury notes also reflect that Claimant was responding well to chiropractic modalities. Claimant does not appear to have received any treatment between April 13, 2011 and August 31, 2011. On the occasion of the August 31, 2011 office visit, Dr. Simmer reported that Claimant had been doing "better" since his last office visit, but rated his low back pain at a level 4 "since his last treatment". Again, Dr. Simmer noted decreased lumbar extension and right lateral flexion along with biomechanical joint dysfunction at the L5 vertebral level. (See Claimant's Exhibit B; Defendants' Exhibit 3). Concerning the August 31, 2011 treatment note, Claimant acknowledged that he was "pretty sore" on the occasion of that visit. (HT, 27/21-28/14).

5. While Claimant admitted to periodic flares of low back pain on a pre-injury basis, he denied having continuous long-term complaints prior to the subject accident:

> Mr. Miner:
> Q. We looked at some records and saw that you had some episodes where you had some four and so you go in and see the doctor. Would that go away after visiting with Dr. Simmer?
>
> Claimant:
> A. Yes.
>
> Q. And the one episode where you got up to - - I think a seven where you went and saw Dr. Simmer - -
>
> A. Uh-huh.
>
> Q. - - how long would that kind of a flare-up last before this accident?
>
> A. A day or two. You know, sometimes one treatment would do the job, sometimes it took two.
>
> Q. All right. Since the accident have you had at anytime where you were without pain?
>
> A. No.

HT, 56/20-57/9.

In general, the substance of Claimant's testimony is that he acknowledged that prior to the subject accident, he had complaints of low back pain/discomfort as reflected in Dr. Simmer's records, but that this discomfort was always temporary, and never persisted. Since the subject accident, Claimant contends his complaints have been chronic and unrelenting.

6. As noted, the subject accident occurred on or about September 12, 2011. Claimant was not seen again by Dr. Simmer until September 16, 2011. He acknowledges that he did not give Dr. Simmer a history of the alleged accident on the occasion of that visit. In his September 16, 2011 note, Dr. Simmer noted that Claimant was suffering from low back pain at level 4 out of 10, the same level of discomfort with which he presented on August 31, 2011.

Explaining Dr. Simmer's recitation of identical pre-injury and post-injury levels of discomfort, Claimant testified that as a result of the pain medications he received on the occasion of his September 14, 2011 evaluation by Kathryn Fitzgerald, PA-C, he had received some relief from his initial post-accident discomfort. With respect to Claimant's lumbar spine, Dr. Simmer made the same objective findings as he had on a pre-injury basis. He noted that Claimant was responding well to chiropractic care. He instructed Claimant to return on an as-needed basis. (See Claimant's Exhibit B, 4).

7. Claimant was next seen by Dr. Simmer on September 22, 2011 and again presented with subjective pain complaints at level 4 out of 10. Decreased lumbar extension and right lateral flexion were again noted, as was biomechanical joint dysfunction at L5. Claimant was released from care and urged to return on an as-needed basis.

8. Subsequent to September 22, 2011, the Simmer Chiropractic patient ledger for Claimant reflects that he was seen for treatment by Dr. Simmer on the following occasions: January 27, 2012; January 30, 2012; February 6, 2012; February 24, 2012; March 9, 2012; April 12, 2012; May 2, 2012; May 8, 2012; May 22, 2012; May 25, 2012; and May 31, 2012. The notes generated by Dr. Simmer between February 27, 2012 (the date on which Claimant was declared medically stable by Dr. Gussner) and October of 2012 (the date on which Claimant commenced treatment with Dr. Thompson) are significant because of their potential to belie Dr. Doerr's assumption that Claimant was essentially symptom free between the date on which he was declared medically stable and the date on which he again sought treatment for recurrent low back complaints with Dr. Thompson. Although Claimant treated on multiple occasions between February 27 of 2007 and October of 2012, treatment notes exist only for treatment dates of May 2, 2012; May 8, 2012; May 22, 2012; and May 25, 2012. These notes reflect that Claimant's

pain was self-rated at level 3-4 out of 10. Dr. Simmer's objective findings for the May 2012 treatment dates are very similar to those noted in prior notes.

