BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH GEORGE, Claimant, v. SEARS, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2014-008780** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed July 20, 2016

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 Coeur d'Alene on December 1, 2015. Claimant, Joseph George, was present in person and represented by Richard Whitehead, of Coeur d'Alene. Defendant Employer, Sears, and Defendant Surety, Indemnity Insurance Company of North America, were represented by Eric S. Bailey, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on March 31, 2016. The Commission has reviewed the Findings of Fact and Conclusions of Law proposed by Referee Taylor, and largely agrees with his analysis and proposed outcome, but nevertheless declines to adopt the same. As developed infra, the Commission concludes that further treatment is warranted of issues related to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009).

ISSUES

The issues to be decided are:

1. Claimant's entitlement to medical care due to his industrial accident;

2. Claimant's entitlement to temporary disability benefits due to his industrial accident; and

3. Claimant's entitlement to permanent partial impairment benefits.

All other issues are reserved.[1]

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial accident on March 22, 2014, when he lifted a tire while working for Sears. Defendants accepted the claim and provided benefits until neurosurgeon Jeffrey Larson, M.D., concluded Claimant required lumbar surgery, whereupon Defendants

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[1] Claimant's briefing argues his entitlement to attorney fees—an issue Defendants assert has been addressed in briefing for the first time. This issue was not noticed for hearing. It was identified in the Complaint and Answer and listed by both parties in their request for calendaring and response, respectively. However in the telephone conference scheduling the hearing, it was not identified as an issue for hearing. Thus, the Commission's Notice of Hearing did not list it. At the commencement of hearing, the Referee identified the issues to be addressed:

> [Referee Taylor:] The issues to be addressed today as set forth in the Notice of Hearing are as follows:
>
> 1. Whether, and to what extent, Claimant is entitled to the following benefits:
> A. Medical care; and
> B. Temporary Partial and/or Temporary Total Disability benefits.
>
> The August 25, 2015 Notice of Hearing indicates that all other issues are reserved. In discussion with counsel just prior to going on the record, I was advised that counsel are in agreement that the issue of permanent partial impairment may be treated in this hearing as well. Is that correct?
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> Mr. Whitehead: That's correct, Your Honor.
>
> Mr. Bailey: Yes, it is.
>
> Referee Taylor: Very well. Thank you. And thus, all other issues would be reserved.
>
> Mr. Whitehead: Correct.

Transcript p. 6, l. 23 through p. 7, l. 16.

Inasmuch as Idaho Code § 72-713 requires the Commission to "give at least ten (10) days' written notice of the time and place of hearing and of the issues to be heard," the issue of attorney fees is reserved and is not addressed herein.

denied further responsibility, asserting Claimant's need for surgery was due to his pre-existing pars defect rather than his industrial accident. Claimant underwent lumbar surgery in June 2015. He seeks further medical benefits for his lumbar surgery, temporary disability benefits during his recovery from surgery, and permanent impairment benefits.

Defendants acknowledge Claimant's industrial accident but assert that the accident caused only a temporary aggravation of his pre-existing condition. They maintain Claimant has received all appropriate benefits and that his persisting symptoms are due to the natural progression of his pre-existing condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Jeffrey Larson, M.D., taken by Claimant on November 23, 2015;
3. The testimony of Claimant and Cathy George taken at the hearing;
4. Claimant's Exhibits A through W admitted at the hearing;
5. Defendants' Exhibits 1 through 15 admitted at the hearing; and
6. The post-hearing deposition testimony of Michael Ludwig, M.D., taken by Claimant on December 9, 2015.

FINDINGS OF FACT

1. Claimant was born in 1985. He was 30 years old and resided in Spirit Lake at the time of the hearing.

2. **Background.** Claimant was raised in Kuna where as a youth he participated in dirt bike and motorcycle riding, wrestling, basketball, football and Boy Scouts. At a young age

he was diagnosed with paramyotonia congenita, a genetic muscle disorder causing temporary loss of hand and calf muscle strength in cold weather as triggered by cold weather and inadequate nutrition. The disorder never precluded Claimant from any of his usual rigorous physical activities and his coaches were never even aware Claimant had this disorder. Claimant had no low back problems that hampered his participation in any activities.

3. Claimant's sports activities resulted in several injuries. He broke his collar bone playing football. He also broke his elbow and suffered a torn meniscus resulting in knee surgery. In each instance he recovered and resumed his usual activities. He had no back symptoms prompting medical evaluation during his high school years.

