

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JEFF GLICKMAN,

Claimant,

v.

TNT INSURED TOWING, LLC,

Employer,

and

STATE INSURANCE FUND,

Surety,  
Defendants.

**IC 2012-020021**

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

**1/7/2014**

**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 Boise on May 10, 2013. Claimant, Jeff Glickman, was present in person and represented by Richard Owen, of Nampa. Defendant Employer, TNT Insured Towing, LLC (TNT), and Defendant Surety, State Insurance Fund, were represented by Bridget Vaughan, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on September 4, 2013.

**ISSUES**

The issues to be decided presently are:

1. Whether Claimant suffered an injury arising out of and in the course of employment;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Claimant's entitlement to medical care; and

4. Claimant's entitlement to temporary disability benefits.

### **CONTENTIONS OF THE PARTIES**

Claimant alleges he suffered a lumbar injury at TNT on June 11, 2012, when he and a co-worker lifted an engine block. He asserts entitlement to medical benefits for his resulting lumbar injury and surgery and temporary disability benefits during his recovery.

Defendants assert that Claimant's account of his work accident at TNT is fabricated, that he suffered pre-existing lumbar pathology, and that his work at TNT did not cause his need for medical treatment.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A through L, and Defendants' Exhibits 1 through 4, admitted at the hearing;
3. The testimony of Claimant, Bruce Holder, Jimmy Marcum, Tommy Thompson, and Toby Moore taken at the May 10, 2013 hearing;
4. The post-hearing deposition of Alan M. Harben, M.D., taken by Claimant on June 14, 2013;
5. Defendants' Exhibit 5, comprising Dr. Tomaras' May 6, 2013 response to correspondence from the State Insurance Fund (dated April 30, 2013), admitted June 26, 2013;
6. Dr. Tomaras' May 30, 2013 response to correspondence from Claimant's counsel (dated May 17 and 20, 2013), and said May 17 and 20, 2013 correspondence, admitted June 26, 2013, and hereby identified as Claimant's Exhibit M; and

7. The post-hearing deposition of Timothy E. Doerr, M.D., taken by Defendants on June 27, 2013.

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 conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant was born in 1966. He was 46 years old, had been married for 17 years, and lived in Carrollton, Georgia at the time of the hearing.

2. TNT salvages auto parts, sells used auto parts, and purchases and sells scrap metal. At all relevant times, Tommy Thompson was the owner of TNT. He often worked in the salvage yard. Toby Moore was the yard boss and a truck driver for TNT. He managed the approximately 10-15 TNT employees who worked in the yard and also made periodic deliveries to Portland and other locations. Jimmy Marcum was the manager of auto salvage and worked in TNT's business office, not in the yard.

3. **Background.** Claimant was raised 20 miles east of Atlanta, Georgia where he completed the tenth grade. He subsequently obtained his GED. Following high school he worked in residential construction and landscaping.

4. On June 24, 2002, Claimant presented to Gerilyn Metoyer-Thompson, M.D., complaining of back pain for two weeks. Straight leg raising was negative and Claimant was diagnosed with lumbar strain.

5. In 2003, Claimant moved to Idaho where he worked in residential construction. Commencing in 2005, Claimant was incarcerated for drug involvement for approximately 18 months. He then qualified for a work release program and was hired by TNT where he worked

for approximately eight months. After being paroled, Claimant left TNT and returned to Georgia where he remodeled houses his parents purchased for resale.

6. On November 25, 2006, Claimant presented to Narendra Logendra, M.D., complaining of back pain after moving old cabinets. He had good range of motion, no sensory deficits and no pain in his lower extremities. Dr. Logendra diagnosed lumbar sprain with muscle spasm and prescribed Lortab, Zanaflex, and a Medrol Dosepak.

7. On February 13, 2007, Claimant presented to Bill Martin, M.D., complaining of low back and left leg pain after lifting a cast iron bathtub the prior November. Dr. Martin diagnosed low back pain and left radiculopathy. He recommended an MRI. Dr. Martin also prescribed pain medications and home exercises. On February 15, 2007, Claimant underwent a lumbar MRI that revealed L4-5 and L5-S1 annular bulging and facet hypertrophy causing foraminal narrowing at L4-5 and L5-S1, most severe at L4-5 on the left and L5-S1 bilaterally. He continued to treat periodically with Dr. Martin for persisting back pain.

