BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES GOLDBERG, Claimant, v. WESTERN CONTAINER, dba LONGVIEW FIBRE PAPER AND PACKAGING, INC., Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2012-029521** **IC 2012-007538** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED AUGUST 13, 2015

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 Twin Falls, Idaho on December 17, 2014. Claimant, Charles Goldberg, was present in person and represented by John F. Greenfield, of Boise, Idaho. Defendant Employer, Western Container, dba Longview Fibre Paper and Packaging, Inc., (Longview), and Defendant Surety, Old Republic Insurance Co., were represented by Lora Rainey Breen, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 8, 2015.

ISSUES

The issues to be addressed are:

1. Whether Claimant suffered an injury from one or more accidents arising out of and in the course of employment;

2. Whether the condition for which Claimant seeks benefits was caused by one or more industrial accidents;
3. Claimant's entitlement to additional medical benefits; and
4. Claimant's entitlement to temporary disability benefits.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant fell while working for Longview on January 4, 2012, and on March 1, 2012. Claimant asserts that his falls caused his need for T12-L2 fusion on April 12, 2012. He requests medical and temporary disability benefits related to that surgery. Defendants contend that Claimant's fusion was not related to his falls but solely related to his pre-existing condition and prior back surgeries. Additionally, Defendants assert Claimant's T12-L2 fusion was not reasonable and necessary medical care. They deny responsibility for medical or temporary disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits 1-13, admitted at the hearing;
3. The pre-hearing deposition testimony of Claimant taken April 24, 2013, and admitted at the hearing;
4. The testimony of Claimant and Ryan Vermilyea taken at the December 17, 2014 hearing;
5. The post-hearing deposition testimony of David Christensen, M.D., taken by Claimant on January 9, 2015; and

6. The post-hearing deposition testimony of Paul Joseph Montalbano, M.D., taken by Defendants on January 28, 2015.

All objections made 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 1955. He is right-handed. He was 59 years old and lived in Wendell at the time of the hearing.

2. Longview is an industrial manufacturer of cardboard containers and packaging materials. It employs more than 100 people at its plant in Twin Falls.

3. **Background**. In 1973 Claimant graduated from high school in Lakeside, California. He joined the U.S. Air Force and served from 1975 until 1995. He worked as a security policeman and as a security controller before retraining and working in mainframe computer repair. After his honorable discharge, Claimant worked for the U.S. Postal Service from 1996 until 2000. In 2000, he moved to Wendell and over the course of several months worked for a trucking business, home improvement supplier, and cold storage business.

4. In October 2000, Claimant started working at Longview as a maintenance mechanic. His duties included repairing all broken equipment from fork lifts to large finishing equipment. His primary responsibility became greasing and oiling very large machinery. Claimant was the only "oiler" at the plant. Most grease and oil was delivered in 55 gallon drums. He was required to transfer 55 gallon barrels of oil, carry 5 gallon buckets of oil to machinery, and walk, climb, bend, and lift 50 pounds regularly. Claimant liked his job and the

people he worked with. By January 2012 he was earning $20.70 per hour. Additionally, Longview provided health insurance.

5. **Significant prior medical history**. Claimant received a 30% service-related disability for chronic migraine headaches that commenced in approximately 1977 while in the Air Force. He continued experiencing migraines regularly through the time of hearing.

6. In 1999, Claimant underwent C6-7 fusion surgery after gradual onset of cervical symptoms. He received chiropractic laser therapy post-surgery and recovered without restrictions.

7. In approximately 2001, Claimant sustained a severe left foot crush and degloving injury while working at Longview. He underwent approximately ten foot surgeries. Claimant was off work and received temporary disability benefits for 37 weeks. The permanent impairment of his left foot was eventually rated at 13% of the whole person. In 2003, Claimant settled his workers' compensation claim with Longview arising from his foot injury.

8. After his 2001 foot injury, Claimant began noticing recurring mild low back pain.

9. On June 22, 2004, Claimant fell asleep while riding his motorcycle home after working a rotating graveyard shift at Longview. He suffered a serious accident in which he broke his left wrist and fractured his spine at T7. He was taken via LifeFlight to Boise and was placed in a body cast for approximately six months. Claimant recovered completely from the spinal fracture and eventually returned to work without restrictions. His left wrist fracture healed improperly and Claimant noted ongoing discomfort and difficulty turning his wrist. He compensated by using his right wrist for most tasks and continued to work.

10. In 2008 and 2009 Claimant's low back became increasingly painful. He could not identify any specific precipitating event but believed prolonged standing on concrete floors at Longview contributed to his increasing back pain.

11. On January 19, 2009, Claimant presented to David Christensen, M.D., reporting pain in his lower back and extending down his right leg to the knee for the prior six months. Diagnostic testing revealed diminished L2 and L3 dermatomal sensation. A lumbar MRI was interpreted as showing right L2-3 disk bulge impinging on the right lateral recess, and right L3-4 far lateral disk herniation impinging on the exiting right L3 nerve root.

12. On February 6, 2010, Dr. Christensen performed minimally invasive right L1-2 microdiskectomy and decompression, and minimally invasive right L2-3 and L3-4 far lateral diskectomy and decompression. He noted that the MRI reading was originally miscounted at L2-3, and the right-sided disc herniation surgically addressed was actually at L1-2. By February 23, 2010, Claimant's condition was improved. He returned to full work duties at Longview within approximately one month.

