BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE SKRUDLAND, Claimant, v. SUPERVALU, INC., Self-Insured Employer, Defendant.	**IC 2012-002491** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed March 19, 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on August 28, 2013. Claimant was present at the hearing and represented by Mark R. Wasden of Twin Falls. Alan R. Gardner of Boise represented the self-insured Employer (Supervalu). The parties presented oral and documentary evidence and one post-hearing deposition was taken. Post-hearing briefs were filed, and the matter came under advisement on November 20, 2013.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;

2. Whether and to what extent Claimant is entitled to benefits for:

   a. Medical care;

   b. Permanent partial impairment (PPI);

c. Disability in excess of impairment (PPD); and

d. Attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant, a grocery store receiving clerk, contends he suffered an industrial L4-5 disc herniation on December 9, 2011 when he fell while trying to steady a heavy load of milk that began to fall. As a result, he claims entitlement to reimbursement – at the full invoiced amount – for his related medical costs, including the cost of discectomy surgery on January 2, 2012 and related diagnostic and follow-up care, as well as PPI of 13% of the whole person and an additional 7% for PPD in excess of PPI. He also seeks an award of attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial of his claim following receipt of Dr. Christensen's opinion that Claimant's condition is causally related to his industrial accident.

Defendants counter that they are not liable for Claimant's benefits on or after December 28, 2011. Although they do not deny that Claimant suffered an industrial accident on December 9, 2011, they argue that Claimant's symptoms for which he was treated on and after December 29, 2011 are the result of lifting a 100-pound dog on December 28, 2011, and not the industrial accident. Defendants contend that a January 1, 2012 chart note in which the dog-lifting possibility is raised constitutes adequate basis to continue denying benefits without further investigation, even after subsequently learning Dr. Christensen's opinion.

OBJECTIONS

All pending objections preserved at the depositions are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing depositions of:
    a. Claimant dated October 26, 2012;
    b. Lacy Davis Walters, PA-C and Elaine Hager dated February 25, 2013; and
2. The testimony taken at hearing of:
    a. Claimant;
    b. Micheline (Mickie) Skrudland;
    c. Matthew Ducharme (via video conference from Michigan);
    d. Ramon Gomez; and
    e. Jesus Ocampo;
3. Claimant's Exhibits (CE) 1-7 admitted at the hearing;
4. Defendant's Exhibits (DE) 1-6 admitted at the hearing; and
5. The post-hearing deposition of David M. Christensen, M.D., taken by Claimant on September 3, 2013.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was 59 years of age at the time of the hearing and resided in Twin Falls with his wife, Micheline (Mickie). His son-in-law, Matt Ducharme, also resided in

Twin Falls in 2011, but he later relocated to Michigan. Claimant's son, Alex Skrudland, resided in Bremerton, Washington.

2. Claimant has no history of treatment for any low back condition.

3. Claimant drives a stick shift-equipped pickup truck and owns four Labrador retrievers, three of whom are unable to jump into the back of the truck without assistance. Three of the dogs weigh 70-80 pounds, and one – the fat one – weighs over 100 pounds. They tear up the house if left inside unattended.

4. Before Claimant's subject industrial injury, he had worked as a product receiver at Supervalu and its predecessor company, sometimes referred to by witnesses as Albertson's, for more than 25 years. Around the time of his injury, Claimant was looking for a different job because he was uncertain whether his Supervalu store would remain in business. After the industrial injury, Claimant returned to his time-of-injury position and stopped looking for alternate employment because his store did not close, after all.

5. Claimant has no preexisting history of treatment for low back symptoms.

INDUSTRIAL INJURY

6. On December 9, 2011 (a Friday), Claimant was working alone in the cooler, unloading a pallet of milk gallons, when the load suddenly dropped. He held onto it with his left hand to steady the fall and it pulled him over onto his left side, on top of the milk containers. Soon after, he felt a dull achy twinge in his low back.

7. Claimant did not immediately report the injury to his supervisor at Supervalu (either Dusty, store manager, or Liz, assistant store manager) because "it wasn't enough pain and everything that I should report." DE-28. However, upon exiting the cooler soon after the accident, Claimant told Elaine Hager, general merchandise manager, that he had

hurt his back. Ms. Hager corroborates this testimony. Ms. Hager advised Claimant to report the event as a workplace accident, but he declined because he was unsure that he had sustained a significant injury. According to Ms. Hager's recollection of their conversation, she and Claimant both believed that reporting a workplace accident would lead to unfavorable treatment by Supervalu.

DECEMBER 9, 2011-DECEMBER 28, 2011

8. On December 9, Claimant completed his shift, and then he had the weekend off. He spent it lying around and watching TV. He returned to work on Monday, December 12, and told Kurt Mealer, Supervalu dairy manager, about his accident with the milk and his back pain. Claimant continued performing his regular duties through the next couple of weeks. He thought his symptoms would resolve on their own. There is no contemporaneous documentation describing Claimant's condition because he did not seek medical care.

9. Claimant's wife, Micheline Skrudland, is a registered nurse who is acquainted with David Christensen, M.D., an orthopedic surgeon, through work. She discussed Claimant's symptoms with Dr. Christensen briefly at some point before Claimant ever sought treatment.

10. On December 28, 2011 (a Wednesday), after Mrs. Skrudland left for work, Claimant drove his truck to Mr. Ducharme's house and they set out on a fishing trip to Roseworth Reservoir. It took about 45 minutes to get there. Upon arrival, the men were disappointed to find the reservoir frozen over. Instead of fishing, Mr. Ducharme built a fire, then set up a target and sighted in a gun. Claimant just sat in a lawn chair by the fire. At his deposition and at the hearing, he testified that his back pain spontaneously worsened

as he was sitting there. Mr. Ducharme observed Claimant having trouble shifting the gears on his truck and taking some pain medication that he knew was over-the-counter, but he did not know whether it was Excedrin, aspirin, or ibuprofen.