8. In August 2007, Claimant was involved in a motorcycle accident and noted increased back pain. He was sore for several weeks and then returned to his usual pain level. On October 5, 2007, Dr. Martin examined Claimant who reported that most of his pain was in his left leg. Claimant continued remodeling houses until late 2007 when he commenced work welding metal boat docks. The work was very heavy.

9. On January 28, 2008, Claimant presented to Dr. Martin reporting chronic low back pain. The chart notes make no mention of leg pain. Claimant had started a new job in a metal shop and his back pain was a little worse. Also in 2008, Claimant started his own residential and commercial lawn care and landscaping business. His business started slowly but picked up throughout 2008.

10. On February 10, 2008, Claimant presented to Dr. Martin complaining of chronic low back pain which was gradually getting worse. Dr. Martin recorded left leg pain and prescribed Lortab. On March 4, 2008, Claimant presented to the emergency department complaining of low back pain. He had a positive straight leg raise test on the left and was diagnosed with an exacerbation of chronic back pain and given Flexeril and Daypro. On May 27, 2008, Dr. Martin examined Claimant and noted his continued low back pain with left L4 radiculopathy. On June 20, 2008, Dr. Martin discussed lumbar injections with Claimant, but he could not afford them. Dr. Martin's notes of this date refer to right radiculopathy. Claimant testified at hearing that this was an error and that all of his lower extremity symptoms during this time were on the left. On September 2, 2008, Claimant presented to Dr. Martin who noted Claimant's MRI documented L4-5 and L5-S1 disc disease with possible nerve root compression at both levels. Claimant reported symptoms to his left calf and was considering lumbar injections. Claimant had shown no suggestion of medication abuse and Dr. Martin continued his Lortab prescription. In spite of his back pain, Claimant continued working throughout nearly all of 2008. In the winter he trimmed trees, working 12-14 hours per day.

11. On December 22, 2008, Claimant presented to Dr. Martin who noted that Claimant's father had died unexpectedly and Claimant "had to move a lot of stuff" exacerbating his back pain. Exhibit B, p. 255. Dr. Martin noted that Claimant was then unable to work because of back pain.

12. On February 24, 2009, Dr. Martin examined Claimant and found his back symptoms stable. Dr. Martin again noted Claimant's disc herniation documented by MRI with left radiculopathy. He continued Claimant's Lortab prescription. Claimant testified at hearing

that during this time he considered his back pain an aggravation for which he took medication. Claimant resumed working.

13. In approximately May 2009, Claimant was stopped by police and cited for driving without insurance. Because he was still on parole, he was returned to Idaho in approximately June 2009 to serve out the remainder of his sentence. Upon being incarcerated, he reported his chronic back pain to prison physicians who restricted Claimant from working and weight lifting. He remained so restricted until 2010. On October 9, 2009, Claimant reported to prison health care providers that he had ruptured two discs three years previously, secondary to picking up a cast iron bathtub, and experienced back pain and left sciatica. On October 20, 2009, Claimant was examined by Mike Takagi, P.A., who recorded complaints of low back pain and occasional left leg symptoms. Claimant reported not wanting to be on any medication that prevented him from Community Work Center (CWC) eligibility. Mr. Takagi assessed low back pain with possible sciatica and prescribed Naproxen. Claimant testified that during this extended period of rest when he was precluded from working and intense exercise, his back “healed up” and his back pain resolved.

14. On January 8, 2010, Claimant asked prison physicians to lift his medical restrictions so he could work. His initial request was denied. However, later in 2010, Claimant renewed his request, his medical restrictions were lifted, and he was cleared to work. Commencing in the spring of 2010, Claimant worked running an 11-member landscaping crew, cutting grass, edging, cleaning, and trimming bushes. In approximately May 2011, Claimant transferred to the wastewater facility at the prison where he watered alfalfa fields, moved wheel lines, hauled 20-foot sections of six-inch pipe, maintained pond aerators, and replaced heavy pump motors. He had no limiting low back or leg symptoms.

15. In September 2011, Claimant transferred to the CWC and sought a job with TNT, where he had worked in 2006. TNT hired Claimant. Claimant worked on the “iron-side” of TNT’s scrap yard. He received refrigerators, washers, dryers, and virtually anything metal. His duties included routinely moving washers, dryers, and refrigerators—weighing up to 150 pounds—by hand and loading them into metal crushers.