13. On November 19, 2010, Claimant presented to Dr. Christensen's assistant, Brian Tureman, P.A., complaining of pain in his right hip and groin which had started in approximately June and progressively worsened. Diagnostic testing demonstrated diminished L2, L3, and L4 dermatomal sensation. On November 30, 2010, Claimant underwent a second lumbar MRI that revealed broad-based disc bulges at L2-3, L3-4, and L4-5.

14. On December 10, 2010, Claimant reported his right leg pain was extending down to his ankle. He denied any specific precipitating injury. By May 6, 2011, Claimant was reporting increased back pain, with pain radiating into both hips and all the way down to his ankles bilaterally. On May 26, 2011, Claimant underwent a third lumbar MRI that revealed a

new right L2-3 disk herniation causing compression, and L3-4 broad based disc bulge causing bilateral stenosis. On May 31, 2011, Claimant reported significant weakness in his right leg which had progressively worsened over the prior several weeks causing difficulty going up or down stairs. Claimant underwent several epidural steroid injections without significant benefit. On August 31, 2011, Claimant reported continued low back and right leg pain, and that his right leg had been giving out and he had been falling.

15. On October 13, 2011, Dr. Christensen performed L2-3 and L3-4 decompression and fusion with instrumentation. Claimant noted significant improvement after this surgery and when examined on December 21, 2011, was anxious to return to work. He was released to return to work January 3, 2012.

16. On January 3, 2012, Claimant returned to full-duty work at Longview. He was six feet three inches tall and weighed approximately 230 pounds. Claimant performed his usual duties and completed his full eight-hour shift that day without difficulty. He felt capable of performing whatever was needed at work.

17. Claimant continued to have migraine headaches approximately a dozen times each month. Longview approved 12 weeks per year of FMLA for his migraines and Claimant usually used all of this allotted leave each year.

18. **January 4, 2012 industrial accident.** On January 4, 2012, Claimant reported to work at Longview at 6:00 a.m. He performed his regular duties without difficulty until, at approximately 1:00 p.m., he was working near the corrugator machine and saw oil spewing from a high pressure hose. Responding to the urgent situation, Claimant walked briskly toward the spewing oil hose and slipped on the oily floor near the machine. His feet went up in the air and he landed hard on his buttocks and rolled onto his back on the concrete floor. A supervisor,

Ryan Vermilyea, was nearby and saw Claimant fall. Vermilyea immediately approached Claimant and asked if he was all right. Claimant responded that he was all right and regained his feet without undue delay. However, Vermilyea was sufficiently concerned that he reported Claimant's fall to his lead man, Alan Peters, telling Peters that Claimant had "taken a pretty good fall" but said he was all right. Transcript, p. 78, l. 15. Peters was aware of Claimant's prior back surgery, approached Claimant, and specifically asked whether he was all right and if he needed to go to the hospital. Claimant responded that he was all right and did not need to go to the hospital.

19. At hearing, Claimant testified he landed hard, noted immediate back pain, and was concerned about his well-being. However, he was also concerned about retaining his job at Longview. He was concerned because he had already been away from work for three months for his October 2011 L2-4 fusion. He did not want to report an accident after just one day back at work. Claimant hoped his back pain would resolve without further medical care and he already had an appointment scheduled for February 29, 2012, with his back surgeon, Dr. Christensen, for a final evaluation of his previous lumbar fusion. Therefore Claimant declined the offer to go immediately to the hospital. He continued to work his usual duties at Longview. Claimant testified that after his January 4, 2012 fall, his low back pain became progressively worse until he could hardly tolerate walking.

20. On February 29, 2012, Claimant presented to Dr. Christensen's office but was only examined by his assistant, Brian Tureman, P.A. Claimant reported that his left leg was going numb and his legs felt like they were going to give out. Tureman noted increased right and left leg weakness and recorded that Claimant thought "he may have twisted wrong this past week at work and was in a lot of pain." Exhibit 7, p. 60.

21. **March 1, 2012 industrial accident.** On March 1, 2012, Claimant arrived at the Longview plant at 5:30 a.m. to begin his work shift. Longview's parking lot was icy and Claimant twisted his right ankle and fell onto his back while attempting to walk across the lot. Claimant required assistance from a co-worker to regain his feet. Claimant worked for two hours and then had to go home because his ankle, back, and head were aching. Claimant has not returned to work since that time. His ankle injury resolved, but his back pain worsened. Claimant testified that after his March 1, 2012 fall, his back pain progressed to where "Most places I crawled, or I had to be on crutches or a cane, whatever. There was no way of just getting up to walk." Claimant's Deposition, p. 177, ll. 5-7.

22. On March 14, 2012, Claimant underwent another lumbar MRI. On March 15, 2012, Claimant presented to Dr. Christensen and reported his January 4, and March 1, 2012 falls at work. Claimant also reported increased lower back pain, right thigh numbness, left leg pain and daily spasms in both legs. Dr. Christensen concluded that Claimant's falls contributed to his increased back symptoms.