4. In approximately 2007, Claimant was hit by another car while driving and subsequently underwent chiropractic neck adjustments for one month.

5. Claimant developed an interest in auto and motorcycle mechanics and took mechanics classes in high school. He became a skilled motorcycle mechanic and never had any difficulty lifting and loading dirt bikes, tires, or other heavy items. He worked as a parts manager at Triumph. He later worked at Bowdry's Motor Sports earning $15.00 per hour plus commissions. Claimant also worked as a parts manager at Lake City Autobody.

6. In 2013, Claimant started attending classes full-time at ITT in Boise and working full-time at Les Schwab Tires. Claimant did well at Les Schwab and progressed to where he was able to perform any task in the store. He considered pursuing management training until he discovered he would have to move periodically and work in four different stores before being considered for a management position. Claimant continued attending ITT to obtain a degree and increase his earning power.

7. In late 2013, Claimant began working at the tire center at Sears in Coeur d'Alene. His starting wage was $9.00 per hour plus commission. The tire shop was heated. By March 2014, he was working full-time at the tire center and also attending ITT full-time. His estimated weekly earnings at Sears were $370.00. He also began working part-time in computer drafting through ITT.

8. **Industrial accident and treatment.** On March 22, 2014, Claimant was unloading tires at Sears and lifted a 35-inch tire and rim weighing at least 100 pounds out of the bed of a pickup. He twisted and set the tire down and felt immediate low back pain. It was near the end of his shift and Claimant did not then report the incident because he had the next few days off work and believed his back pain would resolve. Claimant returned to work as scheduled the following Tuesday but could not perform his usual duties due to persisting back pain. He then reported his accident to his supervisor.

9. Claimant sought medical treatment and was initially assessed with a muscle strain which was expected to resolve in a few weeks. However, lumbar x-rays revealed a pars defect.[2] Light-duty work assignments were difficult given his persisting back pain. He participated in physical therapy which improved muscle tone but did not resolve his back pain. On April 22, 2014, a lumbar MRI showed bilateral L5 pars defects.

10. On May 1, 2014, Claimant was examined by Michael Ludwig, M.D., who recorded Claimant's complaint of low back pain now radiating into his right buttock. Dr. Ludwig diagnosed lumbar strain with aggravation of segmental instability. Over the ensuing

[2] A pars defect is "a failure of the posterior elements [of the vertebra] to be contiguous. It can either be due to a prior fracture or acute fracture or it can be a congenital abnormality …." Ludwig Deposition, p. 18, ll. 16-18.

weeks he provided three epidural lumbar injections, which improved Claimant's back pain only temporarily.

11. On July 29, 2014, Dr. Ludwig's nurse, Lynn, spoke with Surety's adjuster, Sandra Finnegan, who authorized consultation with neurosurgeon Jeffrey Larson, M.D. Dr. Ludwig then referred Claimant to Dr. Larson.

12. In August 2014, Claimant presented to Dr. Larson who confirmed segmental instability and recommended lumbar surgery to stabilize Claimant's lumbar spine.

13. Surety scheduled Claimant for an examination by orthopedic surgeon Douglas Porter, M.D., in November 2014. After the examination, Claimant received a letter advising him of the Surety's conclusion that his continuing back symptoms were due to pre-existing conditions and declining to provide further medical treatment. Defendants denied the surgery recommended by Dr. Larson.

14. Claimant's back pain continued to render him unable to return to his usual duties at the tire center. His mother encouraged him to return to school. Claimant returned and completed his training at ITT. He graduated with his associate's degree in drafting and design from ITT in December 2014 and posted a 3.93 GPA. He then began working as a designer draftsman for Rocky Mountain Roller Coasters, with earnings substantially greater than his wages at Sears. Claimant waited to pursue the lumbar surgery Dr. Larson recommended until he qualified for coverage under his new employer's group health plan.

15. On June 18, 2015, Dr. Larson performed an L5 laminectomy and posterior fusion at L5-S1 with instrumentation. Claimant was off work the week of surgery and tried to work from home the second week after surgery. He then returned to work part-time, five or six hours per day over the ensuing four weeks and by the end of six weeks post-surgery had worked back

up to full-time work, five 10-hour days per week. His design drafting work allowed him to stand and stretch his back regularly.