9. Claimant's self-report of his level of discomfort ranges from 3 to 7 out of 10 in the records discussed above but, for the most part, hovers around a level 4 out of 10. More interesting is the unvarying nature of Dr. Simmer's objective findings and recommendations for future care. These similarities have led Claimant's counsel to argue that Dr. Simmer's signed chiropractic notes are computer generated, employing some type of algorithm that varies them minutely from visit to visit, presumably to make it appear that the records are generated by a human being, i.e. Dr. Simmer, on the occasion of each visit. In his reply brief, Claimant's counsel averred that he tested this proposition by a call to chiropractor Simmer's office at some time subsequent to the date of hearing. Counsel spoke with someone named "Amber" who confirmed his suspicions. (See Claimant's Reply Brief, 10). Counsel's alleged discussions with Dr. Simmer's office staff are not evidence of record and the Commission will not consider Claimant's speculations about how Dr. Simmer's chart notes are generated. The notes and other records generated by Dr. Simmer's office were admitted into evidence without objection pursuant to J.R.P. 10(g). Dr. Simmer, or some member of his staff could have been deposed on these issues but was not. Without evidence to support his speculations, we decline to entertain counsel's assertion that the records are anything other than what they appear to be, i.e. records generated and signed by Dr. Simmer.

Post Accident Medical Treatment

10. Claimant first sought medical care following the subject accident on September 14, 2011, when he was evaluated by Kathryn Fitzgerald, PA-C, at St. Luke's Regional Medical Center in Meridian. PA Fitzgerald recorded a history of injury consistent with Claimant's

testimony at hearing. She also recorded Claimant's pain as being 7 out of 10. Concerning pre-injury medical history, Claimant denied prior low back injury excepting a very mild strain roughly 14 years prior to the date of evaluation. PA Fitzgerald noted that as of September 14, 2011, Claimant was taking Voltaren for knee pain, which he also found helpful for back pain. She noted that Claimant's medications on the day of evaluation included Lotrel, Voltaren, Allopurinol and Norco. Claimant testified that on a pre-injury basis he took Voltaren regularly and Norco periodically. (HT, 74/6-75/19.) PA Fitzgerald diagnosed Claimant as suffering from a lumbar strain. In addition to his regularly prescribed pain medications, she wrote Claimant a prescription for Baclofen.

11. On September 19, 2011, Claimant was first seen by Cody Heiner, M.D., at St. Luke's in Meridian. Claimant rated his pain on the occasion of that visit at 5 to 8 out of 10. Again, he gave no history of recent low back pain, but did admit to a "similar episode" of low back pain "years ago". Dr. Heiner recommended physical therapy and the imposition of temporary restrictions.

12. Regular physical therapy—13 visits—from September 20 through October 27 helped, and lumbar range of motion increased, although some waxing and waning of pain continued. The physical therapist concurred with the diagnosis of lumbar strain but also noted "submaximal core function, deconditioning, and submax exercise endurance/tolerance" as issues.

13. On November 7, 2011, Dr. Heiner opined Claimants symptoms had "plateaued." He advised Claimant about degenerative changes and morbid obesity. He ordered an MRI.

14. On November 10, 2011, a lumbar MRI showed a shallow protrusion with an annular tear at L5-S1 with facet arthritis but without nerve root impingement. All lumbar levels above it were normal.

15. Dr. Heiner referred Claimant to Christian Gussner, M.D., who first saw Claimant on November 29, 2011. Dr. Gussner recorded a history that Claimant injured his low back during a patient transfer on September 12, 2011. His notes reflect that he received the following history from Claimant about pre-injury symptoms:

> Admits prior injury to back 15 years ago while transferring a patient from a WC to a pick up truck at Elmore Medical Center and work comp claim. Seen only by a chiropractor in Mountain Home and diagnosed with a "disk compression" based on x-ray/exam but no MRI. Back pain resolved after several chiropractic treatments a week for about 6 weeks and denies any low back pain since. He denies any activity restrictions or impairment rating.
>
> Claimant's Exhibit E, 7.

Dr. Gussner examined Claimant and reviewed the MRI ordered by Dr. Heiner. He diagnosed Claimant as suffering from a lumbar disk displacement, i.e. a shallow annular tear at L5-S1 and low back pain. Dr. Gussner imposed activity restrictions and recommended a trial of epidural steroid injection. When first evaluated by Dr. Gussner, Claimant denied having any radiation of symptomatology into his lower extremities.

16. Dr. Gussner performed an epidural steroid injection on December 2, 2011. He was seen again by Dr. Gussner on December 15, 2011, reporting a 25 to 50% decrease in low back pain.