23. On April 6, 2012, Dr. Christensen reviewed the lumbar MRI with Claimant. Claimant's pre-existing L2-4 fusion survived the falls intact. However, Dr. Christensen concluded Claimant had sustained L1-2 damage warranting surgical intervention. After further evaluation, Dr. Christensen concluded that given Claimant's pre-existing L2-4 fusion, fusion of L1-2 would accelerate wear at T12-L1 and require additional surgery at that level within a year. Therefore, Dr. Christensen recommended, and Claimant agreed, to a two level fusion. On April 12, 2012, Dr. Christensen performed a T12-L2 fusion. After recovering from surgery, Claimant's back pain was lessened and he was able to walk. Claimant's Deposition, p. 178.

24. On April 2, 2013, Dr. Christensen declared Claimant medically stable and permanently restricted him to lifting no more than 25 pounds. Exhibit 7, p. 95.

25. **Condition at the time of hearing.** At the time of hearing Claimant continued to have low back and leg pain, the right leg more than the left. His right leg also tended to spasm and give out. He noted some spasms in his left leg.

26. **Credibility.** The record repeatedly demonstrates that Claimant has a strong work ethic and desired to continue working. He hoped that his back pain after the January 4, 2012 fall would resolve. Only when his back worsened after his January 4 and March 1, 2012 falls and his March 14, 2012 lumbar MRI disclosed L1-2 pathology prompting surgical consultation did he assert his present claims.

27. Having observed Claimant and Mr. Vermilyea at hearing and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

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

29. **Causation and additional medical benefits.** The first three issues presented are interrelated and address whether Claimant's January and March 2012 falls while working at Longview caused injury resulting in the need for T12-L2 fusion surgery. It is well settled that "An employee's employer and surety are only liable for medical expenses incurred as a result of

'an injury' (i.e. an employment related accident). I.C. § 72-432(1). An employer cannot be held liable for medical expenses unrelated to any on-the-job accident." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). A claimant must provide medical testimony that supports his 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only 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).

30. In the present case, Drs. Knoebel, Montalbano, and Christensen have each addressed the relationship between Claimant's 2012 falls and his T12-L2 fusion. These physicians' opinions are examined below.

31. *Dr. Knoebel*. Richard Knoebel, M.D., examined Claimant on June 7, 2012, at Defendants' request. Dr. Knoebel diagnosed pre-existing chronic low back pain with prior lumbar surgeries, including fusion, and continued degenerative changes of the low back with subsequent fusion, all non-industrial. He opined that Claimant's 2012 falls at Longview produced no new injury; rather, the need for L1-2 surgery pre-existed his falls. Dr. Knoebel wrote:

> The claimant subsequently went on to have treatment for degenerative changes above his prior fusion level, but with extension 2 levels above the fusion, not just the adjacent level. He had decompression of degenerative changes at L1/2, but a fusion from T12—L2. It is noted that the indications for this fusion surgery, degenerative findings, were present on diagnostic studies already 5/11. There was no evidence of aggravation of this pre-existing degenerative change on an industrial basis.

Exhibit 9, p. 11.

32. *Dr. Montalbano.* Paul Montalbano, M.D., reviewed Claimant's medical records and diagnostic films at Defendants' request. He concluded Claimant's T12-L2 fusion was not related to his industrial accidents. Additionally, Dr. Montalbano opined that Claimant's T12-L2 fusion was not medically necessary. Dr. Montalbano based his opinion largely upon his reading of the May 26, 2011 and March 14, 2012 MRI films which he testified he compared side by side and were identical at L1-2. He opined there was no MRI evidence of worsening or narrowing and thus no difference before or after Claimant's 2012 falls. Dr. Montalbano concluded that, if anything, Claimant experienced only a temporary lumbar strain due to his falls at Longview.

33. *Dr. Christensen.* Dr. Christensen, who performed all three of Claimant's spinal surgeries, opined that Claimant's 2012 industrial accidents caused his need for T12-L2 fusion surgery. Dr. Christensen opined that Claimant's January 4 and March 1, 2012 falls both contributed to his increased back symptoms and as between the two falls, the former was the more likely cause. Brian Tureman's notes of March 15, 2012 recorded that Claimant: "had a fall at work on January 4, 2012 and also had another fall 3/1/12 also at work. Steadily his symptoms have gotten worse since the fall in January and significantly worse since his fall a couple of weeks ago. He complains of more weakness especially in the right leg, difficulty ambulating, and numbness." Exhibit 7, p. 63. Dr. Christensen's notes of March 15, 2012, also documented Claimant's increased lumbar pain and weakness in walking, and observed:

> MRI of the lumbar spine shows the patient to be status post L2-L4 decompression and fusion. The adjacent L1-2 level shows retrolisthesis with broad-based disk bulge causing stenosis bilateral lateral recess and centrally.
> ….
>
> Significant increase in numbness and weakness since January with MRI demonstrating L1-2 stenosis as outlined above. Based on the patient's progress as documented postoperatively up to December 21, 2011 I believe within a reasonable degree of probability that the fall in January could be considered a

> likely cause for his increase in symptoms. The fall a couple of weeks ago I'm sure has also contributed.

Exhibit 7, p. 65.

