BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY KOBROCK, Claimant, v. THE FRANKLIN GROUP, Employer, and ALASKA NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2015-009878** **IC 2016-025830** **IC 2017-031421** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 25, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Twin Falls on April 4, 2018. Dennis Petersen represented Claimant. Emma Wilson represented Employer and Surety. The parties presented oral and documentary evidence. The record was held open for submission of exhibit V, an updated CV, which was later received without objection from either party. The parties took post-hearing depositions and submitted briefs. The case came under advisement on October 16, 2018. This matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided according to the Notice of Hearing are:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code §§ 72-701 through 72-706 and whether they are tolled under § 72-604;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether Claimant is medically stable and, if so, on what date;
4. Whether and to what extent Claimant is entitled to:

a) Temporary disability and
b) Medical care.

All other issues are reserved.

At hearing, issue 1 above was limited to a September 21, 2016 event. The temporary disability issue arises only if Claimant is not medically stable, or has become stable after the date opined by Dr. Bauer. The medical care issue relates to treatment after Dr. Bauer's date of medical stability and includes a change of physician request to recognize Dr. Blair as a treater.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffered three compensable accidents/injuries while in the employ of Employer. The first occurred on April 14, 2015 when Claimant experienced the onset of sudden low back pain while stocking shingles. Claimant contends that his symptoms resolved with treatment, and that he was symptom-free for a period of months prior to his second accident of September 1, 2016. On that date, Claimant contends that he suffered a low back injury when lifting and carrying a 5/8 inch full size sheet of plywood. The parties acknowledge that timely notice and claim were made for this accident. Finally, Claimant contends that on September 21, 2016, he suffered a third low back injury while loading a length of sheet rock into a customer's pickup. He claims to have immediately notified his supervisor of this accident. As a consequence of the September 2016 accidents, Claimant contends he has suffered injury to his lumbar spine for which he has required medical treatment. He denies that he is at a point of medical stability and contends that he requires further evaluation in order to assess his need for additional medical treatment, to include possible surgery. Claimant requests that Benjamin Blair, M.D., be recognized as his treating physician for the purpose of performing such additional evaluation. Claimant contends that, prospectively, he may be entitled to time loss benefits during treatment, or following surgery.

Defendants acknowledge that timely notice of injury and claim for benefits was made for the accidents of April 14, 2015 and September 1, 2016. However, Defendants deny timely notice and claim for the accident of September 21, 2016. Further, Defendants contend that Claimant has failed to demonstrate that Defendants were not prejudiced by Claimant's failure to give timely notice. Defendants contend that Claimant has not suffered any permanent injury to his lumbar spine as a consequence of the subject accidents. They acknowledge, at most, that Claimant has suffered a temporary aggravation of a pre-existing lumbar spine condition, from which he has fully recovered. Claimant is not entitled to further medical care and is not entitled to a change of physician.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Joint exhibits A through V (Exhibit V was later supplied by the parties and can be found inserted within Exhibit Q.);
3. Post-hearing depositions of R. David Bauer, M.D., and Benjamin Blair, M.D.

FINDINGS OF FACT

1. At all times relevant hereto, Claimant was employed by Franklin Building Supply at Employer's Burley location, and he was so employed as of the date of hearing.

2. Claimant has suffered numerous industrial accidents over the years, as set forth at JE T. Claimant does not appear to have suffered any work-related injury to his low back until the accident of April 14, 2015. On that date, while stocking shingles, he turned and felt something pinch in his low back. (Tr. 24/19-25/6). Claimant contends, and Employer does not dispute, that this mishap was immediately reported to Employer.

3. Claimant sought medical treatment at Riverview Urgent Care where he was seen

on April 15, 2015, with complaints of pain in the low back radiating to the left lower extremity. (JE K at 1). Claimant was diagnosed with low back pain and referred to Burley Physical Therapy where he was evaluated by Nick Greenwell, MPT, on April 20, 2015. (JE L). To Mr. Greenwell, too, Claimant complained of low back and left lower extremity pain. By April 22, 2015, Claimant's symptoms were somewhat improved, but by April 27, 2015, his complaints had increased. He rated his pain at 9/10 and described his pain as a dull ache which ran down his leg. (JE L at 15). These symptoms appear unchanged as of April 29, 2015. (JE L at 17). However, by May 4, 2015, Claimant reported improvement in symptoms with pain at a level 5/10. Similar complaints were reported on May 6, 2015.