17. Another epidural steroid injection was performed on January 6, 2012. In follow up on January 19, 2012, Claimant reported an overall 50 to 75% improvement. Dr. Gussner recommended continued lumbosacral spine stabilization exercises and activity restriction.

18. Claimant was seen for purposes of a closing evaluation on February 27, 2012. A previous key functional assessment of February 6, 2012 had demonstrated an ability to engage in medium work. Dr. Gussner found Claimant to be medically stable as of February 27, 2012 and

entitled to a 1% impairment rating for the effects of his lumbar spine condition. Dr. Gussner declined to apportion any part of this impairment rating to a pre-existing condition.

19. By letter dated March 20, 2012, Dr. Gussner expressed his views on the issue of medical causation. In this regard, he stated:

> To the best of my knowledge, Mr. Davidson had asymptomatic degenerative changes in the lumbar spine prior to the injury of 09/12/2011. It is impossible to know for sure if the shallow L5-S1 disk protrusion with annular tear was present prior to the injury of 09/12/2011. However, Mr. Davidson reports that he did not have any back pain for several years prior to the recent injury. Hence, on a more probable-than-not basis the shallow protrusion and annular tear resulting in back pain was caused by the injury. He does report a prior episode of back pain approximately 15 years prior, which completely resolved and hence I do not feel is relevant as a pre-existing condition.
>
> Claimant's Exhibit E, 29

20. Claimant first sought chiropractic care from Boulevard Chiropractic on August 20, 2012. At that time, he presented with neck, thoracic and low back pain. The chiropractic notes reflect that Claimant gave a history of neck pain and thoracic pain since August 19, 2012, the day before the chiropractic visit. However, a date of onset of September 12, 2012 was given for the onset of Claimant's low back pain. One must suppose that this represents a typographical error, and that Claimant actually gave a history of onset of September 12, 2011. Claimant was seen at Boulevard Chiropractic for care of his low back complaints on September 5, 2012; September 14, 2012; October 8, 2012; November 6, 2012; April 29, 2013; and July 2, 2013.

21. Beginning October 2012 Claimant received significant treatment from pain physician Sandra Thompson, M.D. This treatment included injections. Claimant's weight at that time is recorded at 246 pounds. Medical notes showed Dr. Thompson was advised and followed up to discover the status of Claimant's workers' compensation claim. Medical records do not show it likely that these treating physicians considered Claimant's condition to be

related to the accident.

22. On August 23, 2013, Richard Manos, M.D., examined Claimant upon referral from Dr. Thompson. He noted Claimant's weight at 345 pounds. He diagnosed a central L5-S1 disk herniation with chronic mechanical back pain. He recommended a discogram.

23. On September 19, 2013, Timothy Doerr, M.D., evaluated medical records and examined Claimant at Defendants' request. He opined that Dr. Gussner's MMI date, permanent restrictions, and PPI rating were correct. He cited the six-month hiatus in treatment afterward as further evidence Claimant's current condition was unrelated to the accident. He opined Claimant was not a candidate for surgical intervention. He opined Claimant could return to work without any restrictions.

24. On November 18, 2013, Richard Radnovich, D.O., ordered a discogram. Radiologist Vicken Garabedian reported "discordant symptoms." Afterward, Dr. Manos opined it was nondiagnostic.

25. On January 22, 2014, Dr. Manos conditionally suggested he would consider surgery if Claimant lost weight to below 300 pounds. He referred Claimant to pain management.

26. Pain management notes show Claimant provided a history inconsistent with other medical records, specifically, intractable pain since the accident and having lost his job because he was unable to function as a result of the accident. (The record shows Claimant was terminated April 26, 2012 for endangering patients by twice failing to perform safety monitor duties.) These notes express concerns about opioid dependency, inappropriate mixing of prescriptions with alcohol and marijuana, and depression. Overall, Claimant showed significant improvement over the course of treatment.