16. Claimant worked in TNT’s scrap yard from September 2011 through June 2012. He did not pull transmissions or engines from salvaged cars, but he was involved in moving them. Claimant worked Wednesday, and Friday through Monday. He was one of only two people who worked the yard on Sundays. He was off work on Tuesday and Thursday.

17. Claimant had no significant back problems while working at TNT until March 2012. He then noted aching pain in his low back, right buttock, and thigh. On March 21, 2012, Claimant presented to a Steve Stedtfeld, P.A., at Correctional Medical Services who recorded pain in the right buttock with occasional radiation to the knee, negative straight leg raising, and toe raising within normal limits. Claimant testified that his aching pain continued for a few days and then resolved. He continued performing his usual duties at TNT.

18. Claimant’s low back and right buttock pain returned and on June 1, 2012,<sup>1</sup> Claimant presented to Mike Takagi, PA-C, who recorded Claimant’s report of pain in his back and right leg to the knee. Mr. Takagi prescribed a prednisone dose pack and followup in one week if Claimant was not feeling better. Claimant testified that he received two Medrol Dosepaks and his pain subsided after the second dose pack. He continued performing his usual duties at TNT.

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<sup>1</sup> Close examination of the medical records suggests that Claimant submitted a request for medical treatment to prison medical providers on May 29, 2012, but was not examined by Mr. Takagi until June 1, 2012. See Exhibit C, p. 391. Statements by the witnesses and counsel referring to a May 29, 2012 examination are considered to reference the June 1, 2012 examination by Mr. Takagi.

19. Claimant was scheduled to be released on June 25, 2012, and planned to fly back to his family in Georgia upon his release. He gave notice to TNT that he would be leaving. TNT hired Bruce Holder by early June 2012 to replace Claimant and Claimant began training Holder at TNT.

20. **Alleged accident and medical treatment.** Claimant testified that on June 11, 2012, while working at TNT, he helped Holder lift an engine block and experienced immediate intense back and right leg pain.

21. On June 12, 2012, Claimant presented to Mike Takagi, PA-C, at Correctional Medical Services who recorded Claimant's complaints of back pain: "pt back pain initially improved on Prednisone then on day 4 pt lifted engine Block [sic] at work then he felt a crackling & had immediate pain to L leg." Exhibit C, p. 360. Claimant testified at hearing that he reported pain in his right leg and the reference to his left leg must have been an error.

22. Claimant was released on June 25, 2012, and flew home to his wife and son in Georgia. On June 28, 2012, Claimant presented to the Hope Clinic near Atlanta complaining of low back pain. Notes from his visit indicate that he was released from incarceration four days prior, and had worked the prior year without opioids. The physician assessed low back pain and positive right straight leg raising. Claimant testified at hearing that the examining physician accused him of being a drug abuser and refused to seriously consider his symptoms.

23. Claimant's wife was able to add him to her insurance coverage and he was subsequently examined by a physician at the Kaiser Clinic in Georgia. On July 24, 2012, Claimant underwent a lumbar MRI that revealed L3-4 left foraminal disc protrusion, L4-5 moderate concentric disc bulge, and L5-S1 mild disc bulge with a right paracentral sequestered



disc fragment<sup>2</sup>, measuring approximately 6 x 5 mm, contacting the right S1 nerve root. Exhibit D, p. 496.

24. On August 3, 2012, Claimant reported low back pain to Evelyne Ekinde, LPN, with “Onset 1.5 months ago after trying to pick up a car motor.” Exhibit D, p. 520. On August 9, 2012, Claimant presented to Pamela Vick-Bope, M.D., who recorded his right low back and leg pain, noting: “This problem began approximately 7 weeks ago and was associated with an injury during lifting. The patient states the pain began suddenly and is chronic and constant.” Exhibit D, p. 498.

25. Claimant received two lumbar epidural steroid injections without significant improvement. On November 5, 2012, neurosurgeon Christopher Tomaras, M.D., performed L5-S1 hemilaminotomy, foraminotomy, and microdiscectomy. Claimant’s intense right leg pain resolved, however his low back pain persisted. Dr. Tomaras referred Claimant to pain specialist Jada Reese, M.D., who recommended a spinal cord stimulator trial which significantly decreased Claimant’s back pain. Noting the success of the trial, Dr. Reese recommended surgical implantation of a spinal cord stimulator. At the time of hearing, Claimant was scheduled for the surgical implantation.