4. Claimant returned to Riverview Urgent Care and Medical on May 11, 2015 with complaints of low back pain radiating into the left and now right lower extremities. On exam, straight-leg raise was positive bilaterally. Light-duty restrictions were continued and Claimant was directed to continue with physical therapy. Physical therapy notes from May 11, 2015 and May 13, 2015, reflect continued improvement. On May 13, 2015, it was noted that Claimant's left leg was slowly gaining strength and he had less back pain. Although further physical therapy was evidently contemplated, Claimant was not seen again at Burley Physical Therapy until after the September 2016 accidents.

5. On May 26, 2015, Claimant was again seen at Riverview Urgent Care and Medical. He reported his complaints as moderate, or unchanged since his visit of May 11, 2015. He continued to complain of low back pain with radiation of symptoms into his bilateral lower extremities. Though he continued to have subjective complaints, he requested a work release since he "needed to go back to full duty." (See JE K at 5-D). As of May 26, 2015 Claimant was released to work without restrictions.

6. The record does not reflect that Claimant sought any care for his back between May 26, 2015 and September 21, 2016.

7. Claimant testified that he made a full recovery from the accident of April 14, 2015, and that his low back and lower extremity symptoms resolved completely prior to the accident of September 1, 2016. (Tr. 59/19-61/4).

8. As noted, Defendants do not contest the timeliness of notice and claim in connection with the April 15, 2015 accident/injury.

9. Claimant suffered a second industrial accident on September 1, 2016 while loading plywood into a customer's horse trailer. Claimant testified that he immediately reported this accident to Bart Hutchinson, the Yard Manager. According to Claimant, Mr. Hutchinson completed a supervisor's accident report. Claimant did not seek immediate medical treatment for this accident, hoping that it would resolve on its own. (Tr. 29/18-24). Between September 1, 2016 and September 21, 2016, Claimant described his complaints as low back pain with pain going down the back of his legs "every now and then" to "quite a bit." (Tr. 31/13-32/6).

10. Claimant testified that he suffered his third industrial accident on September 21, 2016 while helping a customer load two 10 x 4 sheets of sheet rock into the customer's pickup. (Tr. 32/7-33/23). Claimant testified that as with the September 1, 2016 accident, he immediately notified his supervisor, Bart Hutchinson. (Tr. 33/24-34/3). Following this accident, Claimant testified that the pain he was experiencing down the back of his legs became constant. Claimant's supervisor directed Claimant to Riverview Urgent Care and Medical for treatment/evaluation.

11. No separate supervisor's report of injury exists for the accident of September 21, 2016. However, on September 21, 2016, Hutchinson prepared a workers' compensation First

Report of Injury, in the form supplied by the Industrial Commission. (See JE B at 1). That form reflects the occurrence of an accident on September 1, 2016 while Claimant was loading plywood into a pickup. Though prepared by Mr. Hutchinson on September 21, 2016, the form makes no reference to a separate and distinct accident occurring that date. It was not until August 8, 2017 that a First Report of Injury or Illness was prepared with respect to the September 21, 2016 accident. This document was prepared by Claimant's counsel.

12. The Riverview Urgent Care and Medical Clinic note of September 21, 2016 reflects that Claimant gave a history of an accident occurring not on September 21, 2016, but on September 14, 2016. (See JE K at 6). For his part, Claimant denied the occurrence of a separate accident of September 14, 2016:

> Q: [By Mr. Peterson] The records from River View do indicate it's that day and I'm looking at Joint Exhibit K, page six, once again, dated September 21, 2016, and I'm going to read it to you. Okay? The patient presents with a chief complaint of constant back pain of the back since Wednesday, September 14, 2016. Where did - - do you have any knowledge as to where September 14, 2016, comes from?
>
> A: I don't know. I might have told them I hurt by back the previous week and it's not got any better. I don't recall.
>
> Q: Okay. Then the question arises did you have an accident September 14, 2016?
>
> A: Not that I remember.
>
> Q: Then it says: It has the following qualities. Sharp and achy. Does that describe your symptoms?
>
> A: Sharp and achy. Yeah. I guess that could describe it.
>
> Q: Then it continues. The patient reports it was the result of an injury that occurred on September 14, 2016, which was work related, which had a sudden onset. Once, again, do you have any idea where September 14 come from?
>
> A: No.
>
> Q: Then it says the patient had no similar problem in the past. Did you have

an accident on 2015?

A: Yes.

Q: So, when it says no similar problems in the past, that's not true?

A: I would - - I really don't know. I don't understand how they would word that, put it that way.

Q: Okay. And, then, skipping down just a little bit more. It says patient reports that the pain radiated to the left lower extremity and right lower extremity. Is that true?

A: Yes.