16. Following Surety's denial, Claimant incurred medical bills in the amount of $72,478.36 in connection with his June 2015 back surgery and related care. (Claimant's Exhibit L). These bills were satisfied by Claimant's non-occupational group health insurer, Blue Cross of Idaho, for the sum of $35,002.09 after the application of contractual adjustments with Claimant's providers. Blue Cross of Idaho has asserted a subrogation claim in the amount of $35,002.09. (*See* Defendant's Exhibit 11). As well, Claimant is himself obligated to pay certain out-of-pocket expenses (co-payments, deductibles) in the amount of $3,000.00. (Transcript 68/22-70/11).

17. Following recovery from surgery, Dr. Larsen released Claimant without restrictions. The physical therapist identified no permanent restrictions.

18. **Condition at the time of hearing.** Surgery eliminated Claimant's buttock pain and improved but did not eliminate all of his back pain. At the time of the hearing, Claimant continued to have some back symptoms. He exercised care in lifting. He could not comfortably bend over to put on his shoes, run, jog, or play basketball. He tolerated sitting in a car for approximately two hours before needing a break to stretch his back. He no longer tolerated riding a motorcycle. Lifting his five year old child was uncomfortable. Claimant limited his lifting to about 50 pounds.

19. At the time of hearing Claimant continued to work full-time designing roller coasters at Rocky Mountain Roller Coasters. He believes additional physical therapy would be beneficial but presently lacks the resources to obtain such.

20. **Credibility.** Having observed Claimant and Mrs. George at hearing, and carefully compared their testimony with other evidence in the record, the Referee found that both are credible witnesses. The Commission finds no reason to disturb the Referee's findings and observations on presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

21. The provisions of the Idaho Worker's 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).

22. **Medical care.** The first issue is whether Claimant is entitled to further medical care for his industrial accident. Idaho Code § 72–432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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. Thus, Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable.

23. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court overruled in part Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), regarding the determination of reasonable medical treatment, stating:

> [T]he central holding of Sprague, which remains valid, is simply: "It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable." 116 Idaho at 722, 779 P.2d at 397.
>
> The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

Chavez, 158 Idaho at 797-798, 353 P.3d at 418-419. Of course, even though the injured employee's treating physician may require the treatment, an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Thus Claimant's request for medical benefits herein must be supported by medical evidence establishing causation.

24. Claimant asserts that he required further medical treatment due to his industrial accident, specifically, the lumbar stabilization surgery performed by Dr. Larson. Defendants dispute causation. Three medical experts have evaluated Claimant's need for additional medical treatment arising from his industrial accident.

25. Dr. Porter. Douglas Porter, M.D., examined Claimant at Defendants' request on November 6, 2014. Dr. Porter diagnosed pre-existing lumbar spine L4-5 pars defect and pre-existing lumbar degenerative disc disease at L3-4 and L5-S1, all unrelated to Claimant's industrial accident. He also diagnosed lumbar sprain/strain and temporary aggravation of Claimant's pre-existing pars defect and degenerative lumbar disc disease which Dr. Porter

considered resolved by the time he examined Claimant. He concluded that Claimant had reached maximum medical improvement, required no further medical treatment, sustained no permanent impairment from his industrial accident, and that his continued back pain resulted solely from the natural progression of his pre-existing lumbar conditions. Dr. Porter was not deposed in this matter and his report provides little explanation to support his conclusory opinion.

26. Dr. Ludwig. Dr. Ludwig provided Claimant three therapeutic and diagnostic epidural lumbar injections. He opined that Claimant's pars defect pre-existed his industrial accident but was asymptomatic. Having repeatedly examined Claimant and participated in his treatment, Dr. Ludwig testified at his post-hearing deposition regarding the causation of Claimant's injuries and the factors supporting his causation opinion:

> A. My opinion was that the injury described on March 22nd, 2014, likely caused a permanent aggravation of underlying condition and would likely require surgical stabilization.
>
> Q. Okay. And could you explain in more detail why that's your opinion in light of the structures, the testing that was done, the physical therapy that wasn't successful, and the temporary relief provided by the injections.
>
> A. Sure. Mr. George, when he presented, was genuine and he was consistent throughout his medical treatment. He had symptoms as well as objective findings, including radiographic motion at the segment, that were consistent with prior patients I have seen with instability related to this diagnosis. He sustained temporary benefit to the injections but unfortunately continued to regress back to a baseline of pain. I felt that he showed the appropriate physical accommodations for the pain to be expected for this and was diligent in his physical therapy after discussing with his therapist. I thought that he had exhausted conservative measures at that time.

Ludwig Deposition, p. 10, l. 19 through p. 11, l. 13.