### **DISCUSSION AND FURTHER FINDINGS**

26. 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,

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<sup>2</sup> A sequestered disc fragment is a disc fragment that is extruded and totally detached from the disc.

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).

27. **Occurrence of an accident.** The first issue is whether Claimant suffered an accident at work on June 11, 2012. Idaho Code § 72-102(18)(b) defines accident as “an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.” In the present case, Defendants argue that Claimant’s hearing testimony of an accident at work—lifting an engine block on June 11, 2012—is fabricated. Claimant and several witnesses have testified regarding the circumstances surrounding Claimant’s alleged industrial accident. Their testimony is examined below.

28. Claimant. Claimant testified that on Monday, June 11, 2012, Claimant and Bruce Holder were helping TNT owner, Tommy Thompson, clean up the yard. Thompson was driving a large front end loader with a pickup bed serving as a bucket on the forks. Claimant and Holder were picking up metal scrap and placing it in the pickup bed. Claimant testified:

A. We were cleaning up the yard. Scrap. Bruce and I was [sic]. Tommy was in the loader and moving some bed of transmissions around, motors [sic]. There was [sic] some transmissions and motors on the ground that we were picking up and putting in beds to stack to clean up. There was a motor on the ground that—I guess it had rolled out of another bed that Tommy wanted us to put in the pickup bed and he was on the loader and said—well, I said, you know, let’s pick it up with the loader, was going to get the chains and he said, no, just put in [sic] the bed. Bruce and I grabbed the motor and started to pick it up and that’s when I felt the—felt like a crunching in my back when I got part way up. When I got about three-quarters of the way up the pain was very severe, instant, very sharp and very hot.

Q. (by Mr. Owen) And where did you feel the pain?

A. My low back. Straight down my right leg all the way to my toes.

Transcript, p. 58, l. 15 through p. 59, l. 7.

29. Claimant testified that as soon as the block was loaded into the pickup bed, he went across the yard to TNT's business office and reported the incident to Marcum. Claimant testified that he complied with Thompson's direction to lift the block by hand because he did not want to risk losing his job at TNT and being returned to the prison until the date of his release. Claimant testified he had Holder do the heavy lifting thereafter while Claimant avoided heavy lifting and operated the scales or performed other less physically demanding duties until he left TNT on June 24, 2012.

30. Holder. Bruce Holder testified that when Claimant was training him in June 2012, Claimant and Holder were helping Thompson clean up the yard. Thompson was driving the front-end loader with a pickup bed positioned as a bucket on the forks of the loader. They came to a V-8 engine block and Thompson directed Claimant and Holder to pick it up and place it in the pickup bed. Holder testified that the usual practice would have been to drop the pickup bed, chain the engine block to the forks of the loader, use the loader to place the block into the pickup bed, and then move the pickup bed with the loader. However, Thompson emphatically told them to just lift the block by hand into the pickup bed. Holder characterized Thompson as an angry man, often verbally abusive and profane in giving directions to his employees. Holder testified that he and Claimant got on either end of the block and while lifting the block, Claimant exclaimed that his back popped. After setting the block into the pickup bed, Holder testified that Claimant hobbled over toward the office. Holder testified that from that time until Claimant left TNT, Claimant did not do any heavy lifting. Holder lifted heavy items while Claimant ran the scales.

31. Marcum. Jimmy Marcum, TNT's business office manager for the last five years, testified that Claimant's job required lots of lifting, that he was a good worker, never missed any

work, and never had difficulty performing his job. Marcum testified that Claimant reported to him on June 11, 2012, that Claimant hurt his back helping Holder lift an engine and that Marcum reprimanded Claimant for lifting it by hand. Marcum then independently confirmed with Holder that the accident happened as Claimant reported it. At hearing Marcum testified:

Q. (by Mr. Owen) Okay. Is there any doubt in your mind that this happened?

A. No, there is no doubt in my mind. I—you know.

Q. Did you know the State Insurance Fund on your behalf has denied that it happened? Did you know that, sir?

A. To be honest with you, no, I don't [sic] what they do.

Q. Do you have any facts that back that up?

A. Back what up?

Q. Their denial that this accident happened on June 11<sup>th</sup>?

A. No.

Q. Do you know of any reason that that's not true?

A. I don't see why they would beings how I filled out the report on the 11<sup>th</sup>.

Transcript, p. 188, l. 17 through p. 189, l. 7.