Q: And, then, it says patient is here regarding pain to his lower back times one week. That's to get back to September 14?

A: I don't know if they just didn't put - - they just wrote something down. I don't know.

Q: Okay. But, once again, you didn't have an accident on September 14?

A: No. Not that I know of.

Tr. 34/25-36/18. The Riverview Urgent Care and Medical Clinic chart note of September 21, 2016 reflects that Claimant presented with complaints of low back pain radiating to the left and right lower extremities. He was diagnosed as suffering from low back pain, given certain work restrictions, and prescribed a number of medications. By October 5, 2016, Claimant's complaints were unchanged. On that date, Riverview Urgent Care and Medical records reflect ongoing complaints of pain radiating down Claimant's legs. The note also reflects that Claimant described having injured his back in a similar way a year earlier "which was much worse," but which resolved with physical therapy.

13. On October 5, 2016, Claimant had positive straight-leg raise bilaterally. (See JE K at 12-13). Claimant was referred to Burley Physical Therapy and Rehabilitation. The initial physical therapy notes do not reflect that Claimant presented with radicular complaints, although

they do reflect that Claimant had, in addition to complaints of low back pain, some left-greater-than-right gluteal pain. On October 13, 2016, physical therapy notes reflect that Claimant reported an increase in back pain which he rated at 9/10. By October 17, 2016, Claimant reported decreased pain, but with continued sharp pains down his left leg. Physical therapy notes from October 24, 2016 reflect that Claimant presented with complaints of a "lot" of pain. He had pain now affecting both legs. On October 26, 2016, the physical therapy notes reflect that Claimant presented with complaints of an increase in his back pain described as dull, and traveling down both legs.

14. On October 26, 2016, Claimant was also seen in follow-up at Riverview Urgent Care and Medical. The records of that visit reflect that Claimant presented with complaints more severe than those he had on October 5, 2016. His complaints included pain radiating into his lower extremities, along with occasional burning in his feet. MRI evaluation of Claimant's lumbar spine was recommended. That evaluation was conducted on or about November 1, 2016, and the study was read as follows:

> Findings: This report assumes five lumbar vertebral bodies, numbering the vertebra from the lumbosacral junction. Consider plain film correlation prior to any intervention.
>
> Alignment: There is no subluxation. There is slight reversal of the normal lumbar lordosis.
>
> Bone marrow: Normal.
>
> Vertebral bodies: Normal.
>
> Disc spaces: Mild desiccation and disc space narrowing at L2-L3 and L3-L4. Mild desiccation without disc space narrowing at L4-L5 and L5-S1.
>
> Posterior elements: Normal.
>
> Central canal: Mild narrowing at L2-L3 and L3-L4.

> Neural foramina: Moderate left L3-L4 foraminal impingement secondary to far lateral disc protrusion at this level. There is also a right far lateral disc protrusion at L5-S1with moderate foraminal impingement at this level. Small far lateral disc protrusion on the left at L4-L5 with impingement upon the lateral aspect of the foramen at this level.
>
> Report
>
> Visualized distal cord/conus: Grossly normal.
>
> L1-L2: Normal.
>
> L2-L3: There is broad-based posterior disc bulging and indentation of the thecal sac and mild narrowing of the AP diameter of the canal.
>
> L3-L4: There is a far left lateral disc protrusion in addition to central disc bulging. This results in left foraminal impingement.
>
> L4-L5: Note is made of a smaller left far lateral disc protrustion and lateral foraminal impingement.
>
> L5-S1: Right far lateral disc protusion, right lateral foraminal impingement.
> Visualized paraspinous structures: small mid and upper pole cysts involving the left kidney.
>
> IMPRESSION: Multilevel disc degenerative changes and multilevel far lateral disc protrusion see above description at each level.

JE M at 1-2.

15. On November 8, 2016, Claimant described his complaints as having improved from severe to moderate. A recommendation was made that Claimant be referred to a spine specialist for further evaluation. Work restrictions were continued.

16. Claimant was first seen by Justin Dazley, M.D., on November 21, 2016. To Dr. Dazley, Claimant described symptoms of pain in the low back and legs, left worse than right, accompanied by a burning sensation. Dr. Dazley also reported that Claimant's lower extremity complaints were less bothersome to Claimant than his back pain. He reported continuous symptoms in the low back and intermittent symptoms in the legs. Dr. Dazley noted that the MRI,

though demonstrating multilevel mild disc degeneration, did not demonstrate significant neurologic compression. Claimant's neurologic exam appeared to be largely normal, and Dr. Dazley recommended electrodiagnostic studies to further assess Claimant's leg symptoms. His differential diagnosis included low back pain and lumbar radiculopathy. He referred Claimant for further physical therapy modalities. However, from the evidence of record, it does not appear that Claimant received additional physical therapy.

