BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANTHONY HITE, Claimant, v. TIMBERLINE DRILLING, INC., Employer, and AMERICAN MINING INSURANCE CO., Surety, Defendants.	**IC 2011-025903** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** Filed September 11, 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 Coeur d'Alene, Idaho on February 5, 2015. Claimant, Anthony Hite, was present in person and represented by Michael Verbillis, of Coeur d'Alene. Defendant Employer, Timberline Drilling, Inc. (Timberline), and Defendant Surety, American Mining Insurance Co., were represented by Scott Wigle, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Briefs were submitted. Eric Bailey, of Boise, authored Defendants' brief. The matter came under advisement on August 4, 2015.

ISSUE

The parties have specified the issue to be determined as: whether Claimant's injury and the resultant pathology to his spleen is causally linked to his industrial injury of October 14, 2011, when he injured his right shoulder. All other issues are reserved.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained a right shoulder injury while working for Timberline on October 14, 2011, and consequently underwent right shoulder surgery on December 5, 2011. While recovering from surgery, Claimant fell on the ice on the walkway beside his home. He asserts that, in falling, he protected his right shoulder by turning and landing on his left side, thereby damaging his spleen. He also asserts that he further damaged his spleen when dismounting a table at physical therapy for his right shoulder. Claimant argues Defendants are responsible for the costs of medical treatment of his spleen as the direct and natural consequence of his industrial right shoulder injury. Defendants assert that Claimant's fall on the ice near his home constitutes a superseding intervening event and they are not responsible for the costs of treatment of his ruptured spleen.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1-8, admitted at the hearing;
3. Defendants' Exhibits 1-11, admitted at the hearing; and
4. The testimony of Claimant and Tara Hite, Claimant's wife, taken at the February 5, 2015 hearing.

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

FINDINGS OF FACT

1. Claimant was born in 1970. He is right-handed. He was 44 years old and lived in Hayden at the time of the hearing.

2. Timberline is a drilling company that, among other things, constructs drilling equipment, including skids and platforms. It conducts business in Idaho and neighboring states.

3. **Background**. Claimant completed the 11th grade, but did not graduate from high school and has not obtained a GED. He participated in many high school sports, snowboarded, and later excelled in BMX racing. Claimant was the Idaho state champion BMX racer for two or three years. He could do 360 degree jumps on a BMX and on a snowboard.

4. After leaving high school, Claimant obtained training in crane and forklift operation. He became certified in heavy structural welding and worked as a fabricator welder and millwright for over 20 years. No later than 2010, he was hired at Timberline as a fabricator.

5. **Significant prior medical history**. Claimant suffered many accidents and injuries in his various work and recreational pursuits. He has fractured his heels, lower leg, femur, fingers, left elbow, right wrist, back, and several ribs on multiple occasions. In August 2004 Claimant was boating and lacerated his spleen when he fell against the corner of a counter with his left side. He sought medical attention several days later and was hospitalized for observation and conservative care for approximately one week. His condition improved without surgery and he was discharged. After his release, Claimant experienced no further problems with his spleen through 2011.

6. **October 14, 2011 industrial accident and treatment.** On October 14, 2011, Claimant was at Timberline fabricating a core drill skid weighing several hundred pounds. Upon finishing welding one side of the skid, Claimant and a coworker flipped the skid over to weld the

other side. As the skid turned over, a welding burr caught Claimant's right glove and the force of the turning skid yanked Claimant's right arm, throwing him to the ground. He noted immediate right shoulder pain but finished his work assignments that day and continued to work for several more days. Claimant's shoulder symptoms worsened and he subsequently sought medical attention. A right shoulder MRI on November 6, 2011, revealed a large SLAP tear of the right shoulder with biceps anchor involvement. On December 12, 2011, Jonathan King, M.D., performed right shoulder surgery. Claimant wore a sling for several weeks and then gradually began physical therapy to rehabilitate his right shoulder.

7. **February 10 or 12, 2012 slip and fall at home.** On or about February 10 or 12, 2012, Claimant was still recovering from his right shoulder surgery when he slipped on ice and fell while walking on the walkway beside his home. Claimant testified his legs flew straight out ahead of him and he consciously and instinctively twisted to his left while still in the air to keep his recently operated right shoulder from striking the ground. Claimant landed hard on his left side with his left elbow bent and his left arm tucked against his body. The impact knocked the wind out of him. He noted immediate sharp left side pain and believed he had probably cracked one or more ribs. Claimant regained his feet and entered his house where he sat down to catch his breath and his wife noticed his discomfort. He had fractured ribs before and believed his left side pain was from such a fracture and would resolve in time without medical attention. He caught his breath and the left side pain abated.