32. Marcum asked Claimant whether he wanted medical treatment, but Claimant indicated he would wait and see if his back improved; if his back got worse, he would need to see a doctor. Marcum did not notice any indication that Claimant was in pain thereafter; however, Marcum worked in the business office not in the yard. Marcum testified that he subsequently had several phone conversations wherein Claimant told him his back was not getting better and Claimant was going to have to see a doctor.

33. Thompson. TNT owner Tommy Thompson testified Claimant was a good employee. Thompson testified that he did not recall ever directing Claimant and Holder to lift an

engine block by hand and that would not be the normal procedure. Thompson did not recall ever seeing Claimant limping or holding his back. Thompson denied ever knowing of Claimant's alleged injury at TNT until contacted by the Surety after Claimant left his employment with TNT. Thompson admitted that although the front end loader has an enclosed cab, he is capable of shouting a message over the noise of the loader and making himself heard.

34. Moore. TNT yard supervisor Toby Moore testified that he supervised Claimant's daily activities and that Claimant was a good worker and very trustworthy. Moore trusted Claimant to drive the front end loader. Claimant was the only employee besides Moore and Thompson who was allowed to operate the loader. Moore testified that TNT employees would not be expected to lift anything heavier than a four cylinder engine or a transmission by hand. Anything heavier would be lifted with the loader. Moore estimated that a V-8 engine block would weigh from 500 to 700 pounds. He did not believe that Thompson would direct employees to lift such a block by hand. Moore confirmed that Thompson yells at his employees and is a "gruff guy to work for." Transcript, p. 227, l. 13.

35. Moore testified that June 11, 2012, was his day off and that he was not informed that Claimant suffered an injury. Moore believed he would have noticed a change in Claimant's work performance between June 11 and June 24, 2012, if Claimant had injured his back. However, Moore acknowledged that his work schedule only overlapped with Claimant's schedule on Wednesday, Friday, and Saturday, and that Moore regularly made one-half day deliveries and also occasionally made longer deliveries to Portland.

36. Credibility. Having observed Moore at hearing and compared his testimony to other evidence of record, the Referee finds that Moore is a credible witness; however, his opportunity to fully observe Claimant's physical capability after June 11, 2012, was limited.

37. Defendants note that Claimant and Holder are friends and that Holder left TNT on July 1, 2012, not on good terms. Defendants emphasize differences between Claimant's and Holder's accounts of the accident. However, whether Claimant fell to his knees while lifting the engine block from right beside the pickup bed—as Claimant testified, or whether Claimant “kind of went down” while moving the engine block from five or ten feet away to the pickup bed—as Holder testified, are insignificant differences. Similarly, while their estimates of the engine's weight varied, both agreed it was a V8. The testimony of Marcum and Holder corroborates Claimant's testimony. Having observed Marcum and Holder at hearing and compared their testimony to other evidence of record, the Referee finds that both are credible witnesses.

38. Having observed Thompson at hearing and compared his testimony to other evidence of record, the Referee finds his recollection subject to serious question.

39. Claimant's testimony is corroborated by Holder, Marcum, and by the June 12, 2012 medical records of Mike Takagi, PA-C, and a number of subsequent medical records. While some of Claimant's subsequent medical records do not mention a work accident, the reported timing of the onset of his severe symptoms is consistent with the asserted occurrence of his accident. Having observed Claimant at hearing and compared his testimony with all other evidence of record, the Referee finds that Claimant is a credible witness.

40. Claimant has proven he suffered an accident while helping lift an engine block at TNT on June 11, 2012.

41. **Causation.** The next issue is whether the condition for which Claimant seeks benefits was caused by the industrial accident. 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). Magic words are not necessary to show a doctor’s opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). A preexisting disease or infirmity of the employee does not disqualify a workers’ compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

42. Claimant herein alleges that his June 11, 2012 industrial accident caused his need for lumbar surgery. Two physicians have opined regarding the causation of Claimant’s lumbar pain and radiculopathy. Their opinions are examined below.