17. Electrodiagnostic testing was accomplished on November 30, 2016 by David Jensen, D.O. That study was read as a normal electrodiagnostic test; there was no evidence of a neuropathy to explain Claimant's lower extremity symptoms.

18. Claimant was next seen by Dr. Dazley on January 9, 2017. At that time, Claimant continued to complain of pain in the lower back and left leg, with a burning sensation in the left foot near the little toe. He complained of primarily left-sided symptoms, with occasional right-sided symptoms. Neurologic exam was, again, essentially normal. Dr. Dazley noted that there was neither electrodiagnostic nor radiologic findings to explain Claimant's ongoing lower extremity complaints. However, Dr. Dazley appeared to accept that Claimant's complaints were real since he expressed the belief that Claimant's symptoms warranted further treatment, although not surgical treatment. He recommended conservative modalities of pain management and physical therapy. He revised his assessment to "no diagnosis found."

19. On February 21, 2017, Claimant was first seen by Michael McEntire, M.D., who eventually provided a series of epidural steroid injections in an effort to treat Claimant's lower extremity symptoms. Dr. McEntire's February 21, 2017 record reflects that Claimant presented with the following symptoms:

> Back pain is constant and aching and worse with twisting, lifting, and activity. Leg pain is more sharp and radiates down the posterior lateral legs to the ankles, and often felt into the feet. Pain is more or less constant, but worse with activity.

(JE P at 1). Claimant's physical exam was significant for positive lumbar facet loading maneuvers and positive straight-leg raise, bilaterally. Dr. McEntire had the opportunity to review the previous radiologic and electrodiagnostic testing. His assessment included chronic bilateral low back pain with bilateral sciatica. He noted the following:

> Imaging shows mild stenosis L2-3 and L3-4, with multilevel degenerative disc disease and facet arthropathy. It's a bit difficult to identify a specific neurologic impingement consistent with his symptoms, and EMG was normal. Exam suggests a bilateral L5-S1 radicular-type pain. There is some neural foraminal impingement at L5-S1. Several epidural steroid injections were performed, the last occurring on April 3, 2017.

Claimant was seen in follow-up by Dr. McEntire on May 9, 2017 at which time Dr. McEntire reported that Claimant expressed improvement in much of his back and leg pain, although he was still limited in some of his daily activities. Dr. McEntire's assessment continued to include chronic bilateral low back pain with bilateral sciatica, noting that there was not much evidence that Claimant was a surgical candidate. Dr. McEntire recommended further conservative modalities to treat Claimant's complaints. Claimant was last seen at Dr. McEntire's office on January 17, 2018 with ongoing complaints as follows:

> Patient reports that he has been having continued increases of pain in his back and that conservative measures of exercise and stretching are not helpful. He has been working through the process of getting facet injections approved and litigated. The pain is most prominent with moving sided to side and he is able to bend at the waist, but going back to an erect posture is painful. The same is the case for lateral bends and he no longer can tolerate back extension. He is unable to lay supine and sleep for more than a few hours until he is woken up from pain and paraesthesias [sic] in his legs.

JE P at 27. On exam, Claimant had moderate-to-severe positive straight-leg raise bilaterally. It was thought that Claimant exhibited "continued and significant increases in his objective exam

and subjective pain that indicate lumbar facet arthropathy and lumbar stenosis progression." (JE P at 28).

20. At the instance of Surety, Claimant was evaluated by R. David Bauer, M.D., on July 6, 2017. Dr. Bauer described Claimant's symptomatology as of the date of evaluation as follows:

> The symptom diagram was filled out on July 6, 2017. Mr. Kobrock indicates that he has pain in his lower back, and circles the entirety of the left and right lower extremities. He notes that most of the pain is in the low back, with some radiation to his buttock and thighs. When he tries to sleep at night, his back and legs all the way down to his toes will "throb." He indicates that his pain is 6-7/10, on a 0-10 Visual Analogue Scale. When asked what increases his pain, Mr. Kobrock says "it is hard to say." If he sits, stands, or walks for too long, his pain will increase. He has "not found anything to make it better."

JE Q at 6-7. On exam, Claimant reacted to simulated rotation and compression of his spine. Straight-leg raise was positive for increased back pain at 30 degrees bilaterally. However, Claimant had no radicular pain in either the seated or supine position. Dr. Bauer diagnosed a strain of the lumbar spine, resolved. He noted Claimant's multilevel degenerative disease of the spine, which he felt was neither aggravated nor accelerated by the subject September 1, 2016 accident. He felt that Claimant was medically stable and without ratable impairment.