34. Dr. Christensen explained that Claimant's clinical examination in March 2012 showed evidence of new damage resulting from his falls—specifically reduced hip flexion strength, quadriceps weakness, and diminished sensation in the L1 distribution radiating over the hip to the groin and upper thigh below the groin. Dr. Christensen explained that Claimant had similar symptoms prior to his first surgery. However, these symptoms resolved after surgery, but then returned after Claimant's 2012 falls, thus necessitating further surgical treatment. Dr. Christensen testified he considered Claimant's increased hip and groin pain, right thigh numbness, and quadriceps weakness, together with the March 2012 MRI report suggesting possible impingement of the L2 nerve root and concluded:

> It tells us that there was a new injury. And based on our assessment, looking at the MRI where we saw no changes where he had a previous L2 to L4 fusion, knowing that all of these nerves at the L1/2 level and below pass L1/2, it appeared to us that that was the most likely cause of the new neurologic symptoms.

Christensen Deposition, p. 44, ll. 14-19.

35. In addition to clinical changes, Dr. Christensen also testified of changes between the lumbar MRIs from May 2011 and March 2012: "The difference here, there's also asymmetric left-sided facet hypertrophy, which effaces the left lateral recess." Christensen Deposition, p. 28, ll. 1-3. He noted the relative significance of diagnostic imaging and clinical examination: "We don't operate on MRIs. We operate on people. So a lot of our judgment, when it goes into surgery, is based on our clinical exam. It's correlated with imaging." Christensen Deposition, p. 28, ll. 9-12.

36. *Weighing the medical opinions.* Dr. Knoebel opined that Claimant needed T12-L2 surgery even before his 2012 falls. In contrast, Dr. Montalbano opined Claimant did not need T12-L2 surgery before or after his falls. Finally, Dr. Christensen testified Claimant needed T12-L2 fusion surgery after and because of his falls.

37. Dr. Knoebel initially summarized Claimant's January 4, 2012 fall thus: "He reports he then had a slip and fall on some oil at work on 1/4/12. He did continue working despite this, however. He reports increased back pain from the fall." Exhibit 9, pp. 3-4. Significantly, Dr. Knoebel subsequently incorrectly recorded: "claimant subsequently reported a fall at work 1/4/12 which was not reported in any timely manner." As previously noted, Claimant's January 4, 2012 fall was witnessed and documented by a Longview supervisor. Dr. Knoebel concluded:

> The claimant did note to Dr. Christensen a twisting at work on or about 1/4/12. A twisting at work is consistent with activities at work equivalent to activities of daily living. There was no extraordinary event, accident or injury. This did not reasonably represents [sic] an aggravation of the claimant's pre-existing and ongoing lumbar condition."

Exhibit 9, p. 10. Dr. Knoebel's opinion appears to confuse the nature of Claimant's January 4, 2012 industrial accident.

38. In direct response to Dr. Knoebel's opinion that indications for Claimant's T12-L2 fusion were present in May 2011, Dr. Christensen testified that had there been indication for L1-2 fusion at the time he performed Claimant's L2-4 fusion in October 2011; Dr. Christensen would have surgically addressed it at that time. It is noteworthy that when faced with Claimant's increasing back complaints after his falls in early 2012, Dr. Christensen recommended a two-level fusion because he anticipated Claimant would need fusion at T12-L1 within 12 months of fusion at L1-2.

39. Dr. Montalbano opined that Claimant's T12-L2 fusion was not related to his 2012 falls. Defendants maintain that Claimant's back pain became progressively worse after his 2011 surgery and assert this establishes that his symptoms were due to chronic degenerative processes, thus any need for surgery in 2012 was due to the progression of his pre-existing lumbar condition.

40. The record establishes that Dr. Montalbano did not examine Claimant at any time, had no personal opportunity to correlate MRI findings with clinical observations, and did not know any particulars of the mechanism of Claimant's injuries. Dr. Montalbano was not aware of how Claimant fell in January or March 2012, how he landed, or what he landed on. However, Dr. Montalbano admitted that Claimant went "from a normal exam a month prior to a fall and then an abnormal exam." Montalbano Deposition, p. 40, ll. 19-20.

41. Claimant correctly asserts that Dr. Christensen noted after Claimant's second surgery his back condition was steadily improving—not declining—until his fall on January 4, 2012. Furthermore, in contrast to Dr. Montalbano's opinion that Claimant's falls caused no changes on MRIs, the radiologists reading the 2011 and 2012 MRIs described differences. Robert Wasserstrom, M.D., interpreted Claimant's May 26, 2011 lumbar MRI thus: "L1—L2: There are changes of moderately severe degenerative disk disease with disk space narrowing osteophyte formation and annular bulging. This causes a mild degree of central canal stenosis. There is no significant neural foraminal stenosis." Exhibit 12, p. 6. Joshua Hall, M.D., interpreted Claimant's March 14, 2012 lumbar MRI thus:

> L1/L2: Focal kyphosis as described above with posterior disk osteophyte formation causing mild central canal stenosis. Asymmetric left-sided facet hypertrophy effaces the left lateral recess best seen on axial T2 image number 7 of series 8 and sagittal T2 images 5 and 6 of series 4. There is questionable impingement of the transiting left L2 nerve root. Please correlate clinically for radiculopathy.

No significant foraminal stenosis involving either exiting L1 nerve root.

Exhibit 12, p. 14 (emphasis supplied). Dr. Christensen physically examined Claimant and recorded differences that clinically confirmed changes after the 2012 falls.

42. Dr. Christensen's opinion relating Claimant's T12-L2 fusion to his 2012 falls at Longview is the most supported by the evidence as a whole and the most persuasive. Claimant has proven that his need for T12-L2 fusion surgery was related to his industrial accidents.