8. On February 14, 2012, Claimant attended physical therapy for his right shoulder. The record of that visit notes: "Pt reports he slipped and fell on ice about 4 days ago, protected R shoulder but thinks he may have fractured ribs on L." Defendants' Exhibit 3, p. 42.

9. **February 16, 2012, physical therapy and emergency hospitalization.** On February 16, 2012, Claimant attended further physical therapy prescribed for rehabilitation of his right shoulder. Following a period of shoulder exercises, the physical therapist massaged and manipulated Claimant's right shoulder as he lay face down on a table. Upon completion of the manipulation, Claimant's right shoulder was too sore to push himself up from the table so, still facing down, he slid his body off the table until his legs extended over the side of the table and his feet touched the floor. As his abdomen slid over the edge of the table he felt sharp pain in his left side and believed that he had probably irritated the ribs he fractured when he fell on the ice at his home several days earlier.

10. Claimant left the physical therapist's office and stopped to see some friends at a nearby business before going home. After talking with his friends for a few minutes, Claimant began feeling ill with severe lower abdominal pain. He noted a sensation of fullness in his lower left abdomen. Claimant got in his vehicle intending to drive to Kootenai Medical Center one-half mile away, but stopped along the road in route, unable to drive further and feeling that he was about to pass out. He called his wife who called his mother and an ambulance. Claimant's mother and the ambulance both arrived at approximately the same time and his mother took him on to Kootenai Medical Center.

11. Jeffrey Zurosky, M.D., treated Claimant on February 16, 2012 at the Kootenai Medical Center emergency room and recorded Claimant's report of left flank pain after falling "4 days ago on the ice." Claimant's Exhibit 2, p. 5. Claimant rated his pain at 9 or 10 out of 10 and reported his pain had worsened that morning and then again while in physical therapy for his right shoulder. Claimant was diagnosed with a lacerated spleen, pseudoaneurysm, and actively bleeding splenic artery. Casey Fatz, M.D., performed splenic artery angiogram with coil

embolization of the bleeding splenic artery branch. The procedure was initially successful in halting the bleeding. Claimant remained hospitalized at Kootenai Medical Center for approximately one week under the care of Timothy Quinn, M.D. Dr. Quinn's February 24, 2012 discharge summary recounted Claimant's previous spleen injury years earlier and noted:

> Then about 4 days prior he slipped on the ice and fell, and has been having a lot of tenderness. He then came in on the day of admission with a sudden onset of extremely severe abdominal pain. A CT scan was obtained, and it showed still active extravasation of contrast into a large perisplenic hematoma with a splenic rupture. He was evaluated by Dr. Zurosky in the emergency room. We set up an angiogram, and at that time Dr. Fatz was able to embolize a splenic artery aneurysm that was still bleeding. He probably lost about 3 to 4 units of blood, but that stopped it.

Claimant's Exhibit 2, p. 1. Dr. Quinn's discharge assessment included delayed splenic rupture with post traumatic splenic artery pseudoaneurysm rupture.

12. Dr. Quinn directed Claimant to return in one week; however, his condition worsened over the next few days and on February 28, 2012, Claimant was admitted to Sacred Heart Medical Center in Spokane where Michael Moore, M.D., performed emergency splenectomy. Claimant remained hospitalized until his release on March 6, 2012. He was hospitalized again from March 15-18, 2012, due to the sequelae of his ruptured spleen and splenectomy.

13. **Condition at the time of hearing.** At the time of hearing Claimant continued to have right shoulder pain and limitations; however, he had recovered from the emergency splenectomy.

14. **Credibility.** Having observed Claimant and his wife at hearing and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

15. 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).

16. **Causation and direct and natural consequences.** The sole issue presented is whether Defendants are liable for Claimant's spleen injury and treatment. This prompts a two-fold inquiry as to the actual medical cause and the legal proximate cause of his spleen injury.

17. Medical causation. 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).

18. Claimant alleges that his February 10 or 12, 2012 fall on the ice and his February 16, 2012 sliding off the physical therapist's table caused his spleen injury. A number of

physicians have addressed the relationship between Claimant's fall on the ice and his emergency splenectomy.