21. Dr. Bauer's deposition was taken on June 7, 2018. On direct examination he explained that Claimant had no objective neurologic findings on exam. Although Claimant did exhibit positive in straight-leg raising in the supine position, this maneuver did not produce any evidence of radiculopathy. Similarly, although Claimant had some pain radiating into his buttocks with axial compression, neither did this finding suggest true radiculopathy. (Bauer Depo., 8/19-11/3). Dr. Bauer testified that his clinical evaluation of Claimant was consistent with the MRI and EMG studies, both of which failed to demonstrate evidence of lower extremity radiculopathy. Dr. Bauer believed that Claimant's November MRI demonstrated pre-existing

conditions only. In other words, had Claimant undergone MRI evaluation immediately prior to September 2016 such a study would have yielded findings identical to the November 2016 study. (Bauer Depo., 14/2-18). In support of this conclusion, Dr. Bauer observed that Claimant's complaints have waxed and waned over time which is consistent with the natural progression of a multilevel degenerative process that would have occurred regardless of the September 2016 accident. (Bauer Depo., 14/19-25). At most, Dr. Bauer was willing to concede that Claimant suffered a temporary exacerbation of his baseline condition as a consequence of the subject accidents. He proposed that Claimant responded to epidural steroid injections and that with this treatment, his temporary exacerbation has resolved. Therefore, even though Dr. Blair may have noted that Claimant suffered from radicular complaints going down to his feet in October of 2017, the fact that Dr. Bauer noted no such symptom in July of 2017 suggests that Claimant's current complaints cannot be the product of injuries occurring in September of 2016. Otherwise, one would expect Claimant to have had findings consistent with radiculopathy at the time of Dr. Bauer's examination.

22. On cross examination, Dr. Bauer acknowledged that he did, in fact, take a history from Claimant of lower extremity complaints radiating down into his toes. (Bauer Depo., 27/16-22). Further, he acknowledged that the pain diagram prepared by Claimant in connection with Dr. Bauer's examination reflects that Claimant noted bilateral lower extremity complaints going down into his feet. Dr. Bauer then testified that if Claimant's lower extremity complaints predominated over his back symptoms, Claimant might be a candidate for repeat epidural steroid injections or decompressive surgery. However, Dr. Bauer continued to insist that Claimant did not present with such a history. (Bauer Depo., 27/16-28/7).

23. Dr. Bauer did not believe that the CT myelogram recommended by Dr. Blair is indicated. First, the November, 2016 MRI was a high quality study, and the difference in diagnostic accuracy between MRI and CT myelogram is "miniscule." He would not expect further study to do anything but duplicate the MRI findings. (Bauer Depo., 16/12-18/12).

24. Claimant was seen by Benjamin Blair, M.D., at the instance of Claimant's counsel in October of 2017. His report reflects that Claimant presented with the following complaints on October 25, 2017:

> Currently, Mr. Kobrock complains of back pain which radiates to the bilateral lower extremities. He states his leg pain is worse than his back pain. The pain radiates to the feet. He notes associated numbness and weakness. His pain is particularly worse with sitting and driving. At best, his pain is 7/10. It is currently 8/10. At worst, his pain is 8-9/10. He is currently undergoing pain management with oral narcotics with reevaluation every 3 months, which makes his pain tolerable. He is currently working light duties with no lifting greater than 20 pounds. He is unable to perform his time of injury job and he is currently an inventory specialist.

JE R at 4. Dr. Blair had the opportunity to review past medical records, to include the aforementioned MRI and EMG studies. Like Dr. Bauer, Dr. Blair concluded that Claimant suffered from pre-existing multilevel degenerative disc disease. However, because Claimant had been asymptomatic in the months prior to September of 2016, and symptomatic at all times thereafter, Dr. Blair concluded that the September 2016 accidents aggravated Claimant's underlying condition, causing his pre-existing condition to become symptomatic. (See JE R at 6). Dr. Blair felt that Claimant's condition warranted further radiologic evaluation by way of a CT myelogram. In this regard, he explained that while the November 2016 MRI demonstrated significant foraminal narrowing, the severity was "borderline" in terms of making a judgment about the need for surgery. Further study was thought to be indicated to determine the extent of neurologic impingement.