43. Reasonable medical treatment. Defendants alternatively assert, based upon Dr. Montalbano's opinion, that Claimant's T12-L2 fusion was not reasonable and necessary medical treatment under Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 720, 779 P.2d 395, 395 (1989) overruled by Chavez v. Stokes, No. 42589, 2015 WL 4086935 (Idaho July 7, 2015), because Claimant was not improved thereby. However, after Defendants filed their brief and the instant case came under advisement, Sprague, upon which Defendants relied, was overruled. In Chavez v. Stokes, No. 42589, 2015 WL 4086935 (Idaho July 7, 2015), the Idaho Supreme Court stated:

> After careful review, however, we conclude that any indication in our prior cases that the three factors from Sprague were the sole means to determine reasonableness was an unsound reading of that opinion. In fact, we overrule Sprague to the extent that it stands for the adoption of a specific test for the reasonableness of medical treatment under Idaho Code section 72–432(1). We also overrule Sprague's holding that the reasonableness of medical treatment is a question of law. This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72–432(1) is a question of fact to be supported by substantial and competent evidence.
> ….
>
> [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. …. We also caution against a

> retrospective analysis, which relies on the benefit of hindsight. That kind of analysis would serve only to second-guess the treatment requirement of the physician without a fair consideration of the information known at the time and place of treatment and any exigent circumstances.

Chavez v. Stokes, No. 42589, 2015 WL 4086935, at 5-6 (Idaho July 7, 2015)

44. Dr. Christensen's notes reflect Claimant's difficulty ambulating shortly prior to his T12-L2 fusion. Claimant credibly testified that he could hardly walk before his T12-L2 fusion. He was able to walk afterward—an improvement that would have weighed heavily under the Sprague test. Claimant's surgeon, Dr. Christensen, who had performed his two prior spinal surgeries, recommended and performed the T12-L2 fusion and Claimant was improved thereby. Considering the totality of the circumstances, Claimant's T12-L2 fusion constituted reasonable medical treatment pursuant to Idaho Code § 72-432.

45. Claimant has proven Defendants are liable for additional medical benefits, including Claimant's T12-L2 fusion surgery and associated medical expenses.

46. **Temporary disability benefits.** The final issue is Defendants' liability for temporary disability benefits. 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).

47. In the present case, Claimant has proven that his need for T12-L2 fusion was caused by his industrial accidents and thus has proven his entitlement to benefits for temporary disability resulting therefrom. He requests temporary disability benefits from March 15, 2012, through April 2, 2013.

48. The record establishes that Claimant ceased working on March 1, 2012, approximately two hours after his fall that morning. Dr. Christensen first examined Claimant after his January 4, and March 1, 2012 falls on March 15, 2012. Claimant underwent T12-L2 fusion on April 12, 2012, and was in the period of recovery until April 2, 2013, when Dr. Christensen declared Claimant's condition medically stable. The record does not establish that Longview 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.

49. Claimant has proven Defendants are liable for temporary disability benefits during his period of recovery from March 15, 2012, through April 2, 2013.

CONCLUSIONS OF LAW

1. Claimant has proven that his need for T12-L2 fusion surgery was related to his industrial accidents and constituted reasonable medical treatment for his industrial accidents.

2. Claimant has proven Defendants are liable for additional medical benefits, including Claimant's T12-L2 fusion surgery and associated medical expenses.

3. Claimant has proven Defendants are liable for temporary disability benefits during his period of recovery from March 15, 2012, through April 2, 2013.

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 __27____ day of July, 2015.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13____ day of __August_____, 2015, 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:

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sc __/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES GOLDBERG, Claimant, v. WESTERN CONTAINER, dba LONGVIEW FIBRE PAPER AND PACKAGING, INC., Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2012-029521** **IC 2012-007538** **ORDER** FILED AUGUST 13, 2015

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 that his need for T12-L2 fusion surgery was related to his industrial accidents and constituted reasonable medical treatment for his industrial accidents.

2. Claimant has proven Defendants are liable for additional medical benefits, including Claimant's T12-L2 fusion surgery and associated medical expenses.

3. Claimant has proven Defendants are liable for temporary disability benefits during his period of recovery from March 15, 2012, through April 2, 2013.

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

DATED this __13____ day of _August_____, 2015.

INDUSTRIAL COMMISSION

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

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

Commissioner Thomas P. Baskin Dissenting

1. For the reasons set forth below, I respectfully dissent. Both Drs. Christensen and Motalbano have testified that in making an informed decision about whether or not surgery is warranted in a case of low back pain with suspected radiculopathy, it is critical to correlate clinical impressions with objective diagnostic studies. In this regard, Dr. Christensen testified:

> A. We don't operate on MRIs. We operate on people. So a lot of our judgment, when it goes into surgery, is based on our clinical exam. It's correlated with imaging.
>
> Christensen Deposition, 28/9-12.

Similarly, Dr. Motalbano testified:

> A. And that is my point going back to even 2011. Although we like to operate, like Dr. Christensen said, on patients and not MRIs, it's actually a combination of both of those instances. You need a clinical examination that correlates with an MRI scan.
>
> And when that correlation matches, the patient is a good candidate for surgery, if they fail conservative measures.
>
> Montalbano Deposition, 17/5-13.