19. Jonathan King, M.D., performed Claimant's December 2011 right shoulder surgery and followed him post-operatively. In Dr. King's April 5, 2012 note, he recorded that Claimant "was actually doing reasonably well until recently he fell on the ice and suffered a ruptured spleen." Claimant's Exhibit 1, p. 14.

20. Ruth Cockley, M.D., who examined Claimant at Sacred Heart Medical Center on February 28, 2012, comprehensively summarized his history of spleen traumas:

> It sounds like between four and eight years ago, the patient suffered a splenic laceration while on a boat. It sounds like he fell, as the boat with [sic] changing speed and landed on the corner of a counter top with the left side of his rib cage. The patient was hospitalized [at] Kootenai Medical Center for this. It sounds like the patient did fairly well and had no problems until approximately three weeks ago. He states that he fell on the ice on a driveway and ended up splinting to the left after a recent right shoulder surgery. He states his elbow went into his rib cage when he fell to the ground, and had some pain in the area at that time. He did not seek treatment. It sounds like he did fairly well until approximately nine days ago, when he had sudden pain in the left upper quadrant that seemed to spread out over his abdomen. The pain started while at physical therapy for his shoulder. The patient did seek immediate treatment for this and describes the pain as excruciating. He was found to have a bleed in the splenic artery ….

Claimant's Exhibit 3, p. 12. Dr. Cockley concluded: "This is a 42-year-old male with a prior splenic injury and a repeat fall resulting in bleeding of the splenic artery requiring metallic coils approximately a week ago." Claimant's Exhibit 3, p. 13.

21. Michael Moore, M.D., diagnosed Claimant with delayed splenic rupture and performed Claimant's emergency splenectomy on February 28, 2012. Dr. Moore recorded:

> His splenic history actually dates back to eight years ago with a traumatic injury [to] the spleen resulting in a significant subcapsular hematoma, which was managed nonoperatively but with fairly a [sic] pronounced ileus and 10 days hospitalization. He recovered and did well until approximately the second or third of February when he had a relatively minor fall and his elbow jutted into the left upper quadrant. He felt like he broke some ribs and managed this at home

> with nonnarcotic analgesics and was recovering until the 16th of February when he had the abrupt onset of severe worsening pain and presented to Kootenai Medical Center emergency room where he was found to have acute hemorrhage into the spleen with active extravasation.

Claimant's Exhibit 3, p. 9.

22. John McNulty, M.D., examined Claimant on November 17, 2014. Dr. McNulty agreed with Dr. King's assessment.

23. The opinions of Drs. King, Cockley, Moore, and McNulty relating Claimant's ruptured spleen to his 2012 fall on the ice at his home are well supported by the evidence and persuasive. However, their opinions do not relate Claimant's spleen injury to his activities at physical therapy.

24. As noted above, Claimant credibly testified that at the conclusion of physical therapy for his shoulder on February 16, 2012, he lay face down on a table while the therapist massaged and manipulated his shoulder. Claimant then slid off the table until his feet touched the floor. He felt pain in his left side as he slid off the table. Within minutes after leaving therapy he began feeling ill and decided to drive to the hospital. As he drove toward the hospital "the road got really long and dark, so I knew I was started [sic] to pass out." Defendants' Exhibit 9, p. 72. In his pre-hearing deposition Claimant described his understanding of the cause of these events:

> Q. (by Mr. Verbillis) How did you dismount from the table? You said you slid?
>
> A. Yeah, just slid off the side.
>
> Q. Off the side. Did you hit the ground or the floor?
>
> A. Just until my feet hit the ground, you know.
>
> Q. And what was it about that experience that caused the sensation in your belly to bother you?

> A. Well, I just slid over my rib cage. I just—I—I felt a pain from it, but I just figured it was from hurting my ribs.
>
> Q. Okay.
>
> A. I didn't think much of that. I mean, it wasn't a—
>
> Q. Until about an hour later when you were—
>
> A. Yeah, it was—
>
> Q. –grabbing air.
>
> A. Well, as much time—it wasn't even an hour.
> ….
>
> MR. WIGLE: I need to go back to that for just a minute, that day in the physical therapy office getting off the physical therapy table. Are you thinking that this process that you went through to get off the physical therapy table hurt your spleen?
>
> THE WITNESS: Well, actually, this is what the doctor told me, that my spleen had bled into an aneurysm, and he said it was about the size of a good-sized grapefruit, and when I slid off the table, I smashed it enough to make it go poof (indicating), and then it really started bleeding out fast.
>
> MR. WIGLE: So that's what lit up the symptoms and—
>
> THE WITNESS: Right.
>
> MR. WIGLE: Oh, I got you.
>
> THE WITNESS: And then between—and then I was bleeding out real fast, because by the time I even made it to the hospital the—it was a football-sized clot, they said. I was bleeding out that fast.
>
> MR. WIGLE: I got you. Who's the doctor that gave you that explanation, is that Quinn?
>
> THE WITNESS: Yeah.