27. Dr. Larson. Dr. Larson also examined Claimant repeatedly and participated in his treatment. He opined that Claimant's accident caused a permanent aggravation of his pre-existing pars defect:

> –sometime in March of 2014 lifting a—moving a tire, had what appeared to be a routine back strain; but through a series of tests … a series of imaging, examination, and diagnostic and therapeutic injections, found that he was symptomatic from an L5 pars fracture that was, in my opinion, preexisting the injury but permanently aggravated by the injury, and that's what led for the need for surgery to stabilize that segment.

Larson Deposition, p. 8, ll. 3-12.

28. Dr. Larson strongly disagreed with Dr. Porter's conclusion that Claimant's industrial accident produced only a temporary aggravation of his pre-existing pars defect and that Claimant's continuing symptoms after November 2014 were the natural progression of his pre-existing condition. Dr. Larson explained the basis for his causation opinion:

> A. Well, it's based on the relationship to the event itself, the mechanism of the event, the location of the symptoms, and then the examination that Dr. Ludwig did and I did, and then the imaging studies, and the temporary response to the injections. He had injections directed at the pars defect, at the facet joints adjacent to the pars defect, and also in the epidural space adjacent to the pars defect, and could get temporary relief with these. He had some more diagnostic-specific pars injections that gave him relief. But nothing sustained. So I don't think there's any question that he was symptomatic in regards to those pars defects.
>
> Q. Okay. And did your surgical inspection confirm what your preoperative diagnosis was?
>
> A. Well, the—he had pars defects at surgery, and he improved significantly after having stabilization of those, so I think it's consistent with his—my preoperative presumption.

Larson Deposition, p. 10, l. 13 through p. 11, l. 6. Dr. Larson explained precisely the mechanism of Claimant's persisting post-accident symptoms:

> the pars is what connects the superior facet to the inferior facet of one vertebral body. …. If you envision that the pars—you now have a disconnected superior and inferior facet on one vertebral segment. So in this case, he's got L5 pars fractures, which mean that the inferior L5 facet is only connected by ligament, or soft tissue, to the rest of the bone. …. So now when he bends forward, now the motion there is only stabilized by the ligaments."

Larson Deposition, p. 19, l. 12 through p. 20, l. 9. He testified that the accident of March 22, 2014 caused Claimant's pre-existing pars defect to became symptomatic because: "The ligaments, or soft tissues, that are holding them together are disrupted, strained, popped, stretched; and then you end up with this abnormal motion that you're not going to gain back. Once that happens, then you have a permanently aggravated condition." Larson Deposition, p. 22, ll. 9-13. Dr. Larson explained that although the bilateral pars defect at L5 pre-existed Claimant's industrial accident, the segment was not unstable pre-accident because it was not symptomatic. The industrial accident caused the instability resulting in lumbar and right buttock symptoms.

29. Dr. Larson summarized how the surgery he provided reduced Claimant's back symptoms by reducing his lumbar instability :

> we don't have x-rays ahead of time to show, how much motion there was; but I know now, on a more-probable-than-not basis within a reasonable degree of medical certainty, that he now has symptomatic movement of those pars which he didn't have previously, and it's very common to see that when you treat these patients with those. And the surgery that was rendered to him was to bridge across them with these screws and rods and fuse across them, so you lose that motion.

Larson Deposition, p. 24, ll. 7-16.

30. The opinions of Dr. Ludwig and Dr. Larson are adequately explained, well-reasoned, consistent with and supported by the evidence of record, and more persuasive than the opinion of Dr. Porter.

31. Defendants have asserted that the lumbar surgery Dr. Larson performed was not reasonable. However, considering the totality of the circumstances, the surgical treatment provided by Dr. Larson was reasonable and necessary to address the instability of Claimant's lumbar spine related to the permanent aggravation of his pre-existing bilateral pars defect.

Furthermore, Dr. Larson credibly testified that the medical expenses Claimant incurred for his lumbar surgery were reasonable and necessary for his industrial accident and that his related physical therapy bills were appropriate.

32. Claimant has proven his entitlement to reasonable medical treatment including but not limited to lumbar surgery and physical therapy due to his industrial accident.