DISCUSSION AND FURTHER FINDINGS

Claimant's Substantive Credibility

27. The Referee who presided at hearing resigned before this matter came under advisement. The Referee to whom this case was then assigned could not make findings of observational credibility, and made no findings of substantive credibility, except to observe that certain Spine Institute of Idaho records reflect that Claimant gave a history of having lost his job because of a physical inability to perform its demands, while Employer's records show that Claimant was discharged because he failed to appropriately monitor patients by video. As explained in Painter v. Potlatch Corp., 138 Idaho 309, 63 P.3d 435 (2003), credibility determinations made by the referee or the Industrial Commission are of two types, observational and substantive credibility. As with Referee Donohue, in a case that it did not hear, the Commission's ability to make a credibility determination is limited to determining whether Claimant's testimony is substantively credible. As explained by the Court:

> Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. *Id.* Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. *See id.* at 900-01, 841 P.2d 430-31 (citations omitted). The Commission's findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence. *Jensen*, 135 Idaho at 412, 18 P.3d at 217 (citing *Zapata*, 132 Idaho at 515, 975 P.2d at 1180).

In Painter, the referee assigned to the case judged claimant to be credible based on his demeanor at hearing. Thus, the referee made a finding of observational credibility which could not be overturned by the Commission. However, the Commission nevertheless found claimant to be incredible based on inconsistencies in his testimony which were apparent from a dispassionate review of the record:

> Painter did not adequately explain why he recorded the alleged incidents on his calendar on the days they occurred but did not report them to his doctors or to his Employer until weeks later. Painter never reported the details of the incidents to co-workers. At one point, Painter testified that he was uncertain about the location of the forms for "major" versus "minor" incidents, but Employer has only one form and makes no such distinction. Finally, inconsistencies exist between Painter's initial workers' compensation claim and his later testimony describing the incidents.

28. Here, a number of inconsistencies and conflicts between Claimant's testimony and other facts of record lead the Commission to conclude that certain important aspects of Claimant's testimony lack substantive credibility. Claimant told neither PA Fitzgerald, Dr. Heiner, Dr. Gussner, Dr. Manos nor Dr. Doerr about his history of low back discomfort which immediately preceded the subject accident. In fact, the records of these treaters reflect that when asked, Claimant specifically denied any recent history of low back pain. However, the records of Simmer Chiropractic clearly reflect that Claimant had a history of low back discomfort which immediately preceded the subject accident. Faced with Dr. Simmer's records, Claimant acknowledged that he did in fact have a history of low back discomfort immediately preceding the subject accident, quite contrary to what is reflected in the history he previously gave to treating/evaluating physicians. It becomes important to explain this discrepancy and Claimant has attempted to do so by minimizing the pre-injury complaints described by Dr. Simmer as episodic or temporary. However we find that Claimant's disinclination to provide an accurate medical history to his treating/evaluating physicians significantly undermines the reliability of his current insistence. Therefore we find that little weight should be given to Claimant's testimony describing the nature and severity of the pre-injury complaints described in Dr. Simmer's records.

MRI Evaluations

29. Claimant has had three MRI evaluations. Each of the three studies was interpreted by the same radiologist, Dr. Merandi. The first, performed on November 2, 2011 was read as showing the following significant findings:

> **L5-S1**: Shallow annular protrusion with annular tear with facet arthritis without foraminal compromise or nerve root impingement.
> **IMPRESSION**: Annular Protrusion with annular tear L5-S1 without nerve root impingement at this time.
>
> Defendants' Exhibit 6, 67.

The second exam was performed at Dr. Thompson's instance on October 15, 2012, and was read as follows:

> **L5-S1**: There is a desiccated degenerated disc with annular protrusions with central irregularity and annual tear similar to that seen on prior exam. There is no foraminal involvement at this time. No definitive nerve root impingement. There is facet arthritis.
> **IMPRESSION**: L5-S1 disc protrusion with annular tear and facet arthritis similar to that seen on last exam.
>
> Defendants' Exhibit 6, 68-69.

From this report, it is impossible to understand whether the "desiccated degenerated disk" noted by the radiologist is a new finding, or, instead, a finding that was extant in the first study, but simply not referenced by the radiologist at the time the first study was read.

30. The third and final study was performed on December 20, 2013, and was read by the same radiologist as follows:

> **L5-S1**: Once again, there is disc desiccation and degeneration with annular tear with slight protrusion slightly more prominent than last exam. No evidence of nerve root impingement or central canal stenosis.
> **IMPRESSION**: Annular tear and slight protrusion at L5-S1 slightly more prominent than the 2012 exam.
>
> Claimant's Exhibit D, 6-7.

As read by Dr. Merandi, the third study does reflect some progression of the changes noted at the time of the second, and perhaps first, MRI evaluations.