11. At the end of their sojourn, which lasted four-and-a-half or five hours, Claimant dropped Mr. Ducharme off at his house and returned home. According to Claimant, he "went in the house and laid on the couch for awhile. Took some more Ibuprofen, tried to get it to quit hurting and it just wouldn't - - it wouldn't quit, so I thought maybe if I got in our hot tub and laid there for awhile that it would quit hurting and it didn't. So, I just got back out and laid on the couch and waited for Mickie to get home." Tr., p. 86. He went to bed, but "I just can't get comfortable and it just - - I can't sleep and it just gets to hurting more. I can't get - - I can't find the right place to lay and my foot is going more numb. It's just - - it just is painful." Tr., p. 87. At the hearing, Claimant confirmed that this is how he felt on arrival at the emergency room on December 29. On January 9, 2012, he told Surety "…I had to go into the emergency room because it just, finally just locked up on me. It was a Thursday." DE-31. Also on December 29, Claimant reported his accident and injury to Kilee Burton, Supervalu bakery employee, when he could not reach a supervisor.

TREATMENT

12. Claimant's testimony, as well as his medical records, establish that his low back symptoms were worse on December 28, 2011 than they were before. The next day he sought medical treatment.

13. Claimant, accompanied by his wife, was initially evaluated for low back symptoms on December 29, 2011 by Adam R. Bowman, M.D., an emergency room

physician. Dr. Bowman recorded his understanding of the onset of Claimant's low back pain in his chart note:

> This is a 57-year-old male who presents to the emergency room complaining of left-sided low back pain that is the worst in his left upper buttock radiating down his left leg to his heel. He states that approximately 3 weeks ago he was at work and a palate of milk was tipping over and he strained his back trying to steady it. *He had a little bit of pain at that time but that had essentially gone away until yesterday* when his pain began worsening to the point that he describes it as a 10 out of 10 shooting pain today. He states that the pain is better if he holds still. He denies any numbness in his groin or saddle anesthesia….He denies any numbness in his legs. He does complain of pain radiating all the way down the back of his leg….He does complain of a paresthesia also down the back of his leg…."

CE2-3 (emphasis added.) Claimant disputes that his pain ever went away; thus, he asserts Dr. Bowman's note on this point is in error. In contrast, Claimant testified that his pain gradually worsened until this hospital visit. His wife corroborates his testimony.

14. On exam, Dr. Bowman noted tenderness to palpation in the superior left buttock and left paraspinous musculature. He also noted Claimant had a positive straight leg raise test on the left, but not on the right. Otherwise, Claimant's exam revealed normal findings.

15. Dr. Bowman diagnosed sciatica after ruling out cauda equina syndrome because "his history and examination are not consistent with this." CE2-4. "As such, I do not feel that emergent MRI scanning is indicated today in the emergency room. The patient's history and symptoms are most consistent with sciatica." *Id.* Dr. Bowman prescribed medications and recommended that Claimant follow-up with Dr. Lucie DiMaggio within three days, or return to the emergency room if his symptoms worsened.

16. Claimant, accompanied by both his wife and his son, returned to the emergency room on January 1, 2012. This time, he was evaluated by Lacy Walters-Davis, P.A. In describing the history relevant to Claimant's injury, Ms. Walters-Davis wrote:

> Patient reports he was seen on Thursday for sciatica and he feels the pain is worse today. *He reports that he has a little back pain for the last 3 weeks.* About 3 weeks ago a stack of milk fell and he held the stack all the way down to the ground. He works as a receiving manager at Albertson's. He reports that he has had the low back pain until Wednesday evening. About Thursday morning the back pain was still there. *He went ice fishing on Wednesday and he states that he lifted up about a 100-pound dog into the back of a pickup and the pain in his back worsened, and when he woke up Thursday he had sharp shooting pain down the back of his left leg to his heel.* He reports it is a tingling, burning, deep kind of pain. He denies any fevers or chills. He reports that on Friday he became weak in that left leg and really has been unable to get up and about since Friday due to pain. He reports excruciating pain with movement. He states that he gets spasms in his back which seem to make the pain in his leg worse. He reports that he was seen here and prescribed … [medications] two days ago. He got slight relief with Norco but has really not been able to sleep for the last 4 days since the leg pain started. He reports also a numbness to [*sic*] the top of his foot that began Friday as well….

CE2-20 (emphasis added.) Claimant strongly disputes that he reported only a little back pain over the previous three weeks or that he lifted a 100-pound dog on December 28. On that point, four people were present when Ms. Walters-Davis examined Claimant.[1] Their positions as to what was said follow:

a. Claimant and his wife testified that neither of them told Ms. Walters-Davis that Claimant had lifted a dog, so her note is inaccurate.

b. Claimant's son did not testify.

c. Ms. Walters-Davis testified that, to the best of her knowledge, the chart note is accurate. She had no independent recollection of what Claimant (or anyone else in the room) reported, and acknowledged that there was a lapse of approximately two hours and 45 minutes between the time she took Claimant's history and the time she created

[1] Present were Claimant, his wife, Ms. Walters-Davis, and Claimant's adult son (Alex Skrudland) who had arrived for a visit from Bremerton, Washington, just in time to accompany his parents to the hospital.

> it. However, Ms. Walters-Davis testified that the only reason she would (or could) have included this information was that Claimant or someone on his behalf provided it to her.