33. Claimant requests payment of full invoiced amounts of his outstanding medical bills pursuant to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009). In Neel, the Idaho Supreme Court held that "when a surety initially denies an industrial accident claim which is later determined to be compensable, it is precluded from reviewing medical bills for reasonableness under the workers' compensation regulations from the time such bills are initially incurred until the claim is deemed compensable, but once the claim is deemed compensable a surety may review a claimant's medical bills incurred thereafter for reasonableness in accordance with the workers' compensation regulatory scheme." Neel, 147 Idaho at 149, 206 P.3d at 855. The rationale for this rule was succinctly explained by the Court:

> When an injured worker seeks medical treatment, and knows that his claim has been denied, he/she will most likely inform the physician that the case is not a workers' compensation claim and will either rely on his/her private insurance or inform the provider that there is no insurance. Under those circumstances, the provider is justified in assuming that it is not barred by any contractual adjustment or workers' compensation regulations from charging its usual and customary charge. In those cases, the injured worker is potentially liable for the entire charge because there is no prohibition against balance billing. When, however, the claim has been held to be compensable, the injured worker can inform the provider that his case is a workers' compensation claim, thereby notifying the provider that the Workers' Compensation Law is applicable to its charges. When the injury has been accepted as a compensable claim, the Workers' Compensation Law operates to limit the provider's charge and there is no justification for requiring the Surety after accepting the claim to pay more than the Workers' Compensation Law allows.

34. In Niebuhr v. AAPEX Construction, Inc. IC 2006-513568, 2011 WL 4674792 (Idaho Ind. Com. 2011), the Commission addressed a case differing from Neel in that there was no denial of the claim. The employer/surety acknowledged Niebuhr's accident was compensable but disputed causation of a portion of the claim relating to treatment of Niebuhr's cervical spine. Niebuhr then obtained surgical treatment of her cervical condition on her own. The Commission concluded:

> In all important respects, [Niebuhr] is in exactly the same situation as was the claimant in Neel, at least with regard to the surety's denial of responsibility for claimant's cervical spine injury. The rationale of Neel should apply to require Surety to pay 100% of the invoiced amount of the bills incurred by [Niebuhr] in connection with her cervical spine condition between the date of Surety's denial, and the date of this decision.

Niebuhr v. AAPEX Construction, Inc. IC 2006-513568, 2011 WL 4674792, at 11 (Idaho Ind. Com. 2011). See also Kibler v. The Fausett Group, Inc., IC 2012-016396, 2016 WL 3385275, at 11 (Idaho Ind. Com. 2016) ("Under the Neel Doctrine … when Defendants fail or refuse to pay for compensable medical charges, leaving Claimant to incur such debt, Defendants must pay or reimburse such charges at the full invoiced amount.")

35. In this case, the medical bills incurred by Claimant during the period of denial total $72,478.36. However, these bills were satisfied by Blue Cross of Idaho for $35,002.09, under terms which presumably protect Claimant from balance billing. Blue Cross of Idaho has affirmed that it intends to pursue its contractual rights of subrogation to any recovery made by Claimant for the bills in question. Pursuant to Williams v. Blue Cross of Idaho, 151 Idaho 515, 260 P.3d 1186 (2011), such an award by the Commission is subject to the claim of a subrogated health carrier.

36. The underlying premise of Neel is that where the workers' compensation surety has denied responsibility for the payment of medical bills claimant is in the wilderness; he is on

his own, and must strike whatever bargain his providers require in order that he may obtain the care that he needs. In such a scenario it is entirely reasonable to make an award to Claimant in the amount of 100% of the billed charges, so that he will have the funds necessary to pay the full invoiced amount of his bills, if this is what the provider insists on. However, this rationale is called into question where, as here, Claimant is only obligated to satisfy a $35,002.09 subrogation claim on billed charges of $72,478.36. In such a setting, what is the justification for making an award to Claimant of 100% of the billed charges in question, i.e. $72,478.36?

37. We addressed this precise question in Aspiazu v. Homedale Tire Serv., 2012 IIC 004 (2012), and concluded that the Court's ruling in Neel extended to this scenario as well, even though it could conceivably result in a "windfall" to Claimant.[3] We concluded that the Neel Court did what it did in order to avert greater mischief that might result if, in scenarios like the one before us, surety is allowed to satisfy its obligation to pay the medical bills incurred during the period of denial simply by satisfying the subrogation claim. We see no reason to depart from the conclusions we reached in Aspiazu and conclude that Claimant is entitled to receive a Neel award equal to 100% of the billed charges incurred during the period of denial, or $72,478.36, whichever is greater.