43. Dr. Harben. Dr. Harben is board certified in physical medicine and rehabilitation and pain management. He also has a doctorate in biomechanics from Georgia Tech. He examined Claimant on March 22, 2013. Dr. Harben interviewed Claimant for nearly an hour and reviewed Claimant’s medical records from 2007 onward. Dr. Harben was especially interested in Dr. Martin’s treatment of Claimant’s preexisting back condition. Dr. Harben reviewed both the MRIs and the MRI reports. He concurred in the radiologists’ readings of the scans. He particularly scrutinized Claimant’s medical records from March 22, 2012, May 29, 2012, and June 12, 2012.

44. Dr. Harben testified that Claimant’s normal symmetric deep tendon reflexes and ability to toe raise as documented on his March 21, 2012 examination and his June 1, 2012 examination indicate he had no significant nerve root involvement at that time. Harben Deposition, p. 51. Dr. Harben specifically testified that the June 1, 2012 examination notes

showing normal deep tendon reflexes, normal gait, and full back range of motion all suggest normal nerve roots, and only the right leg pain to the knee could be suspicious for nerve root involvement. He noted that a number of conditions, other than lumbar disc pathology, could account for right leg pain to the knee.

45. Dr. Harben considered Claimant's testimony of lifting the engine block with Holder and feeling a crunching in his back with immediate severe back pain straight down his right leg to his toes. Dr. Harben opined that these symptoms evidence a new injury with disc herniation affecting the L5-S1 nerve root. Dr. Harben testified that the July 24, 2012 lumbar MRI, showing L5-S1 right-sided disc extrusion, corresponded to Claimant's reported symptoms after his accident. Dr. Harben reviewed Dr. Tomaras' operative report and suspected that Dr. Tomaras' description of the sequestered disc fragment as a chronic fragment, likely meant more than a few days or weeks old, but Dr. Harben was unsure if Dr. Tomaras intended to classify the fragment as three months old, six months old, or older. Harben Deposition, p. 54. Dr. Tomaras performed surgery November 5, 2012—approximately five months after Claimant's June 11, 2012 accident.

46. Dr. Harben opined that lifting the engine block caused a new injury to Claimant's low back:

A. (by Dr. Harben) We have first his history, which is consistent with a significant exacerbation of his pain, even though he did have chronic low-back pain, as well as findings radiating into the right leg consistent with a radiculopathy, and MRI findings consistent with a radiculopathy, and surgical findings consistent with the same diagnosis.

Q. (by Mr. Owen) Do you think this was a new injury or, like Dr. Tomaras, do you think he aggravated a preexisting injury?

A. Well, he did have a bad back—we know that—with disk bulges at several levels and some radiation of pain down to the knee but nothing necessarily



radicular. Certainly back pain, probably some SI joint pain, but I would say the disk herniation is a new injury.

Harben Deposition, p. 38, l. 23 to p. 39, l. 13.

47. Dr. Harben testified that even assuming Claimant's symptoms in March and May of 2012 indicated an L5-S1 disk injury, the accident made Claimant worse because:

[E]verything we see here suggests he was a person with a diseased back, with chronic back pain, but a person that could actually do heavy work on a reasonably long-term basis and could do reasonably well with conservative treatment. And then he went to a person after this disk herniation that really couldn't work at all, so that's a huge change in a person that obviously worked with back pain.

Harben Deposition, p. 41, ll. 9-16.

48. Dr. Doerr. Timothy Doerr, M.D., is a board certified orthopedic surgeon. He interviewed and examined Claimant for approximately ten minutes on April 23, 2013, at Defendants' request. Dr. Doerr reviewed Claimant's medical records and concluded that Claimant's L5-S1 disc herniation predated the June 11, 2012 industrial accident.

49. In his deposition, Dr. Doerr testified that spontaneous disc herniations happen "quite frequently." Doerr Deposition, p. 14, l. 3. He testified that the changes documented on Claimant's July 24, 2012 MRI could possibly occur without specific trauma. Doerr Deposition, p. 14. Dr. Doerr testified that Claimant's exam of March 21, 2012, with diagnosis of pain in the buttock on the right with occasional radiation lateral to the knee with assessment of sciatica with radiation would be consistent with a herniated disc at L5-S1. Doerr Deposition, p. 17. Dr. Doerr testified that Claimant's exam on June 1, 2012, by Mike Takagi, PA-C, assessing low back pain with radicular symptoms, was consistent with the July 24, 2012 MRI findings. Dr. Doerr opined that Claimant's two Medrol Dosepaks, first on June 1, 2012, and then on June 5, 2012, would be first line conservative treatment measures for a compressed nerve in the lumbar spine.