17. On examination, Ms. Walters-Davis noted symptoms not documented on December 29. For example, Claimant reported dullness to palpation of the posterolateral aspect of his thigh and lower leg. Also, he had "decreased strength in great toe extension and foot eversion. He has normal foot inversion, normal plantar flexion, weak dorsiflexion at the ankle all on the left. The right side is normal." CE2-21. An x-ray was obtained which ruled out acute fracture. Ms. Walters-Davis diagnosed lumbar strain with L5, S1 radiculopathy and weakness. She telephoned Dr. Christensen**,** who recommended a lumbar spine MRI and follow-up. She also prescribed Valium, for muscle spasm control, and ibuprofen (800 milligrams).

18. Claimant, **accompanied by his wife,** followed up with Dr. Christensen on January 2, 2012. Dr. Christensen's chart note indicates only the December 9, 2011 milk accident as a potential factor precipitating Claimant's low back symptoms.

> The twinge has grown and increased and quickly became associated with left leg radiating symptoms. The patient was able to ambulate and has tried to modify activities and use anti-inflammatories. Despite this, symptoms have progressed. Over the last 4-5 days, patient has had severe pain into his foot, which he has had previously, but is now associated with significant increase in weakness. His pain is intense and he is having difficulty even standing or walking.

CE2-32.

19. Dr. Christensen reviewed Claimant's MRI images taken earlier on January 2, 2012. He identified a focal left L4-5 disc herniation with extrusion severely compressing the traversing left L5 nerve root, as well as a broader foraminal disc herniation that appeared to contact the exiting L4 nerve root. On exam and diagnosis, Dr. Christensen

noted, among other things, radiculopathy, profound left lower extremity weakness (including foot drop), diminished sensation in his left L5 nerve distribution, and significant pain interfering with Claimant's ability to stand, walk and perform activities of daily living.

20. Dr. Christensen recommended a minimally invasive left L4-5 diskectomy in place of conservative care "[due] to the chronicity of the symptoms and the progressive nature of them as well as the profound weakness seen and MRI findings of disk herniation correlating with his symptoms…." CE2-33. Claimant underwent the recommended surgery later that day.

21. Surety accepted Claimant's claim on January 12, 2012. On February 3, 2012, Surety sought Dr. Christensen's opinion through a check-box letter. Dr. Christensen responded on February 23, 2012 that, on a more-probable-than-not basis, Claimant's L4-5 disc herniation is related to his December 9, 2011 industrial accident. Without further inquiry, on February 28, 2012, Surety denied Claimant's claim because it appeared from his December 29, 2011 and January 1, 2012 medical records that his need for surgery was related to lifting a 100-pound dog, and not to an industrial injury.

22. Claimant contacted Ms. Davis-Walters seeking an amendment to her medical record, the only record that says anything about Claimant lifting a dog. In March 2012, Ms. Walters-Davis had no independent recollection of the facts in her January 1, 2012 chart note; however, she had no reason to believe she had erred, so she declined to change the note.

23. Claimant's recovery progressed smoothly until May 2012, when his low back symptoms began worsening. Based upon new MRI findings, Dr. Christensen's P.A.

diagnosed scar tissue enhancement at L4-6. He recommended that Claimant finish his prescription for anti-inflammatory medication and continue activity as tolerated, using caution with repetitive bending, twisting, or lifting.

24. In August 2012, Claimant reported that he was sore, with aching in his left leg worse after working and sitting in certain chairs. He was taking ibuprofen, 800 milligrams, as needed, and wanted another prescription for anti-inflammatory medication, which Dr. Christensen provided. Dr. Christensen confirmed the MRI evidence of scar tissue enhancement at L4-5 and noted Claimant's radicular symptoms were improved. Although Claimant's residual symptoms were controlled with medication, he still had motor and sensory deficits. Dr. Christensen assessed temporary restrictions including no lifting, pushing or pulling over 40 pounds; no more than occasional bending, stooping, twisting, climbing, squatting, kneeling or overhead reaching.

25. Claimant's symptoms persisted. On October 25, 2012, Dr. Christensen noted that his left leg radiculitis had progressively worsened over the prior two to three months. He ordered MRIs, with and without contrast. "If no new stenosis is seen, I feel he would be at maximum medical improvement for his December 2011 work-related injury." CE3-36. The new studies revealed a new left L4-5 disc herniation, larger than demonstrated on Claimant's May 2012 MRI, narrowing the left lateral recess and L4-5 neuroforamen. Dr. Christensen recommended a transforaminal epidural steroid injection (TESI) and tightened up Claimant's medical restrictions.

26. Following the TESI, Claimant reported a "tremendous" improvement, but he still had intermittent symptoms, including pain radiating toward the back of his left leg. CE3-40. Claimant's symptoms worsened at times when sitting, or while lying on his left

side. He got relief from being up and ambulating. Dr. Christensen again tightened Claimant's restrictions, such that Claimant was instructed not to lift, push or pull more than 12 pounds; to only rarely bend, stoop, twist, squat, kneel or grip/twist; and to only occasionally climb. He also continued to prescribe medications.

27. Claimant presented to Dr. Christensen on December 28, 2012 with a new pain, worse than it was prior to his TESI, that started on Christmas Day. "This pain is similar to 'original injury pain' prior to surgery." CE3-43. "Patient presents with painful ambulation…[and]…sharp pain into left leg. This pain began on 12/25/12, with no explanation. Patient is unable to have quality sleep secondary to left leg pain." *Id.* Dr. Christensen returned Claimant to work on December 28, 2012 with temporary restrictions and recommended another TESI, which Claimant underwent on December 31, 2012.