Dr. Christensen testified that Claimant's clinical presentation changed following the January 4, 2012 accident. Indeed, a careful review of Dr. Christensen's notes generated before and after the subject accidents seems to confirm this. Per Dr. Christensen, Claimant's findings on exam starting in February 2012 were consistent with neurological compromise at the L1-2 level, on the right. The most Dr. Montalbano would acknowledge was that Dr. Christensen's findings on exam could be consistent with damage at L1-2, but other explanations could as well be entertained. At any rate, both physicians acknowledged that before making any determination to operate on Claimant, Claimant's clinical presentation on exam must be correlated with the MRI studies in order to ascertain, with better confidence, whether or not Claimant has a surgically amenable lesion that is responsible for causing his symptoms.

2. The parties, and the Referee, recognize the importance of ascertaining whether or not there is objective physical evidence which correlates with Claimant's clinical presentation and supports the decision to fuse Claimant at T12 through L2. More specifically, the parties recognize the importance of ascertaining whether or not the subject accidents are responsible for causing some additional injury at L1-2 such that the need for surgical treatment can fairly be said to be related to one or both of those accidents. The parties and the Referee addressed this question by considering and comparing MRI and radiological studies performed both before and

after January 4, 2012. The dispute actually centers on the MRI studies alone, since there does not appear to be any dispute that the plain films demonstrate the same degree of retrolisthesis of L1 on L2 both before and after January 4, 2012. Christensen Deposition, 35/11-36/9; Joint Hearing Exhibits 7-62. There are two MRIs at issue. The first was performed on May 26, 2011, and interpreted by Robert Wasserstrom, M.D. The second was performed on March 14, 2012, and interpreted by Joshua E. Hall, M.D. Significantly, the March 14, 2012 exam was not compared by Dr. Hall against the prior MRI.

3. Dr. Wasserstrom had the following to say about the L1-2 level in connection with the 2011 study:

> L1 - - L2: There are changes of moderately severe degenerative disk disease with disk space narrowing osteophyte formation and annular bulging. This causes a mild degree of central canal stenosis. There is no significant neural foraminal stenosis.
>
> . . .
>
> DEGENERATIVE DISK DISEASE IS ALSO SEEN TO CAUSE MILD STENOSIS AT L1-2 AND L3-4

Joint Hearing Exhibit 12/6-7.

Reviewing the 2012 study Dr. Hall offered the following interpretation of the L1-2 level:

> ALIGNMENT: Mild focal kyphosis at L1/L2. No significant curvature on coronal plane sequences.
>
> . . .
>
> L1/L2: Focal kyphosis as described above with posterior disk osteophyte formation causing mild central canal stenosis. Asymmetric left-sided facet hypertrophy effaces the left lateral recess best seen on axial T2 image number 7 of series 8 and sagittal T2 images 5 and 6 of series 4. There is questionable impingement of the transiting left L2 nerve root. Please correlate clinically for radiculopathy.
>
> . . .
>
> ADVANCED DEGENERATIVE DISK DISEASE ABOVE THE LEVEL OF FUSIONS AT L1/L2 WITH MILD FOCAL KYPHOSIS. NO EVIDENCE OF FRACTURE.

> CENTRAL CANAL STENOSIS IS MILD AT L1/L2 HOWEVER ASYMMETRIC LEFT-SIDED FACET HYPERTROPHY EFFACES THE LEFT LATERAL RECESS. PLEASE CORRELATE CLINICALLY FOR POTENTIAL LEFT L2 RADICULOPATHY.

Joint Hearing Exhibit 12/14-15

4. Although the Referee did not compare the films, he did compare the radiologists' interpretations of those studies and offered the following comments on those interpretations:

> Claimant correctly asserts that Dr. Christensen noted after Claimant's second surgery his back condition was steadily improving—not declining—until his fall on January 4, 2012. Furthermore, in contrast to Dr. Montalbano's opinion that Claimant's falls caused no changes on MRIs, the radiologists reading the 2011 and 2012 MRIs described differences. Robert Wasserstrom, M.D., interpreted Claimant's May 26, 2011 lumbar MRI thus: "L1—L2: There are changes of moderately severe degenerative disk disease with disk space narrowing osteophyte formation and annular bulging. This causes a mild degree of central canal stenosis. There is no significant neural foraminal stenosis." Exhibit 12, p. 6. Joshua Hall, M.D., interpreted Claimant's March 14, 2012 lumbar MRI thus:
>
> > L1/L2: Focal kyphosis as described above with posterior disk osteophyte formation causing mild central canal stenosis. Asymmetric left-sided facet hypertrophy effaces the left lateral recess best seen on axial T2 image number 7 of series 8 and sagittal T2 images 5 and 6 of series 4. There is questionable impingement of the transiting left L2 nerve root. Please correlate clinically for radiculopathy.
> >
> > No significant foraminal stenosis involving either exiting L1 nerve root.
>
> Exhibit 12, p. 14 (emphasis supplied). Dr. Christensen physically examined Claimant and recorded differences that clinically confirmed changes after the 2012 falls.

Referee's Decision, paragraph 41. (Emphasis supplied.)

I believe that the Referee's comparison of the interpretations authored by two different radiologists is problematic in this context. In concluding that the MRI studies demonstrate an interval change or worsening at L1-2, Referee Taylor has not relied on the primary source

material, i.e. the actual films, but rather, interpretations prepared by the radiologists who, themselves, reviewed the films. Referee Taylor concludes that Dr. Hall read the 2012 study as demonstrating a problem that was not extant, or was not as bad, on the 2011 study. Referee Taylor necessarily reaches this conclusion because it appears (to him) that Dr. Wasserstrom saw and described a different condition than that seen and observed by Dr. Hall in his review of the 2012 study.