25. Dr. Blair discussed these and other opinions in his April 25, 2018 deposition.

26. While Dr. Blair affirmed Claimant's presenting complaints of significant lower extremity symptoms, he also acknowledged that Claimant had no objective findings on exam to suggest lower extremity radiculopathy. Dr. Blair testified that the November 2016 MRI revealed multilevel degenerative lumbar spine disease. However, the study was not definitive on the question of whether or not the foraminal narrowing caused neural impingement. Per Dr. Blair, the CT myelogram he proposed is another, and perhaps more sensitive, way to assess whether or not Claimant suffers from nerve root impingement. (Blair Depo., 8/21-12/21). Dr. Blair recommended this additional study even though the EMG results augured against a conclusion that Claimant suffered from true radiculopathy. Dr. Blair explained that electrodiagnostic testing commonly produces a false-negative result for radiculopathy. (Blair Depo., 12/22-13/16; 20/5-14). Further, although Claimant's clinical evaluation was negative for objective findings of radiculopathy, Dr. Blair testified that a negative straight-leg raise test would not rule-out neurological compromise of exiting nerve roots. (Blair Depo., 21/17-22/1).

27. Dr. Blair confirmed his opinion that the September 2016 accidents caused permanent injury to Claimant's lumbar spine, even though he was unable to articulate the exact nature or location of the lumbar spine injury which was caused by Claimant's accident, and which is responsible for his ongoing symptomatology:

> Q: [By Ms. Wilson] What physical injury do you believe resulted from the September 26 accident?
>
> A: Biologically speaking?
>
> Q: Yes.
>
> A: I'm not sure. I'm not sure exactly what occurred other than he had aggravation; whether it was speeding up the degenerative process; whether it was simply just swelling around the nerve itself; whether the discs bulged a little more

> than they were before or a combination of all of that. I would need to have an MRI done right before the injury to be able to tell you what actually physically happened. It could be a combination of all of those.

Blair Depo., 18/15-19/3. The only way that it would be possible to understand the exact nature of the work-caused injury would be to refer to an MRI taken immediately prior to the September 2016 accidents. Of course, such a study was not undertaken.

28. Even though Dr. Blair was unable to be more specific about the nature and location of the work-caused aggravation, his testimony is to the effect that such a change is necessarily implied because Claimant was (by history) asymptomatic in the months preceding September 2016 and symptomatic with complaints of low back pain and lower extremity symptomatology ever since. Therefore, the September 2016 accidents must have caused some type of additional injury to Claimant's lumbar spine.

29. Concerning the development of his low back symptomatology, Claimant testified that prior to April 14, 2015, he had no history of low back problems. (See JE S). Claimant testified that following the April 14, 2015 accident he received medical treatment, which included physical therapy. He was released to return to work on or about May 25, 2015, and returned to his normal job with Employer without restriction. (Tr. 26/10-21). He testified that his symptoms from the April 14, 2015 accident had completely resolved prior to the accidents of September 2016. (Tr. at 59). Following the September 2016 accidents Claimant's complaints have been in his low back and bilateral lower extremities. He testified that his complaints had been more or less unrelenting since September, although he did have some temporary relief following the first epidural steroid injection performed by Dr. McEntire.

DISCUSSION AND FURTHER FINDINGS OF FACT

30. 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).

31. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

32. Per the Referee, Claimant's demeanor did not appear deceptive. Although at hearing he sat with apparent discomfort and moved slowly, he did not exhibit the grimacing, gestures, and exaggerations that sometimes suggest overdramatization. To the contrary, to the Referee, Claimant appeared nearer the stoic end of the spectrum. Moreover, Claimant's continued work within his restrictions is an indicator of a credible, honest presentation of his symptoms. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

I.

Timeliness of Notice and Claim for the Accident of September 21, 2016

33. As noted, Defendants do not challenge the timeliness of notice and claim for the accidents of April 14, 2015 and September 1, 2016. However, they do contend that Claimant failed to give timely notice and make a timely claim for the accident of September 21, 2016. Therefore, they contend that a claim for injuries referable to that accident is time-barred. For the

reasons set forth below, the Commission concludes that lack of written notice is excused by Employer's actual knowledge and that the claim is timely made.

34. Idaho Code § 72-701 specifies that for an accident, a claimant shall give notice to employer concerning the occurrence of the same within sixty (60) days. Further, claimant must make his claim for benefits within one (1) year following the date of the accident. However, if, within the one-year period following the occurrence of the accident, employer has made voluntary payments of compensation or an application for hearing, i.e., "complaint" has been filed, the making of the claim within the one-year period is not required.

35. Idaho Code § 72-702 specifies, *inter alia*, that the notice and claim must be in writing. Idaho Code § 72-704 specifies that want of timely written notice will be excused "if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease."