28. By January 22, 2013, Claimant's symptoms had improved. Dr. Christensen administered another TESI and continued Claimant's restrictions. On February 26, 2013, Claimant reported 1/10 pain. He said the TESIs had helped but, particularly after work, he still had some pain and tingling down his left leg to his foot, as well as left leg weakness. He had also developed hypertension. Dr. Christensen continued Claimant's medications and recommended further testing to monitor Claimant's blood pressure since its recent increase could be related to his medication (Feldene). He opined that Claimant was medically stable and that "he does have some long-term impairment due to his functional loss outlined above and considering his onset of hypertension linked to his injury." CE3-52. Dr. Christensen continued Claimant's restrictions of no lifting, pushing or pulling over 12 pounds; only rare repetitive bending, stooping or twisting; only rare squatting or kneeling; occasional climbing stairs or ladders, or overhead reaching; frequent limited

walking; and continuous repetitive gripping/twisting and hand tool use. He noted, however, that a new lumbar MRI would be necessary in order to assess permanent restrictions.

29. At Defendants' request, on April 9, 2013, Dr. Christensen assessed Claimant's PPI due to his L4-5 condition at 13% of the whole person, with guidance from the *Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sixth Edition)*. Even though Claimant had not undergone a new MRI, Dr. Christensen confirmed that Claimant's February 26, 2013 restrictions were permanent.

30. On August 26, 2013, Claimant again followed-up with Dr. Christensen. He confirmed Claimant's permanent restrictions, adding that Claimant "will need to sit and lean to the right when he gets the burning sensation in the left buttock until the sensation is gone." CE3-62.

POST-INDUSTRIAL INJURY VOCATIONAL AND INCOME HISTORY

31. Claimant continues to work for Supervalu, in the same position, with no reduction in pay. He provided his physician's notes regarding his work restrictions to Dusty, the manager, and to Kathy, the bookkeeper. He was never told that he needed to provide these notes to anyone else. He admitted that he sometimes exceeds his medical restrictions at work.

32. Ramon Gomez, assistant store director/grocery manager, had been Claimant's supervisor for about three months at the time of the hearing. He described Claimant's job as receiving clerk. "…[H]e checks in vendors when they come in and out bringing product inside the store, as well as fills in for dairy - - for the dairy manager - - if our dairy manager is not there he oversees the dairy as well." Tr., p. 117. In addition,

receiving clerks, including Claimant, move stock around on pallet jacks (manual/hydraulic and electric), use hand-held computerized inventory devices, and stock items on store shelves for sale. Loaded pallets can weigh up to approximately five hundred pounds.

33. Claimant works five days per week, eight hours per day. Mr. Gomez sees Claimant at work four days per week, frequently each day. He has seen Claimant bending and twisting, and walking, lifting, pushing and pulling every day. He has not seen Claimant climb stairs or ladders. "He usually asks me to do it." Tr., p. 121. Mr. Gomez first learned that Claimant has permanent medical restrictions only a couple of weeks before the hearing. A representative of Defendants provided him with this information.

34. Jesus Ocampo, another manager, also supervises Claimant. He has been Claimant's supervisor since March 2013. His testimony regarding his observations of Claimant at work is consistent with Mr. Gomez's. He, too, was unaware Claimant had any medical restrictions until a couple of weeks before the hearing.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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). However, the Commission is not required to construe facts 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).

CAUSATION

35. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

36. Here, Defendants do not dispute that Claimant was involved in an industrial accident on December 9, 2011. However, they assert that the injury for which he required L4-5 discectomy on January 2, 2012 was not related to the industrial accident, but, instead, is the result of lifting a 100-pound dog on December 28. There is only one medical expert opinion – Dr. Christensen's – in the record. If it is sufficient to support Claimant's *prima facie* case, then Claimant will prevail.

37. **Dr. Christensen's causation opinion.** Dr. Christensen has performed orthopedic surgeries for about 13 years. During that time, he estimates he has performed several hundred lumbar discectomies. He performed minimally invasive discectomy on Claimant on January 2, 2012 and continued to follow his low back condition through the time of the hearing. The parties stipulated that Dr. Christensen is qualified to render an expert opinion in this case.

38. Throughout his treatment of Claimant, Claimant did not report any potential cause for his low back condition except his workplace accident. On February 3, 2012, Surety notified him of the dog-lifting reports in Claimant's medical records, as well as the notes indicating Claimant's pain had essentially gone away by the time of his fishing trip.

Dr. Christensen responded on February 23 that, on a more-probable-than-not basis, Claimant's L4-5 disc herniation requiring surgery on January 2 was related to his workplace accident. He explained at his deposition that he had spoken to Claimant and, as a result, Dr. Christensen believed Claimant's symptoms had persisted since his workplace accident. "The pain was in his back and had run down his leg and the symptoms had been there prior to the ER visit on 12/29. So that's when he sought treatment, but that's not when the symptoms occurred." Christensen Dep., pp. 20-21.