50. Dr. Doerr reviewed Claimant's June 12, 2012 examination notes that recorded

antalgic gait, full range of motion in his back, deep tendon reflexes two plus bilaterally, negative straight leg raise bilaterally, and pain into his left leg. Dr. Doerr noted that Claimant's June 12 exam is comparable to his June 1 exam, except that his pain was radiating into his right leg on June 1 and into his left leg on June 12. Doerr Deposition, p. 22. Dr. Doerr testified that Claimant's June 28, 2012 exam showed low back and right leg pain. Dr. Doerr opined that Claimant's continued symptoms after his November 2012 surgery were not due to his L5-S1 disc herniation which was removed at surgery, but were consistent with his symptoms ongoing since 2007.

51. On cross-examination, Dr. Doerr agreed that there was no objective proof that Claimant had a disc herniation as of May 29, 2012:

Q. (by Mr. Owen) Would you agree with me, Dr. Doerr that as of May 29, 2012 there's no objective proof that Mr. Glickman had a disc herniation?

....

THE WITNESS (by Dr. Doerr): There were no tension signs, there were no dropped reflexes, there was no weakness, there was no numbness.

Q. There was [sic] no MRI findings?

A. There was no MRI that was completed.

Doerr Deposition, p. 56, ll. 12-21.

52. Dr. Doerr acknowledged that in formulating his opinions he was not aware that Claimant's back pain in 2007 and 2008 did not preclude him from working, even in heavy labor. Dr. Doerr was not aware that Claimant was restricted from work or strenuous exercise for a time while incarcerated in 2010 and his back symptoms resolved. Dr. Doerr was not aware that after several months of forced rest from strenuous work, Claimant began to work again in landscaping, then in wastewater equipment maintenance and repair, and then in very heavy lifting at TNT's salvage yard. Dr. Doerr was not aware that after lifting the engine block on June

11, 2012, Claimant's leg pain radiated all the way to his foot, per his report and as consistently documented in multiple medical exams post-accident. Doerr Deposition, p. 47. Dr. Doerr acknowledged that this presents a narrower differential diagnosis and could indicate a worsening of Claimant's lumbar pathology:

Q. (by Mr. Owen) Well, let's talk specifically about Mr. Glickman, then, who gave a history that before his injury he had a burning, kind of a dull sensation in his right hip with occasional pain down to his knee. And after his accident he had constant pain in his low back with constant radiating, stabbing pains all the way to his foot, does that indicate a worsening of his injury?

A. (by Dr. Doerr) It could, yes.

Doerr Deposition, p. 51, ll. 6-13. Significantly, Dr. Doerr was not aware of Dr. Tomaras' opinion, as Claimant's treating surgeon, that Claimant's accident aggravated his lumbar condition.

53. Dr. Tomaras. Dr. Tomaras, Claimant's treating surgeon, initially agreed with Dr. Doerr's report and conclusions. However when provided with Dr. Harben's report, and after reviewing Claimant's February 15, 2007 and July 24, 2012 MRIs, Dr. Tomaras concluded that Claimant's accident aggravated his preexisting condition.

54. Weighing the conflicting medical opinions. Dr. Doerr's opinion that Claimant's L5-S1 disc herniation preexisted his accident was formulated without knowledge of Claimant's level of functioning over the year or more prior to his accident. Dr. Harben's and Dr. Tomaras' opinions are more persuasive than the opinion of Dr. Doerr. Dr. Harben's opinion is consistent with the evidence, including the MRIs, Claimant's credible testimony of his immediate symptoms at the time of his accident, and Claimant's documented high level of functioning before his accident and his significant and persisting decrease in functioning after his accident. Claimant has proven that his June 11, 2012 industrial accident caused his L5-S1 disc herniation

and extrusion.

55. **Medical care.** The next issue is Claimant's entitlement to medical care. 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 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. Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and 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).