31. The record does not reflect that Dr. Manos reviewed the actual films at the time he performed his evaluation. However, the record does suggest that Dr. Doerr did review the films from November 10, 2011 and October 15, 2012. His report of September 19, 2013 contains his impression of these two films:

> X-RAYS: MRI of the lumbar spine from 11/10/11 was reviewed. This revealed disc space desiccation at L5-S1 with a shallow disc protrusion with annular tear. There is no neurologic impingement.
> MRI of the lumbar spine from 10/15/12 was reviewed. This revealed again disc space desiccation at L5-S1 with a shallow disc central disc bulge and annular tear, unchanged from his previous MRI.
>
> Defendants' Exhibit 12, 186.

32. Claimant contends that the MRI studies support the proposition that the annular tear occurred as a result of the accident of September 12, 2011. The reasoning is as follows: disk desiccation/degeneration is an expected consequence of an annular tear, but it takes some time to develop. Therefore, the fact that the initial MRI does not show any disk desiccation/degeneration at the L5-S1 level tends to support the proposition that the annular tear is of recent origin, i.e. occurring as a result of the September 12, 2011 accident. Claimant's argument in this regard is challenged by the fact that one cannot say, from the way that Dr. Merandi drafted his reports, that there was no disk desiccation/degeneration noted at the L5-S1 level at the time of the first exam. Moreover, Dr. Doerr appears to have independently reviewed the films, and his report reflects that some disk degeneration/desiccation was seen at the L5-S1 level at the time of the first study.

Medical Opinions

33. From his March 20, 2012 letter, as well as his prior chart notes, it is obvious that Claimant's history to Dr. Gussner of having suffered no low back symptomatology immediately prior to the subject accident informed Dr. Gussner's opinion that the injury demonstrated on the MRI, i.e. the shallow annular tear, was more probably than not related to the subject accident. Again, in this regard, Dr. Gussner stated:

> To the best of my knowledge, Mr. Davidson had asymptomatic degenerative changes in the lumbar spine prior to the injury of 09/12/2011. It is impossible to know for sure if the shallow L5-S1 disk protrusion with annular tear was present prior to the injury of 09/12/2011. However, Mr. Davidson reports that he did not have any back pain for several years prior to the recent injury. Hence, on a more probable-than-not basis the shallow protrusion and annular tear resulting in back pain was caused by the injury. He does report a prior episode of back pain approximately 15 years prior, which completely resolved and hence I do no feel is relevant as a pre-existing condition.
>
> Claimant's Exhibit E, 29.

These sentiments were confirmed by Dr. Gussner at the time of his deposition. Dr. Gussner stated that without a pre-injury MRI it is difficult to know whether the annular tear at L5-S1 is an artifact of the subject accident. He testified that based on Claimant's history of being pain free before the injury, the assumption is that the annular tear is the product of the subject accident:

> Q. So if we back up to his MRI that he had on November 10 of 2011. Can you explain to me what that finding is there at the L5-S1 level?
>
> Gussner:
>
> A. It would be really nice if we had an MRI before somebody has an injury, work injury, or the onset of back pain to know what is there before. Often we don't have that information. What the findings show is a shallow annular protrusion, which is a bulging of the disk. A little tear in the disk. And facet arthritis. The facet arthritis we know is a chronic condition. It takes years to develop arthritis. We don't know if the protrusion and annular tear are new or

> old. The assumption is that the patient didn't have pain before, so we are going to assume the annular tear is something that is new.
>
> Gussner Deposition, 8/8-22.

Dr. Gussner testified that he did not feel it appropriate to apportion Claimant's 1% impairment rating to a pre-existing condition because Claimant was symptom free prior to the subject accident, with low back pain only in the remote past. Finally, Dr. Gussner testified that he was unaware of the Simmer Chiropractic records. He acknowledged that if Claimant did have low back symptomatology in the year preceding the subject accident, this might impact his stated opinions. (Gussner Deposition, 23/10-22.)

34. In summary, the incorrect assumptions upon which Dr. Gussner relied in formulating his opinion on causation leave the Commission unable to assign any significant weight to his opinion establishing a causal relationship between the subject accident and Claimant's objectively verifiable injury.