39. Dr. Christensen also opined:

a. He could not be certain of the cause of Claimant's disc herniation. "I wasn't there when the milk cartons fell, you know. From the description the patient gave to me, the amount of force could have caused that. To what degree of probability, it's somewhat uncertain." Christensen Dep., p. 13. "That can be a cause. It's not necessarily the only cause, but it can be a cause." *Id.*

b. It is medically probable that lifting a 100-pound load would herniate a disc.

c. Claimant's burning sensation in his left buttock is consistent with an L4-5 disc herniation. Interoperatively, Dr. Christensen identified "a bulbous disc herniation that was under the L5 nerve root…crossing over the disc." Christensen Dep., p. 14. He explained that the "L5 nerve root does interrelate some of the buttock muscles. And so it can get referred pain from there." *Id.* at 15. However, he also acknowledged that there are many potential causes of low back pain and that there's no way to know for sure

when a disc herniates without "realtime live MRI sequences to watch the process." *Id.* at 15-16. Claimant contends he had the burning sensation before December 28.

d. Resting on the sofa would not cause a herniated disc. "If that's all he was doing was sitting back, relaxing, simply doing that would not cause physiologic stress that would be consistent with enough force to tear a disc or cause a herniation." Christensen Dep., p. 16. On the other hand, a rough car ride might be sufficient to result in a disc herniation. "I guess if it were extreme off-road, if there were a lot of potholes, a lot of jostling, if he were being tossed in the cab of the car." *Id.* at 17-18. Along those lines, Dr. Christensen was unfamiliar with the road to Roseworth Reservoir, and there is no evidence in the record from which to determine its condition at the time of Claimant's fishing trip.

40. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine*, *Id*.

41. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the

events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

42. Dr. Christensen's seemingly contradictory opinions regarding the probability of Claimant's workplace accident being the cause of his L4-5 disc herniation are reconcilable. When asked isolated, more general questions, Dr. Christensen was cautious, acknowledging that the proposed event *could* be related to the proposed outcome. For example:

> Q. …So speaking of the mechanism of injury that he described as him having pulled - - been pulled down to the ground, his left-lower back hitting the milk crates - - stack of milk crates, is that mechanism of injury consistent with having sustained a herniated disc at L4-5?
>
> A. And, again, it's possible that could have.
>
> [objection]
>
> Q. In the absence of anything else he may have reported to you?
>
> [objection]
>
> A. Yeah. Disc herniations can be caused by a number of things, mechanism, such as you described could, certainly, be on that is possible to have caused a disc herniation.

Christensen Dep., pp. 12-13. However, when asked to consider everything he believed about Claimant's case, Dr. Christensen plainly opined that Claimant's workplace accident was likely related to his low back pathology: "Based on my examination of the patient and history given, the symptoms that he was experiencing, and the MRI findings, they were all consistent with a left L4-5 disc herniation, causing left-leg radiculopathy. And as he reports, those symptoms began on 12/9/2011." *Id.* at 22.

43. Dr. Christensen's opinion plainly supports Claimant's *prima facie* case, so long as the material foundational assumptions upon which it rests are most likely accurate, based upon the weight of evidence in the record. Defendants contend that the factual basis for Dr. Christensen's opinion cannot be reconciled with the evidence in the record that Claimant's condition was improving until December 28, and that he lifted a 100-pound dog on that day. Therefore, it must be given no weight. Defendants' argument in this regard must fail because Dr. Christensen's opinion does not rule out a causal link, even if it is proven that Claimant lifted a dog as described in the January 2 chart note. Nevertheless, his opinion does open the door to a potential apportionment issue. Therefore, the credibility of the witnesses and evidence pertinent to determining whether it is more likely than not that Claimant lifted the dog are addressed, below.

44. **Credibility of witnesses and evidence.** Credibility of witnesses and evidence is a matter within the province of the Commission. *Zapata v. J.R. Simplot Co.,* 132 Idaho 513, 975 P.2d 1178 (1999). As such, the Commission's findings on weight and credibility will not be disturbed on appeal if they are supported by substantial and competent evidence. *Id.* In *Stevens-McAtee v. Potlatch Corp.,* 145 Idaho 325, 179 P.3d 288 (2008), the Idaho Supreme Court differentiated between observational credibility and substantive credibility in evaluating witness testimony:

> Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission's findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence.

(Citing *Painter v. Potlatch Corp.,* 138 Idaho 309, 63 P.3d 435 (2003), internal citations omitted.)

45. Medical records are routinely admitted into evidence in workers' compensation hearings. Pursuant to J.R.P. Rule 10.G., "Any medical report(s) existing prior to the time of hearing, signed and dated by a physician, or otherwise sufficiently authenticated, may be offered for admission as evidence at the hearing. The fact that such report(s) constitutes hearsay shall not be grounds for its exclusion from evidence." The weight to be allocated to such records, however, is dependent upon their reliability as determined by the foundation for their existence laid by credible witnesses and/or corroborated by other credible evidence. (*See,* for example, *McRea v. Idaho Youth Ranch, Inc.,* 2013 IIC 0079.)

46. In this case, eight witnesses provided live testimony, under oath and subject to cross-examination. They are Claimant, Mr. Ducharme, Mrs. Skrudland, Ms. Hagel, Mr. Gomez, Mr. Ocampo, Ms. Walters-Davis, and Dr. Christensen. Dr. Christensen's qualifications and credibility are addressed, above and below. Claimant, Mr. Ducharme (via video conferencing technology), Mr. Gomez, Mr. Ocampo, and Mrs. Skrudland testified at the hearing before the Referee. The Referee finds all five to be observationally credible witnesses. Mr. Gomez and Mr. Ocampo both offered substantively credible testimony. They are not further addressed herein because they only began working with Claimant in 2013, and neither offered any significant evidence regarding whether Claimant lifted a dog on December 28, 2011. The substantive credibility of each witness, along with the relative weight to be allocated to the December 29, 2011 and January 1, 2012 chart notes, are addressed below.