36. Here, the evidence does not establish that written notice of the type anticipated by Idaho Code § 72-702 was provided to employer for the accident of September 21, 2016. Although an employer's first report was prepared on that date, it references only an accident of September 1, 2016. However, Claimant testified that on September 21, 2016 he advised his immediate supervisor, Bart Hutchinson, of the occurrence of the September 21, 2016 accident, and that Mr. Hutchinson thereafter directed him to Riverview Urgent Care and Medical for treatment/evaluation. Claimant's testimony in this regard is uncontradicted; Employer did not call Mr. Hutchinson, or any other agent of Employer to controvert Claimant's testimony. Having found Claimant to be a credible witness, we accept his testimony as true. Therefore, we conclude that want of written notice is excused by Employer's actual knowledge of the September 21, 2016 accident per Idaho Code § 72-704.

37. Concerning the requirement that Claimant make his written claim within one (1) year following the occurrence of the September 21, 2016 accident, we take notice that Claimant filed his Complaint seeking compensation for that accident with the Commission on September 15, 2017, well within the one-year period following the September 21, 2016 accident. Therefore, the instant case files squarely within the provisions of Idaho Code § 72-701 pursuant to which a written claim need not be filed where a complaint is filed within the one-year period following the subject accident.

38. Based on the foregoing, we conclude that for the accident of September 21, 2016 the requirement of written notice is excused and that a timely complaint has been made.

II.
Medical Causation

39. Having determined that Claimant's claim for benefits vis-à-vis the September 21, 2016 accident is not time barred, it becomes somewhat less critical to ascertain the extent to which Claimant's injuries are referable to each of the three accidents at issue. For whatever reason, the parties appear to have conceded that the injuries Claimant suffered as the result of the April 14, 2015 accident were temporary and self-limiting. Rather, the attention of the parties has focused on the question of whether or not the accidents of September 2016 have permanently aggravated Claimant's pre-existing degenerative disease of the lumbar spine. Relying on the testimony of Dr. Blair, Claimant contends that the evidence establishes that the September 2016 accidents are responsible for permanently aggravating Claimant's low back condition, entitling him to the further evaluation and medical treatment he has requested in this proceeding. Relying on Dr. Bauer's testimony, Defendants contend that the evidence fails to establish that the subject accidents caused permanent injury to Claimant's lumbosacral spine. At most, they appear willing

to concede that the accidents caused a temporary aggravation of Claimant's pre-existing condition, which has since resolved.

40. It is axiomatic that the claimant in a workers' compensation case carries the burden of proving that the condition for which compensation is sought is causally related to an industrial accident. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 336 P.3d 242 (2014). It is a probable, not merely a possible, causal connection between the employment and the injury which must be proven. The proof required is medical proof, and claimant must demonstrate causation to a reasonable degree of medical probability. *Anderson v. Harpers, Inc.*¸ 143 Idaho 193, 141 P.3d 1062 (2006). The weight and credibility to be given to conflicting testimony is for the Commission to determine. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006).

41. As developed above, the medical opinions of Drs. Blair and Bauer diverge on the question of the impact of the subject accidents on Claimant's low back condition. Both physicians had the opportunity to review the relevant radiological and electrodiagnostic studies. Both physicians had the opportunity to review medical records generated in connection with treatment of Claimant's low back since April of 2015. Both physicians conducted clinical evaluations that were essentially negative for objective signs of radiculopathy. Dr. Blair concluded that Claimant did suffer a permanent injury as a result of the accidents. Dr. Bauer decried this conclusion and was only willing to acknowledge that Claimant may have suffered a temporary exacerbation of the natural course of his underlying degenerative low back disease as a consequence of the subject accidents. In this regard, Dr. Bauer testified:

> A: I would agree that Mr. Kobrock had a time period in which he was having axial pain complaints that were greater than what would be expected from his disease. One of the things that is taught in the American Academy of Orthopedics Occupational Medicine course is that any disease has a natural slope to it, and

> lumbar degenerative disease is something that worsens over time. And so one would expect that Mr. Kobrock's disease would worsen over time, so he became symptomatic and rose above that curve, but then he goes back to what would be expected from his normal disease process. I would say that he had, if anything, a temporary aggravation of that condition, and his current condition that's reflected in the examinations of 2017 and 2018 is what one would expect from the degenerative disease regardless of the incident in question.