35. As with Dr. Gussner, Claimant also failed to give an accurate history of his pre-injury low back complaints to Dr. Manos and Dr. Doerr. Both Dr. Manos and Dr. Doerr were deposed post-hearing, and they, also, had the opportunity to comment on the relevance of the pre-injury chiropractic records to the issue of causation. Dr. Manos testified that without a pre-injury MRI, it is impossible to know whether Claimant's L5-S1 annular tear is an artifact of the accident. Dr. Manos relied on Claimant's history to conclude that the subject accident caused the L5-S1 annular tear:

> (Dr. Manos):A. So in the end, the issue is did his disc - - the protrusion, the annular tear occur because of the lifting, we'll never know because he didn't have an MRI prior. We do know, in my opinion, that he didn't have those types of symptoms prior to that lifting, at least, in any records that I've reviewed.
>
> (Mr. Wager):Q. Sure.

(Dr. Manos)A.: And that it has been chronic in nature. If somebody has, you know, an exacerbation of a lumbosacral strain, in six weeks most people are better, six months 90 percent people are better. So this is something that has been ongoing for three-plus years.

Manos Deposition, 26/2-14.

Q. I'll represent to you that in the hearing in this matter and in the records that have been presented we found that he had had periodic chiropractic care between - - in the period of time between the accident that was 15 years previous and even fairly shortly before this accident. Does that change how you saw the situations here?

A. Well, it would depend upon what his chiropractic care entailed. I mean, was it just maintenance-type things or was it - - you know.

Q. He had, in fact, episodes where he would have onset of pain, it would be as high of 7 out of 10, he would go in for a few visits and, according to his testimony, that would resolve.

A. How many?

Q. He indicated that he was doing about 10 or 12 - - well, he was doing maintenance visits 10 or 12 times a year for chiropractic, but that that was happening a couple of times a year where he'd go in actually for symptoms.

A. Okay. No, it doesn't change my - - because this is more of a chronic - - you know, a consistent chronic problem.

Q. And if you have that kind of a problem and it just resolves, would that be consistent with what you've seen in him since this accident?

A. No. His - - rephrase it.

Q. That's fine. Prior to this accident he said that he would have an onset of pain, it might go as high as 4, it might go as high as 6 or 7, he'd go have a couple chiropractic visits, it would go away within a couple of days or a couple of weeks, and then he'd go months without any problems.

A. That's a completely different problem than what he has now.

Manos Deposition, 9/15–10/24.

36. Essentially, Dr. Manos testified that if Claimant had a recent history of chiropractic treatment for low back problems which always resolved, but since the injury has had

problems which have never resolved then this would actually support his opinion that Claimant has suffered an injury which is causally related to the subject accident.

37. The other interesting aspect of Dr. Manos' testimony is his disagreement with Dr. Doerr on the issue of Claimant's medical stability. As developed infra, Dr. Doerr agrees with Dr. Gussner that Claimant reached a point of medical stability on or about February 27, 2012. Dr. Doerr was under the mistaken belief that Claimant neither sought nor received any further treatment until October of 2012. This assumption helped inform Dr. Doerr's opinion that if Claimant had been getting along okay between February of 2012 and October of 2012 the recurrence or re-emergence of symptomatology in October of 2012 must be related to something other than the original work injury.

38. Dr. Manos disagreed with Dr. Doerr's conclusion in this regard, and stated that, in his view, Claimant has simply never recovered from the subject accident. Paradoxically, the chiropractic records referenced above, which demonstrate that Claimant received chiropractic treatment for his low back between February and October of 2012, might well support Dr. Manos' conclusion that Claimant never really recovered, and has never really been at a point of medical stability, vis-à-vis his low back condition.

39. Per Dr. Manos, fusion surgery for mechanical low back pain without evidence of neurological compression is a treatment of last resort. Dr. Manos had hoped that the discogram would lend some support to the hypothesis that Claimant's L5-S1 disk space is his pain generator. However, even without a confirming diskogram, he believes that L5-S1 fusion surgery is something that should nevertheless be offered to Claimant if he is able to reduce his weight to 300 pounds or less.

40. In summary, Dr. Manos' threshold causation opinion is based on Claimant's current insistence that even though he did have low back pain immediately preceding the subject accident, these symptoms were always only temporary in nature, as compared to Claimant's chronic complaints following the subject accident. Dr. Manos' opinion in this regard is based on testimony which the Commission does not find to be substantively credible, and therefore calls Dr. Manos' opinion on causation into question.