47. ***Claimant and Mrs. Skrudland.*** Claimant had a prior workplace injury and is familiar with claims procedures. In this instance, Claimant did not attempt to report his December 9, 2011 accident to a supervisor until December 29, 2011, raising some question as to the veracity of his claims regarding the etiology of his L4-5 disc herniation. Also, he continued to work during this time. Even so, the Referee finds Claimant's testimony that he continued to have pain from his industrial injury until he sought treatment is credible. Claimant's wife testified that he exhibited pain behaviors during this period. Claimant thought he would get better, so she cared for him and, in that regard, sought advice from Dr. Christensen. Although he felt well enough to go fishing on December 28, there is insufficient evidence in the record to establish that this activity required effort beyond what an individual with back pain could reasonably withstand. Also, Mr. Ducharme testified that Claimant exhibited pain behaviors and took medication, and, as Claimant testified, his wife thought it may make him feel better to get out of the house.

48. As a registered nurse, Mrs. Skrudland is as familiar as anyone with the kinds of information recorded in medical records and the uses to which such information is put. She has been an active participant in Claimant's medical care, both at home and during his evaluations by other caretakers, and she is aware that Claimant values her input where his healthcare is concerned. Also, Mrs. Skrudland's financial interests are aligned with Claimant's; both are directly related to the outcome of this case. It is likely that Mrs. Skrudland discussed the case with her husband over time.

49. Claimant's testimony regarding his symptoms became more detailed over time. As per the Idaho Supreme Court's guidance in *McAtee* cited above, this is insufficient to support a finding that a witness is being untruthful.

50. Claimant's and Mrs. Skrudland's testimony at the hearing that only she (and not Claimant) communicated facts to Ms. Walters-Davis on January 1, 2012 is inconsistent with Claimant's deposition testimony which indicates that he, himself, provided at least some pivotal information to Ms. Walters-Davis. Claimant's deposition was taken approximately eleven months after January 1, 2012; whereas, the hearing took place approximately 20 months after that date. Claimant's memory of the events that took place on January 1 was likely clearer than either his or Mrs. Skrudland's were later, at the hearing. Also, it is highly plausible that Ms. Walters-Davis would have asked Claimant questions, even though he was in pain, and even though Mrs. Skrudland was present and willing to assist. Mrs. Skrudland likely answered some of Ms. Walters-Davis' questions, but Claimant's and Mrs. Skrudland's testimony that she answered all of them, and Claimant answered none, is not supported by the balance of the evidence in the record.

51. The weight of the evidence (apart from the chart note disputes, addressed below) does not establish that either Claimant or his wife would intentionally mislead this tribunal; however, their respective memories of relevant events are not entirely reliable.

52. ***Mr. Ducharme.*** Mr. Ducharme's testimony is reasonably consistent with the weight of evidence in the record. Notably, his testimony that no dogs accompanied him and Claimant on their fishing trip is unrebutted. Mr. Ducharme is a credible witness.

53. ***Ms. Walters-Davis.*** Ms. Walters-Davis has no known prior relationship with any other witness in this case. Although she is likely motivated to appear professional and competent, there is insufficient evidence from which to conclude that she rendered untruthful or inaccurate testimony. She persuasively testified that she is a diligent record-keeper with a good memory.

54. Ms. Walters-Davis is a credible witness.

55. ***Dog-lifting dispute (January 1, 2012 chart note).*** Ms. Walters-Davis' chart note, if accurate, constitutes persuasive evidence that Claimant's low back symptoms requiring surgery may be due to lifting a dog on December 28, and that Claimant lied at the hearing. For the following reasons, the Referee finds it more likely that the chart note is inaccurate on this point, than that Claimant has perjured himself.

56. As noted above, Ms. Walters-Davis was found to be a credible witness; she persuasively testified that although she no longer retains any memory of her encounter with Claimant, she believes her notes accurately reflect just what she was told by Claimant and his spouse. It is clear that Ms. Walters-Davis did record some information that could only have come from Claimant or his wife. Claimant did intend to go fishing and he does own a dog that requires assistance to get into Claimant's vehicle. However, the Referee is not convinced that Ms. Walters-Davis accurately recorded exactly what she heard from Claimant and his spouse. Claimant did mention having dogs at the house to Ms. Walters-Davis, but Claimant and Mr. Ducharme testified that the dogs did not go with them to Roseworth. Ms. Walters-Davis' documentation of ice fishing is inaccurate. Claimant did not go ice fishing. Claimant intended to go fishing, but was unable to because the water was frozen. Ms. Walters-Davis waited over two hours after meeting with Claimant to record the history she took from Claimant, admitting the possibility that she inaccurately recorded what she had been told. Finally medical records of December 29, 2011 and January 2, 2012 do <u>not</u> document a history of Claimant lifting a dog and injuring his low back. If Claimant or anyone else had given a history of lifting a dog, it would have likely appeared in more than one medical record.

57. Ms. Walters-Davis was unable to recall any of the relevant events at the time of hearing, and the Referee recognizes that miscommunications happen. Ms. Walters-Davis has no specific recollection of Claimant providing the history in question, and Ms. Walters-Davis did not read back the history to Claimant or dictate the record in the presence of Claimant and his spouse. Ms. Walters-Davis' isolated note is insufficient to show that Claimant is lying to this tribunal such that an intervening cause, lifting his dog, is responsible for Claimant's low back symptoms.

58. The Referee finds that the chart note is likely an accurate report of Ms. Davis-Walters' understanding, but it fails to persuade the Referee that Claimant lied, or that he actually lifted a dog on December 28.

59. ***Symptom progression dispute (December 29, 2012 chart note by Dr. Bowman and January 1 chart note).*** On December 29, 2011, Dr. Bowman recorded that Claimant "had a little bit of pain at [the time of his milk accident] but that had essentially gone away until yesterday when his pain began worsening to the point that he described as a ten out of ten shooting pain today." CE2-3. On January 1, 2012, Ms. Walters-Davis recorded, "He reports that he has a little back pain for the last 3 weeks," and then, on December 28, 2011, his pain intensified and continued to worsen." CE2-20. Claimant strongly disputes the characterization of the progression of his low back symptoms following his December 8, 2011 milk accident contained in these chart notes.