5. However, it is not clear to me that when Dr. Wasserstrom described "no significant neural foraminal stenosis" when reading the 2011 study, this represents something different than the "questionable impingement of the transiting left L2 nerve root . . . no significant foraminal stenosis involving either existing L1 nerve root", described by Dr. Hall when reviewing the 2012 study. Might these physicians simply be describing the same thing within the bounds of whatever poetic license is given to radiologists to describe what they see?

6. If one of the radiologists said "white" and the other "black," I would agree that it is within the province of the Referee to conclude that the reports prove that there was an interval change between the studies. However, where one radiologist says "white' and the other says "eggshell," it may be a bridge too far to conclude that the radiologists saw different things in the studies. In such circumstances it is better to rely on expert comparison of the films to understand whether there has been an interval change.

7. Therefore, what we must ultimately refer to in this case are the opinions of the physicians who have had the opportunity to review the films, or at least the radiologists' readings of the two MRI studies at issue. Dr. Montalbano testified that he reviewed the actual films of the May 26, 2011 and March 14, 2012 studies. He testified as follows concerning his method and his opinion:

Q. (Ms. Breen) And so that will be our focus here today as well, is focusing on the L1-2, but if you do have comments regarding other levels, feel free to add them if you think they are helpful.

All right. So we're looking at the MRI scans. I'd like to look at those first that are referenced in your report. And I'm going to focus on two of them because you discuss them in your conclusion.

The first is the MRI scan, lumbar spine, dated May 26th, 2011. And that is a pre-injury or pre-date of injury MRI scan. Then we also have a post-date of injury MRI scan that's dated March 14th, 2012.

And you reviewed both of those scans personally, did you not?

A. Correct.

Q. And with respect to the L1-2 level, lets look at the first one.

What did the MRI scan show?

A. It showed postop changes at L1-2.

Mr. Greenfield: What date are you talking about?

Ms. Breen: We're talking about May 26th, 2011.

Mr. Greenfield: That's the third MRI?

Ms. Breen: Well, it's the third MRI, but it's the most recent prior to the dates of injury.

Q. (Ms. Breen): All right. Go ahead, Doctor. I'm sorry.

A. So the MRI of the lumbar spine, with and without contrast, on May 26th, 2011, demonstrated postoperative changes on the right at L1-2, L2-3, and L3-4 where the patient previously underwent decompression/microdiscectomies at those levels.

At the level of L1-2, there are significant degenerative issues. There is evidence of significant facet arthropathy at that level, as well as a broadbased disc bulge.

Q. And that's all stemming from your review of the May 26th, 2011 MRI?

A. Correct.

Q. Then I'd like you to then address the MRI scan dated March 14th, 2012, which is after the alleged dates of injury in this matter.

A. Correct.

Q. What did that show?

A. So with the follow-up MRI scan, there was an interval surgery in October of 2011 where the patient underwent an L2 to L4 decompression fusion instrumentation. But most significantly the level at L1-2 on the MRI of 3/14/2012 is identical to the L1-2 interspace on the May 26th, 2011 MRI. So L1-2 is the same from May of 2011 to March of 2012.

There is no evidence of worsening narrowing. There is no evidence of a worsening disc issue. There is no evidence of disc fracture or ligament instability.

Q. Okay. So that is consistent then with the opinion that you have indicated in your report, that there is no interval change between those two MRI scans as related to the L1-2 level?

A. Correct.

Q. And let me ask you this: How did you compare those scans when you looked at them? Were they side by side?

A. Based on the scans that were brought to me on the CD, it's a DR system, and you could actually pull up the MRIs and look at them on the same screen side by side.

Q. And so you weren't having to go from screen to screen to try to compare it that way? They were sitting right next to each other; correct?

A. Correct.

Q. And let's focus again on the MRI scan of March 14th, 2012.

You address this in your report, but I'll ask it right to you here.

Is there any evidence of traumatic injury to the lumbar spine in general and in particular to the L1-2?

A. No, there is not.

Q. So the issues you see on that MRI scan, would you say they relate to his pre-existing condition then?

A. Yes.

Q. Would you say that they relate to his pre-existing condition entirely?

A. Yes.

Montalbano Deposition, 10/8 – 13/23.

Therefore, Dr. Montalbano unambiguously testified that he performed a side-by-side comparison of the actual films from 2011 and 2012, and verified that at the L1-2 level, the March 14, 2012 MRI is "identical" to the May 26, 2011 MRI. He was therefore unable to conclude that there was any objective evidence that the subject accidents had caused any additional injury at L1-2.