41. Dr. Doerr had the opportunity to examine Claimant for purposes of an Idaho Code § 72-433 exam. To Dr. Doerr Claimant denied anything but a remote history of past low back problems. Dr. Doerr testified that the MRI findings of disk desiccation and facet arthritis definitely predated the subject accident. He testified that it is impossible to say whether the finding of the L5-S1 annular tear is referable to the subject accident. Per Dr. Doerr, an annular tear of this nature can occur from an injury as well as be a natural consequence of degeneration. Dr. Doerr was aware that Dr. Gussner had previously rendered an opinion that Claimant's annular tear is causally related to the subject accident. However, he was asked about the impact of the previously undisclosed chiropractic history on the question of medical causation, and offered the following comments:

> Mr. Wager:
> Q. And I guess I would like to discuss that with you, because you tend to concur with his impairment rating and his date of medical stability. So is there something there that you can elaborate on?
>
> Dr. Doerr:
> A. Why I concurred?
>
> Q. Yes.
>
> A. Well, it wasn't because of who Dr. Gussner was. It was based on the temporal sequence of events and my exam finding.

> Q. Dr. Gussner, as well as yourself, didn't point to any preexisting conditions. You both cite a 15 year old Work Comp back injury that resolved itself. Would your opinion change any if you knew that Mr. Davidson had been seeking chiropractic care for the year prior to his industrial accident complaining of low-back pain anywhere from four to seven out of ten?
>
> A. Yes, potentially.
>
> Q. And why would that be?
>
> A. Well, if he was complaining of back pain up until, you know, the few weeks or months prior to this industrial injury then causation would be in question. There is no magic - - you know, there is no magic number in the standard in Idaho that is medically more probable than not. In general, if someone has gone around six months - - you know, if somebody had a preexisting back problem, but they hadn't sought treatment for six months prior to an injury, then, in general, that is considered a new injury rather than a continuation of a previous problem.
>
> Q. Sure.
>
> A. Anything inside of that six months - - and obviously the closer you get to the date of injury - - you know, if he saw the chiropractor the week before, and saw the chiropractor the first week of September 2011 with back pain seven out of ten, and then he has a work injury the very next week, that obviously is a lot stronger evidence that it was a preexisting condition rather than related to the work injury.
>
> Doerr Deposition, 10/10–11/22.

Therefore, Dr. Doerr, too, recognized the potential significance of the existence of low back symptoms immediately preceding the subject accident to determining whether or not the accident caused objective injury to Claimant's lumbar spine.

42. Dr. Doerr was not sanguine about the prospects for improving Claimant's mechanical low back pain with an L5-S1 fusion, noting that the absence of evidence of neurological compromise and Claimant's physical exam make him a poor candidate for such surgery.

43. It is axiomatic that Claimant bears the burden of establishing a causal relationship between the subject accident and his claimed injury. Claimant must put on medical proof in this regard, and the medical proof must establish, on a more probable than not basis, the existence of such a causal relationship. Here, multiple medical opinions have been issued on this threshold causation issue. As developed above, we have rejected Dr. Gussner's opinion as being based on an incorrect and inaccurate foundation. For similar reasons, we reject the opinion of Dr. Manos which depends on what we have found to be unreliable and self-serving testimony on the part of Claimant that his pre-injury low back problems were of an entirely different character than his post-injury complaints. We cannot say that Claimant did not experience discomfort following the subject accident. However, such discomfort, standing alone, is insufficient to prove injury to the physical structure of Claimant's body. Perez v. J.R. Simplot Co., 120 Idaho 435, 816 P.2d 992 (1991). On the evidence of record, we are unable to conclude that the objective injuries noted on the MRI evaluations, to include the L5-S1 annular tear, are causally related to the accident. We conclude that Claimant is not entitled to the medical and time loss benefits he claims in this proceeding. Since Defendants do not contest responsibility for benefits paid to the date of hearing, this decision is prospective only.

///

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to establish a causal connection between the subject accident and the objective injuries for which he requests further treatment.

2. Claimant is not entitled to the medical and time loss benefits he claims in this proceeding.

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

DATED THIS 24th DAY OF December, 2015.

INDUSTRIAL COMMISSION

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

___/s/_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2015, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

BRYAN S. STORER
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BOISE, ID 83713

JOSEPH M. WAGER
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____/s/_____