60. Claimant asserted at the hearing, "I said that I had a lot of pain and it was getting worse." Tr., p. 90. He testified that his pain intensified on December 28 when he was sitting in a lawn chair at the reservoir. "Just sitting in the lawn chair….I had a sharp-like pain in my back and the pain and the - - it was going clear down to my foot, just a

tingling, burning sensation in my back and leg." Tr., p. 85. Similarly, in his deposition Claimant asserted that he had a lot of back pain over the three weeks following his industrial accident. *See* Cl. Dep., p. 36.

61. Claimant's statements at his deposition and at the hearing are less credible than his statement to Surety on January 9, 2012, less than two weeks after the chart notes in question were created. Claimant reported to Surety that, although his low back ache gradually worsened after his December 9, 2011 accident (especially with certain twisting) ibuprofen relieved most of his pain. He then vaguely added, "But it, it, it just kept hurting more and more and more. And, uh, 'til I ended up with what I did." DE-29.

62. Claimant's statement to Surety is generally consistent with the chart notes. There is insufficient evidence to establish that either Dr. Bowman or Ms. Walters-Davis did not reasonably accurately restate Claimant's reports. Perhaps Claimant had more pain in the weeks leading up to his medical evaluations on December 29 and January 1 than his chart notes belie. However, the evidence is insufficient to establish that either note inaccurately restates a reasonable understanding of Claimant's contemporaneous reports.

63. Claimant has failed to establish it likely that either Dr. Bowman or Ms. Walters-Davis erred in recording their respective understandings of the progression of Claimant's low back symptoms based upon the history provided by Claimant.

64. The relevance of this holding is slight. As determined, above, Claimant's recall of specific events is not entirely reliable. The findings leading to this holding are consistent with that credibility finding. Moreover, Dr. Christensen's opinion is not based upon any particular degree of pain over time, or Claimant's ability to correctly describe it. The persuasive evidence propounded by each party supports a finding that Claimant

continued to have some degree of low back pain after December 9, 2011 and then, on December 28, it noticeably worsened and continued to do so. The Referee is satisfied that Dr. Christensen properly considered these facts in developing his opinion. Also, Dr. Christensen spent substantially more time treating Claimant, and his impressions of Claimant's self-reports as they pertain to his condition are persuasive.

65. Defendants have failed to establish material facts sufficient to render Dr. Christensen's opinion unpersuasive.

66. Dr. Christensen's opinion establishes by a preponderance of medical evidence that Claimant's L4-5 disc herniation requiring discectomy on January 2, 2012 is related to his workplace accident on December 9, 2011. As determined, above, Dr. Christensen's unrebutted opinion supports this conclusion, and there is insufficient evidence to establish that he failed to consider any material facts.

67. Claimant has proven by a preponderance that his herniated L4-5 disc was caused by his workplace accident on December 9, 2011.

MEDICAL CARE

68. 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 required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. Claimant is also entitled to reasonable palliative care. *Hamilton v. Boise Cascade Corp.,* 84 Idaho 209, 370 P.2d 191 (1962).

69. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer 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).

70. In *Sprague v. Caldwell Transportation*, 116 Idaho 720, 722-723, 779 P.2d 395, 397-398 (1989), the Court held that medical treatment already received is reasonable when: 1) the claimant made gradual improvement from the treatment; 2) the treatment was required by the claimant's physician; and 3) the treatment was within the physician's standard of practice, the charges for which were fair, reasonable, and similar to charges in the same profession.

71. Claimant's L4-5 disc herniation was determined, above, to be related to his December 9, 2011 workplace accident. Dr. Christensen recommended surgery, performed on January 2, 2012, which improved (but did not entirely resolve) Claimant's low back symptoms. Claimant has satisfied the *Sprague* criteria and has proved by a preponderance of evidence that he is entitled to medical care benefits related to his L4-5 disc herniation, including but not limited to, reimbursement for the cost of initial treatment and diagnostic services, surgery performed on January 2, 2012, and reasonably related rehabilitation and follow-up care.

72. Defendants assert that they should not be required to reimburse/pay the full invoiced amount of Claimant's medical costs because the law developed in *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009) does not apply. They argue that this case differs significantly from *Neel* in that Claimant's claim was initially accepted and

"[t]he majority of the Claimant's medical treatment occurred while his claim was accepted and paid under the workers' compensation schedule." Def. Br., p. 24. According to Defendants, the presence of a subrogation interest, in this case, is irrelevant.

73. Claimant counters that Defendants did not pay any of Claimant's medical bills. They accepted Claimant's claim on January 12, 1012 (after his diagnostic care and surgery), then denied the claim a couple of weeks later. The result was that Surety reversed the $17.13 total it had paid on the claim to date, leaving Claimant "in the wilderness" for the full invoiced amount of $33,298.97. Claimant not only argues that *Neel* applies, but that the Commission's holding in *Aspiazu v. Homedale Fire Service,* 2012 IIC 0004, further supports his position.

74. The Referee agrees that Surety's brief acceptance of Claimant's claim is insufficient to overcome the fact that Claimant was, for all but a few weeks, required to contract for his own medical care. Further, Surety's reversal of its acceptance negates any benefit to which it may have otherwise been entitled as a result of authorizing benefits. Defendants' argument that Dr. Christensen should have expected to be paid at workers' compensation schedule rates is unpersuasive. St. Luke's Magic Valley, upon learning of Surety's denial, wrote, "We will be deleting workers' compensation from this account and identifying it as a self pay/no insurance account." CE5-3. There is no reason to believe Dr. Christensen should have reacted any differently. The rule of *Neel* applies; Defendants are liable to reimburse Claimant for the full invoiced amount of Claimant's medical bills.