Defendants' Exhibit 9, pp. 278 and 280.

25. Dr. Quinn attended Claimant at the emergency room of Kootenai Medical Center in Coeur d'Alene on February 16, 2012. In an undated letter he subsequently opined:

> [T]he flank injury, suffered in the fall was a major contributing factor, if not the primary cause of the splenic rupture which I followed, as mentioned above. Because of this recovering status from the shoulder injury he was not able to protect himself from the fall, landing on his left flank which resulted in the subsequent splenic injury.

Claimant's Exhibit 6. Significantly, none of Dr. Quinn's records address the impact of Claimant's activities at physical therapy on his spleen.

26. Dr. Zurosky first examined Claimant on February 16, 2012 at the Kootenai Medical Center emergency room and recorded not only his report of pain from falling four days previously on the ice but also upon an undisclosed movement that morning prior to physical therapy: "He states he awoke this morning and moved a certain way and states his pain is now a 9 out of 10 on the pain scale, or 10 out of 10. He states it hurts to move. He was in physical therapy for his right shoulder when he started having these symptoms again." Claimant's Exhibit 2, p. 5 (emphasis supplied). While the notes of Drs. Zurosky, Cockley, and McNulty mention Claimant's report of the onset of pain at physical therapy, they do not indicate Claimant's spleen injury was caused by any activities at physical therapy for his shoulder. The record contains no medical report from Dr. Quinn or any other medical expert specifically relating Claimant's activities at physical therapy with damage to his spleen.

27. Medical evidence supporting a claim for compensation is essential. A claimant must establish a probable, not merely a possible, connection between cause and effect to support his contention. Roberts v. Kit Manufacturing Company, Inc., 124 Idaho 946, 866 P.2d 969 (1993). A claimant's testimony of statements made to him by doctors, but not supported by doctor's reports, depositions, or a doctor's oral testimony "does not constitute medical testimony which is necessary to support his claim for compensation." Sykes v. C.P. Claire and Company, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

28. Claimant has proven that his need for spleen surgery was related to his fall on the ice near his home on February 10 or 12, 2012. He has not proven by medical evidence that his spleen was damaged by his activities at physical therapy on February 16, 2012.

29. Direct and natural consequences. The direct and natural consequences rule addresses the proximate legal cause of a subsequent injury and evaluates the compensability of a subsequent injury or aggravation related to a prior industrial injury. "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." 1 A. Larson & L. Larson, Workers' Compensation (2011) § 10.01, pp. 10–2 through 10–3. The rationale is that the original industrial injury is the cause of all that follows. The rule is applied in practice if not in name by a significant number of jurisdictions to determine causation in subsequent injury cases.[1]

30. In Idaho the direct and natural consequences rule has been applied on a limited basis. In Mulnix v. Medical Staffing Network, Inc., 2010 IIC 0368, 2010 WL 4337035, the claimant suffered an industrial injury that required left shoulder surgery. She subsequently suffered a left labral tear during therapy for her original industrial injury. The Commission found that the additional medical treatment necessitated by the labral tear sustained during therapy was compensable, expressly noting that:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Larson's, The Law of Worker's Compensation, § 13.

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[1] See Sapko v. State, 305 Conn. 360, 44 A.3d 827 (2012) and cases cited therein.

Mulnix, 2010 IIC 0368, 2010 WL 4337035, at 8. See also Gerdon v. Con Paulos, Inc., 2012 IIC 0085, 2012 WL 5398867 (L3-4 disc bulge permanently aggravated by participating in rehabilitation therapy for original industrial accident deemed related and thus compensable); Cavallo v. S. L. Start & Associates, Inc., 2012 IIC 0104 (aggravation of industrial cervical injury by home therapy for original industrial injury deemed related and thus compensable).

31. The direct and natural consequences rule is not without limits. An independent external force may constitute a superseding intervening cause of a subsequent injury. In Kiger v. Idaho Corp., 85 Idaho 424, 380 P.2d 208 (1963), the claimant was injured in an industrial accident. Several weeks later, while traveling to her doctor's office for further treatment of her original industrial injuries, she was injured in an automobile accident. Apparently no party cited the direct and natural consequences rule. Without expressly considering the claimant's fault, if any, in the automobile accident, the Court affirmed the Commission's denial of benefits for injuries therefrom because such injuries did not arise out of and in the course of her employment.