8. In contrast, Dr. Christensen testified that his review of the studies did demonstrate an interval worsening at L1-2 between the 2011 and 2012 studies. In this regard, Dr. Christensen testified:

> Q. (Ms. Breen) And then if you could look at the MRI from May 31, 2011. Actually, I think the MRI was the 26th, 2011. Just let me know when you get there.
>
> A. What date?
>
> Q. It is May 26, 2011.
>
> A. Okay.
>
> Q. All right. And I would just ask you to look at the L1/2 level. And at least, you know, my reading, although I'm not a doctor, would indicate that there were problems going on at L1/2, at least for the diagnostic studies. But I would ask that you comment on that.
>
> A. Osteophyte formation means there were bone spurs there. Annular bulging means that the annulus or outer aspect of the disk had a bulge. That would be anticipated. He already had a herniation in the past. Although, there was no herniation, there was still bulge there. There was no significant neuroforaminal stenosis. Nothing really seemed to be significant on the nerves.
>
> Q. But a mild degree of central canal stenosis, correct?
>
> A. Yes.

Q. And so that MRI was prior to your second surgery, correct, your second surgery being done on, it looks like, October 13, 2011?

A. Yes.

Q. All right. Then I would ask that you look at the MRI dated 3/14/12. Just let me know when you're there.

A. I don't seem to have that report with me.

Q. For 3/14/12?

A. Yes.

Ms. Breen: Do you have that in front of you, John?

Mr. Greenfield: Sure. I have it. This is the MRI you're talking about?

Ms. Breen: Correct. Well, actually, what does it say? I take that back. Yes, 3/14/12 - -

Mr. Greenfield: That's when the MRI was done. He saw him on the 15th. Here it is.

The Witness: Okay.

Q. (Ms. Breen) And I guess what I'm looking at there is the L1/2 level still has no significant foraminal stenosis and still has mild central canal stenosis. Which is, at least per the report, as regards to stenosis what was there prior to that surgery. I mean, because this one was after your second surgery, yeah, after your second surgery.

A. Where are you reading?

Q. At the L1/2 level.

A. Okay.

Q. Where it still has mild central canal stenosis and no significant foraminal stenosis. And so what I'm seeing is that at least as far as stenosis is concerned, the L1/2 level is described as having the same stenosis before, so on May 26, 2011 and after the surgery, and that being March 14, 2012. Is that your reading of it or are you reading it differently?

A. The difference here, there's also asymmetric left-sided facet hypertrophy, which effaces the left lateral recess.

Q. And so that, to you, is the change?

A. Those are the MRI changes.

Q. Okay.

A. There's also the clinical changes.

Q. All right.

A. We don't operate on MRIs. We operate on people. So a lot of our judgment, when it goes into surgery, is based on our clinical exam. It's correlated with imaging.

Christensen Deposition, 25/17 – 28/12

9. It is not clear, however, that in rendering these opinions, Dr. Christensen ever performed a side-by-side comparison of the films as did Dr. Montalbano. Clearly, at the time of his deposition he was only comparing the radiologists' interpretations. It is unclear whether, at some other time, he compared the actual films:

Q. (Ms. Breen) Did you ever look at the different diagnostic studies and compare them, like before the fall and after the fall?

A. Yes.

Q. But you indicated that you don't actually have the MRI in your notes from March?

A. I do not have the paper copy of the report of the MRI.

Q. Okay.

A. With me right now.

Q. Okay.

Mr. Greenfield: You've seen mine though.

The Witness: Yes, but I've looked at this.

Q. (Ms. Breen) And I'm asking about in the past you had that at some point in time then to review?

A. Yes.

Christensen Deposition, 36/10 – 37/2.

10. Therefore, the record informs us that Dr. Montalbano performed a side-by-side comparison of the films and determined that there was no interval change whatsoever at the L1-2 level between the dates of the 2011 and 2012 studies. Dr. Christensen testified that there was an interval change between the two studies, but he did so on the basis of reviewing the radiologists' reports which were shown to him at the time of this deposition. His testimony does not reflect that he ever performed a side-by-side comparison of the films.

11. We know from experience that MRI studies, though widely considered to be the gold standard for evaluating soft tissues and neurological structures of the lumbar spine, are not foolproof. In other cases that have been heard by the Commission, there has been testimony establishing that from time to time MRI studies yield false negative results. In other words, a particular study fails to demonstrate the existence of the physical condition that is actually responsible for causing an individual's clinical presentation. However, that testimony is not before us in this case, and for the Commission to speculate that a false negative result might explain Claimant's clinical presentation and show that it really does correlate with an objective injury, would be to render a type of unqualified medical opinion that was denounced by the Court in *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013).

12. Both physicians in this case agree on the same standard for establishing whether a claimant is a surgical candidate, and whether the subject accident is responsible for causing additional injury to Claimant's lumbar spine. Per the two experts who have rendered testimony

in this case, Claimant's clinical presentation must be correlated with objective findings before any decision can be made whether Claimant requires surgery or that the surgery is needed because of the subject accidents. With that standard in mind, I believe that the more persuasive evidence establishes that Claimant has failed to meet his burden of proving that he suffered an injury to the L1-2 level as a result of the accidents, or either of them, and that Employer/Surety should not be held responsible for his third surgery. I find Dr. Montalbano's testimony much more persuasive than that of Dr. Christensen on this point. I conclude that Claimant has not met his burden of demonstrating that he has suffered additional injury to his lumbar spine as a consequence of the subject accidents, or either of them, and that consequently, he is not entitled to the third surgery performed by Dr. Christensen.

DATED this __13___ day of __August_____, 2015.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __13___ day of _August_____, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

JOHN GREENFIELD
PO BOX 854
BOISE ID 83701

LORA RAINEY BREEN
1703 W HILL RD
BOISE ID 83702

sc __/s/_____