INDUSTRIAL INJURY PPI AND MEDICAL RESTRICTIONS

75. Dr. Christensen's opinions are credible and unrebutted. He assessed 13% whole person PPI to Claimant's post-surgical industrial lumbar spine condition, and

permanent restrictions including no lifting, pushing or pulling over 12 pounds; only rare repetitive bending, stooping or twisting; only rare squatting or kneeling; occasional climbing stairs or ladders, or overhead reaching; frequent limited walking; and continuous repetitive gripping/twisting and hand tool use.

76. The Referee finds Claimant has proven by a preponderance of evidence that he has PPI and medical restrictions as assessed by Dr. Christensen.

PERMANENT DISABILITY

77. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

78. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

79. The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) reiterated that, as a general rule, Claimant's disability assessment should be

performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. However, the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case. Claimant's disability will be determined as of the date of the hearing.

80. Claimant's relevant nonmedical factors at the time of hearing include his age of 59, his education including a high school diploma, and his lifelong experience in the grocery business, including the last 25 years with Supervalu. The impact of these factors on Claimant's employability has not likely changed significantly since 2011.

81. As for the impact on employability of Claimant's medical restrictions due to his industrial impairment, the record contains no expert vocational evidence to assist in this determination. Claimant seeks an award of 20% PPD inclusive of PPI. He continues to work in his time-of-injury job with no reduction in pay, but with some accommodations by his employer (he receives assistance on tasks requiring ladder-climbing). Also, it is likely that, on some occasions, he works in excess of his restrictions. As a result, he was likely less competitive, at the time of hearing, for the universe of jobs for which he was a viable candidate before his industrial accident, as a result of his industrial accident. Whether his loss of access to gainful employment exceeds his PPI, however, cannot be discerned based upon the evidence or legal argument in the record. The Referee declines Claimant's invitation to speculate that he has suffered 7% PPD in excess of PPI.

82. The Referee finds Claimant has failed to prove he has suffered any PPD in excess of PPI.

ATTORNEY FEES

83. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

84. The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

85. Claimant asserts that Surety unreasonably continued to deny benefits after Dr. Christensen opined, on February 23, 2012, that Claimant's L4-5 disc herniation was work-related. Dr. Christensen's opinion remained unrebutted so, even though Claimant's medical records indicated a possible alternate cause, Surety was required to investigate his opinion and obtain sufficient evidence to support an alternate theory of causation in order to continue to deny benefits without penalty.

86. Defendants counter that the evidence in Claimant's chart notes from December 29, 2011 and January 2, 2012 is sufficient to support their continued denial. The Referee disagrees. Once Dr. Christensen rendered an unrebutted causation opinion inconsistent with Surety's denial, it was incumbent upon Surety to further investigate the claim, from both a lay witness standpoint (to investigate the truth of the chart note), and an expert witness standpoint (to investigate the truth of the chart note, and also to investigate the medical plausibility of Dr. Christensen's opinion). Most importantly, Surety's denial is grounded in the assumption that the information regarding lifting a 100-pound dog, if true, would sever the chain of causation. However, this is a medical conclusion that Surety was unqualified to reach without a supporting medical expert opinion.

87. Claimant has proven by a preponderance of evidence that he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 related to Surety's unreasonable denial of benefits following receipt of Dr. Christensen's opinion on February 23, 2012.

CONCLUSIONS OF LAW AND RECOMMENDATION

1. Claimant has proven that his L4-5 disc herniation was caused by his workplace accident on December 9, 2011.

2. Claimant has proven his entitlement to benefits for reasonable medical care related to his workplace accident, including reimbursement for diagnostic services and care, discectomy surgery on January 2, 2012, and related rehabilitation and follow-up costs, at the full invoiced amount.

3. Claimant has proven his entitlement to 13% whole person PPI as a result of his industrial low back impairment.

4. Claimant has failed to prove his entitlement to PPD in excess of PPI.

5. Claimant is entitled to an award of attorney fees, as provided for by Idaho Code § 72-804, for Surety's failure to authorize benefits following receipt of Dr. Christensen's opinion on February 23, 2012. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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 __28th_ day of February, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __19th_ day of __March_____, 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:

MARK R WASDEN
PO BOX 2907
TWIN FALLS ID 83303-2907

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701

ge __/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE SKRUDLAND, Claimant, v. SUPERVALU, INC., Self-Insured Employer, Defendant.	**IC 2012-002491** **ORDER** **Filed March 19, 2014**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 L4-5 disc herniation was caused by his workplace accident on December 9, 2011.

2. Claimant has proven his entitlement to benefits for reasonable medical care related to his workplace accident, including reimbursement for diagnostic services and care, discectomy surgery on January 2, 2012, and related rehabilitation and follow-up costs, at the full invoiced amount.

3. Claimant has proven his entitlement to 13% whole person PPI as a result of his industrial low back impairment.

4. Claimant has failed to prove his entitlement to PPD in excess of PPI.

5. Claimant is entitled to an award of attorney fees, as provided for by Idaho Code § 72-804, for Surety's failure to authorize benefits following receipt of Dr. Christensen's opinion on February 23, 2012. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this __19th_ day of ___March_____, 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 _19th_ day of ___March_____ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MARK R WASDEN
PO BOX 2907
TWIN FALLS ID 83303-2907

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701

ge _/s/_____