32. The superseding intervening cause of a subsequent injury may be in part the worker himself. In Linder v. City of Payette, 64 Idaho 656, 135 P.2d 440 (1943), the worker sustained an industrial accident requiring his left arm to be placed in an eight-pound cast from his finger tips to his shoulder. He subsequently drowned when he stood up to help land a fish and the small boat he and his companion were fishing from capsized. His survivors claimed benefits asserting the cast on his arm interfered with him saving himself. The Court expressly accepted the proposition that a proximate cause analysis from the field of torts applied and stated:

> [I]f there occurs, after the initial accident and injury, an intervening, independent, responsible, and culminating cause, the latter occurrence becomes the proximate cause.
> ….

> It must be clearly kept in mind that the essential causal connection which must not be broken is, not that between the concededly compensable accident and the direct injury therefrom (Brink v. H. Earl Clack Co., 60 Idaho 730, 96 P.2d 500), but between the initial accident and injury and a subsequent and otherwise disconnected injury having no relationship whatever to decedent's employment.

Linder at 656, 135 P.2d at 441. The Court concluded that the boat capsizing was the proximate cause of Linder's death, and affirmed the Commission's denial of benefits. Ostensibly, even the worker's own negligence can contribute to breaking the chain of causation.[2]

33. The Industrial Commission has had recent occasion to reaffirm these principles. In Kelly v. Blue Ribbon Linen Supply, Inc., 2014 IIC 0074, 2014 WL 5320552, the issue was whether the claimant was entitled to workers' compensation benefits for injuries suffered in an automobile accident while returning from an examination related to Kelly's workers' compensation claim. Kelly had sustained an industrial injury and was returning from a medical examination arranged by her employer's surety at which her attendance was statutorily mandated. She was seriously injured when a vehicle traveling the opposite direction lost traction on a snow-covered highway, crossed the centerline and collided head-on with Kelly's vehicle.

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[2] A further illustration from another jurisdiction is useful. In Anderson v. Westfield Group., 259 S.W.3d 690 (Tenn. 2008), Anderson suffered a work-related left elbow injury for which he underwent two surgeries at his employer's expense. The second surgery resulted in loss of feeling in his left ring and little fingers. Anderson later burned his left little finger while cooking at home. The burn was very severe because he had no feeling in the finger. He claimed medical benefits, asserting his severely burned finger was the direct and natural consequence of the original work-related injury to his elbow. The court reviewed subsequent injury cases and concluded Anderson's subsequent injury was entirely unrelated to his employment:

> "as when a claimant with an injured hand engages in a boxing match, the chain of causation may be deemed broken by either intentional or negligent claimant misconduct." [1 Larson's Workers' Compensation Law § 10.05 (2004).] This case clearly falls in the latter category and, therefore, is subject to a negligence analysis.
>
> Applying these principles to this case, we conclude that the employee failed to exercise due care and thus was negligent in placing his hand on the hot burner of the stove in his kitchen. His negligence operates to relieve the employer of liability for medical expenses incurred in treating the injuries resulting from that negligent act.

Anderson v. Westfield Group., 259 S.W.3d 690, 699 (Tenn. 2008) (footnotes omitted).

The parties stipulated that Kelly's actions did not cause or contribute to the collision. The Commission examined the requirement that the injury must arise out of and in the course of employment to be compensable. See Idaho Code § 72-102(18)(a); Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951). Relying upon Linder and Kiger, the Commission denied Kelly compensation for her subsequent injuries even though her conduct did not contribute to her subsequent injuries and she was statutorily mandated to attend the medical examination scheduled by the surety or forfeit compensation.

34. In the present case, Claimant alleges his spleen injury was the direct and natural consequence of his industrial right shoulder injury because he turned to the left while falling on February 10 or 12, 2012, to protect his recently operated right shoulder. Defendants first challenge Claimant's assertion that he consciously turned while falling and intentionally landed on his left side. Defendants maintain that Claimant could not have had the presence of mind, much less the ability, while in mid air falling to consciously choose to turn to the left to protect his right shoulder. They cite the opinion of Spencer Greendyke, M.D., who concluded that Claimant: "was unlikely to be able to control his impact to the point where he landed on his left side rather than his recently operated right shoulder." Defendants' Exhibit 10, p. 295. However, Dr. King testified he had "seen other patients who have had a surgery have a subsequent injury to another body part shortly after that in trying to not further injure the extremity that has just been operated on. So I have seen that pattern before where people injure the other side or turn or fall in a way to protect … the injured extremity." King Deposition, p. 25, ll. 5-12. Dr. King noted: "while the fall itself was not caused by the shoulder operation or its sequelae or the 'guarding' of his shoulder, I can state that the fall itself has a causal relationship to the shoulder pathology. Obviously, Mr. Hite would not have been motivated to protect that shoulder during this fall and