38. **Temporary disability.** The next issue is whether Claimant is entitled to temporary disability benefits due to his industrial accident. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as

[3] How much of a "windfall" Claimant will enjoy in this and similar scenarios is debatable. Remember, he must also compensate his attorney for the fees and costs incurred in obtaining the *Neel* award.

provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

39. In the present case, Claimant has proven that he is entitled to lumbar surgery for his industrial accident and thus has proven his entitlement to temporary disability resulting therefrom. He requests $307.80 per week for 2.8 weeks during his recovery from surgery.

40. Dr. Larson testified that most patients would take six weeks off work after a lumbar surgical procedure such as Claimant had. However, Claimant returned to work part-time less than two weeks after surgery and by six weeks post-surgery had progressed to full-time work, 10 hours per day five days per week. As Dr. Larson observed of Claimant: "he's a hard worker, he's a fit guy. Look, he took two weeks off after surgery. …. I think he's as highly motivated as they come." Larson Deposition, p. 15, ll. 8-9, 20.

41. Claimant's average weekly wage at the time of his accident is taken as the basis for computing his compensation. Idaho Code § 72-419. His average weekly wage at Sears at the time of his 2014 accident was $370.00. Idaho Code § 72-408(1) generally establishes

Claimant's total temporary disability benefits at 67% of his average weekly wage, which equates to $247.90. However, Claimant's temporary disability benefits are subject to a 90% maximum and 45% minimum of the applicable average weekly state wage pursuant to Idaho Code § 72-409. The average weekly state wage for 2014 is $684.00, 45% of which is $307.80. Thus, Claimant's rate of total temporary disability benefits for his 2014 accident is $307.80 per week.

42. At hearing Claimant established that he lost 112.5 hours of work between June 15 and July 19, 2015, while he recovered from his lumbar surgery for his 2014 industrial accident and for which Defendants have provided him no compensation. At the time of his 2015 surgery—more than a year after his accident—Claimant was employed at Rocky Mountain Roller Coasters working 50 hours per week and earning approximately $800.00 per week. He received time and a half for hours in excess of 40 hours per week. His actual straight hourly rate at the time of his 2015 surgery was at least $14.55 ($800.00 ÷ [40 hours + (10 hours x 1.5)]). Specifically, as established by Claimant's Exhibit Q, he missed and worked hours for the following periods post-surgery with calculated actual 2015 earnings as indicated:

	Hours missed	Hours worked	Calculated actual earnings
June 15-21	20	30	$436.50
June 22-28	50	0	$0
Jun 29-Jul 5	21	29	$421.95
July 6-12	16.5	33.5	$487.43
July 13-19	5	45	$691.13

43. Claimant's calculated 2015 earnings exceeded his rate of temporary disability benefits of $307.80 per week, every week post-surgery except for the week of June 22-28, 2015.

44. Claimant has proven his entitlement to temporary disability benefits in the amount of $307.80 for the week of June 22-28, 2015, while recovering from 2015 lumbar surgery for his 2014 industrial accident.

45. **Permanent partial impairment.** The final issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

46. In the present case, Dr. Larson rated Claimant's permanent impairment from his industrial accident due to his permanently aggravated pars defect requiring surgical stabilization at 7% of the whole person. Dr. Ludwig concurred that was "appropriate for a one-level motion segment lesion stabilization surgery." Ludwig Deposition, p. 17, ll. 2-3. Dr. Ludwig testified that even though Claimant's pars defect pre-existed his industrial accident: "If, as you say, there's documented history of high-level physical activity with no prior medical history, I'd be comfortable stating that I would not apportion any of his impairment to pre-existing conditions." Ludwig Deposition, p. 29, ll. 11-14. There is in fact, abundant documented history of Claimant's high level of physical activity without prior medical history of back pain before his industrial accident.

47. Claimant has proven his entitlement to permanent impairment benefits of 7% of the whole person due to his industrial accident.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commission hereby **ORDERS** the following:

1. Claimant has proven his entitlement to reasonable medical treatment including but not limited to lumbar surgery and physical therapy due to his industrial accident.

2. Claimant has proven he is entitled to recover 100% of the invoiced amount of medical bills incurred in connection with medical treatment including but not limited to lumbar surgery and physical therapy due to his industrial accident between the date of Defendants' denial and the date of this decision.

3. Claimant has proven his entitlement to temporary disability benefits in the amount of $307.80 for the week of June 22-28, 2015, while recovering from lumbar surgery for his industrial accident.

4. Claimant has proven his entitlement to permanent impairment benefits of 7% of the whole person due to his industrial accident.

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

DATED this 20th day of July, 2016.

INDUSTRIAL COMMISSION

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

_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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___/s/_____