56. Claimant herein has proven that his June 11, 2012 industrial accident caused or aggravated his lumbar pathology and thus has proven his entitlement to reasonable medical care therefore. Dr. Harben opined that Claimant's care and treatment, including surgery by Dr. Tomaras, has been reasonable and appropriate. Dr. Doerr also acknowledged that surgical treatment was appropriate for Claimant's L5-S1 disc herniation. Dr. Harben testified that a spinal cord stimulator constituted reasonable and necessary medical treatment of Claimant's condition. Dr. Doerr also agreed that a spinal cord stimulator was an appropriate treatment for a patient with chronic back pain and a history of prior drug addiction, however he did not relate Claimant's need for a spinal cord stimulator to his accident. As noted above, Dr. Doerr's opinion is not persuasive as he was not aware of Claimant's high level of functioning prior to his accident. Dr. Reese's notes of February 7, 2013, indicate Claimant's need for a spinal cord

stimulator relates to his lower back pain secondary to his lumbar post-laminectomy syndrome. Claimant's Exhibit F, pp. 601-602.

57. Claimant has proven his entitlement to medical care for his L5-S1 disc herniation sustained in his June 11, 2012 industrial accident, including but not limited to surgical treatment by Dr. Tomaras and the spinal cord stimulator recommended by Dr. Reese.

58. **Temporary disability.** 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 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).

59. In the present case, Claimant has proven that his L5-S1 disc herniation was caused by his industrial accident and thus has proven his entitlement to benefits for temporary disability resulting therefrom. Dr. Harben opined that Claimant was in a period of medical

recovery from the time of his accident at least until Dr. Harben examined Claimant on March 22, 2013. The record establishes that Claimant has been in a period of recovery since leaving employment with TNT on June 24, 2012, through the time of his surgery by Dr. Tomaras on November 5, 2012, and continuing through the time of the hearing when he was preparing for spinal cord stimulator implantation.

60. The record does not establish that TNT made a reasonable and legitimate offer of employment to Claimant which he was capable of performing within the terms of his work restrictions and which employment was likely to continue throughout his period of recovery. Similarly, the record does not establish that suitable light-duty work was available to Claimant in the open labor market during this time. Pursuant to Idaho Code § 72-408 and Malueg, Claimant is entitled to temporary disability benefits during his period of recovery.

61. Claimant has proven he is entitled to temporary total disability benefits from June 25, 2012, through the date of hearing.

#### **CONCLUSIONS OF LAW**

1. Claimant has proven he suffered an industrial accident while helping lift an engine block at TNT on June 11, 2012.

2. Claimant has proven his industrial accident caused his L5-S1 lumbar disc herniation and extrusion.

3. Claimant has proven his entitlement to reasonable medical care for his L5-S1 disc herniation sustained in his June 11, 2012 industrial accident, including but not limited to surgical treatment by Dr. Tomaras and the spinal cord stimulator recommended by Dr. Reese.

4. Claimant has proven he is entitled to temporary total disability benefits from June 25, 2012, through the date of hearing.

## RECOMMENDATION

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

DATED this 20<sup>th</sup> day of December, 2013.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of January, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD OWEN  
PO BOX 278  
NAMPA ID 83653

BRIDGET VAUGHAN  
1311 N 25<sup>TH</sup> ST  
BOISE ID 83702-2320

mg

  /s/  \_\_\_\_\_



**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JEFF GLICKMAN,

Claimant,

v.

TNT INSURED TOWING, LLC,

Employer,

and

STATE INSURANCE FUND,

Surety,  
Defendants.

**IC 2012-020021**

**ORDER**

**1/7/2014**

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Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has proven he suffered an industrial accident while helping lift an engine block at TNT on June 11, 2012.
2. Claimant has proven his industrial accident caused his L5-S1 lumbar disc herniation and extrusion.
3. Claimant has proven his entitlement to reasonable medical care for his L5-S1 disc herniation sustained in his June 11, 2012 industrial accident, including but not limited to surgical treatment by Dr. Tomaras and the spinal cord stimulator recommended by Dr. Reese.

4. Claimant has proven he is entitled to temporary total disability benefits from June 25, 2012, through the date of hearing.

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

DATED this 7<sup>th</sup> day of January, 2014.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Thomas P. Baskin, Chairman

/s/ \_\_\_\_\_  
R.D. Maynard, Commissioner

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of January, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

RICHARD OWEN  
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/s/ \_\_\_\_\_