may have landed differently." Claimant's Exhibit 5. Dr. McNulty agreed "that Mr. Hite was more prone to injury from a fall since his right shoulder was not functioning at full capacity. If he did not have a right shoulder injury he would have instinctively put his right arm out to protect himself during the fall and lessen the impact from the fall." Claimant's Exhibit 7, p. 6.

35. Significantly, Claimant in his earlier years was a two or three time Idaho state champion BMX racer, capable of doing 360 degree jumps on a BMX bike and a snowboard, thus evidencing above average balance, proprioception, and, likely, reaction time. Claimant's account that he fell on his left side to protect his right shoulder has been consistent from his first report to his physical therapist on February 14, 2012—before Claimant was advised of any spleen damage—and continuing to every medical provider thereafter through the time of hearing. His account is credible.

36. Secondly, Defendants assert that even if Claimant deliberately landed on his left side to protect his recently operated right shoulder, his fall on the ice constitutes a superseding intervening event which breaks the chain of causation and liability.

37. All parties concede that Claimant's fall on February 10 or 12, 2012, was on the ice at his home. Claimant credibly testified he consciously turned to avoid landing on his recently operated right shoulder, thus landing on his left side. The manner Claimant chose to land is related to his industrial accident and abundant medical evidence establishes that the fall damaged his spleen. However, this fall had no relation to his work or anything having to do with his treatment or therapy for his original 2011 industrial shoulder injury. He fell because of ice on his own property. There is no assertion and no evidence that he walked differently or did anything differently because of his industrial accident that caused him to fall. Although no party

has expressly alleged that Claimant's negligence caused his fall on the ice, there is no evidence that any entity other than Claimant bears responsibility for his fall.

38. The Idaho Supreme Court's decisions in Kiger and Linder, and the Commission's decision in Kelly compel the conclusion that Claimant's spleen injury resulted from a superseding intervening cause—his fall on the ice at his home. Kelly was denied benefits when her subsequent injury occurred through no fault of her own while traveling from a statutorily mandated IME; it follows that Claimant's request for benefits for a subsequent injury occurring ostensibly due to his negligence while pursuing an activity in no way connected to his employment, must also be denied. The chain of causation was broken by the intervening superseding event of his fall on the ice. The legal proximate cause of Claimant's spleen injury is his 2012 fall on the ice and not his 2011 industrial accident.

39. Claimant has not proven that his injury to his spleen is causally linked to his industrial injury of October 14, 2011, when he injured his right shoulder.

CONCLUSION OF LAW

Claimant has not proven that his injury to his spleen is causally linked to his industrial injury of October 14, 2011, when he injured his right shoulder.

RECOMMENDATION

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

DATED this 1st day of September, 2015.

INDUSTRIAL COMMISSION

_/s/______________________________
Alan Reed Taylor, Referee

ATTEST:

_/s/______________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHEAL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

ERIC S BAILEY/ SCOTT WIGLE
BOWEN & BAILEY
PO BOX 1007
BOISE ID 83701-1007

sc _/s/____________________________________

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANTHONY HITE,

Claimant,

v.

TIMBERLINE DRILLING, INC.,

Employer,

and

AMERICAN MINING INSURANCE CO.,

Surety,
Defendants.

IC 2011-025903

ORDER

Filed September 11, 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:

Claimant has not proven that his injury to his spleen is causally linked to his industrial injury of October 14, 2011, when he injured his right shoulder.

DATED this 11th day of September, 2015.

INDUSTRIAL COMMISSION

_/s/________________________________
R.D. Maynard, Chairman

_/s/___________________________________
Thomas E. Limbaugh, Commissioner

_/s/___________________________________
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

MICHEAL J VERBILLIS
PO BOX 519
COEUR D'ALENE ID 83816-0519

ERIC S BAILEY/ SCOTT WIGLE
BOWEN & BAILEY
PO BOX 1007
BOISE ID 83701-1007

sc _/s/____________________________________