Bauer Depo., 15/11 – 16/6. Dr. Bauer believed that following the accidents of September 2016 Claimant's symptoms "waxed and waned" and that this course was entirely consistent with the natural progression of his demonstrated pre-existing degenerative condition. (Bauer Depo., 14/19-25). Dr. Bauer initially testified that he did not believe that Claimant exhibited signs of lower extremity radiculopathy. Later, when questioned about the history given by Claimant to Dr. Blair, and the pain diagram provided by Claimant to Dr. Bauer, Dr. Bauer testified that only if Claimant's lower extremity symptoms predominated over Claimant's back pain, would he recommend further treatment for lower extremity radiculopathy, up to surgical intervention. (Bauer Depo., 27/23-28/7).

42. Dr. Blair based his opinion on his belief that Claimant has been symptomatic with complaints of low back and lower extremity pain ever since the September 2016 accidents, but not before. This history informed his belief that the subject accident did cause some permanent structural change to Claimant's lumbar spine.

43. Having reviewed the medical records described above, we find little evidence supporting Dr. Bauer's belief that Claimant's symptoms waxed and waned (except within narrow parameters) following the September 2016 accidents. While there is evidence that Claimant's symptoms were more severe on some days than others, by and large the medical evidence supports Claimant's testimony that he did not have low back or lower extremity symptoms prior to September 2, 2016, and that he has suffered from such complaints more-or-less unremittingly

since then. Dr. Bauer's belief that Claimant's "temporary" accident-produced exacerbation was entirely resolved by Claimant's epidural steroid injections is unsupported by either the medical records or Claimant's testimony. We are more persuaded by Dr. Blair's testimony. While Dr. Blair was unable to identify the nature or location of Claimant's lumbar spine injury, his conclusion that a permanent injury occurred is well supported by the onset of low back and lower extremity symptoms occurring more-or-less contemporaneous with the September 2016 accidents. Neither the medical record nor Claimant's testimony supports the theory that Claimant's symptoms developed simply as a consequence of the natural progression of his underlying degenerative low back disease. To adopt Dr. Bauer's reasoning would require us to conclude that the onset of symptoms at or around the time of the September 2016 accidents was entirely coincidental.

44. Defendants have cited *Stief v. Spokane Food Services*, 2013 IIC 0038 (2013), in favor of a finding that Claimant cannot establish medical causation because he cannot identify with any particularity the objective injury associated with the September 2016 acidents. In *Stief*, it was argued that claimant's accident (primarily involving an injury to her meniscus) also aggravated pre-existing arthritis of the weight bearing surfaces of her knee, such that she required a total knee replacement sooner than she would otherwise have needed it. Most of the treaters/evaluators who addressed this theory rejected it. Only Dr. McInnis opined that the accident aggravated claimant's arthritis, but he was unable to conclude the mechanism by which the accident accelerated claimant's condition. However, he candidly admitted that he was unable to definitively say that it was the accident, versus spontaneous worsening, that was responsible for claimant's need for the total knee replacement. While the instant case does bear some similarities to *Stief*, particularly in the fact that Dr. Blair is unable to identify the precise nature

and location of the suspected injury, Dr. Blair's testimony is less equivocal than that of Dr. McInnis. Dr. Blair has persuasively expressed his view that Claimant's pre-existing low back condition was aggravated by the subject accident.

45. For the reasons set forth above, we are more persuaded by the testimony and opinions of Dr. Blair. We conclude that Claimant did suffer a permanent injury to his lumbar spine as a consequence of the September 2016 accidents, even though the medical evidence leaves us unable to identify the precise location and nature of the injury. We are satisfied, as was Dr. Blair, that a permanent aggravation of Claimant's pre-existing condition occurred.

III.

Medical Care/Change of Physician

46. Having concluded that Claimant has suffered a permanent aggravation of his pre-existing condition, it follows that he may be entitled to additional medical treatment. Idaho Code § 72-432 (1) specifies:

> Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

It is unknown whether Drs. Dazley, McEntire, or other of Claimant's recognized treating physicians would have current recommendations for further treatment. Dr. McEntire has suggested that Claimant might be a candidate for a further round of injections. (See JE P at 38). In his last note of January 19, 2017, Dr. Dazley reiterated that Claimant might benefit from further physical modalities. (See JE O at 10). Dr. Blair, Claimant's retained expert, has recommended that Claimant should have the benefit of further diagnostic evaluation in the form

of a CT myelogram. Surety, of course, denied further medical care following receipt of Dr. Bauer's report.

47. In connection with future medical care, Claimant's primary focus is to obtain authorization for the CT myelogram recommended by Dr. Blair. Such care must be provided by Surety pursuant to Idaho Code § 72-432(1) if it is reasonable, and is required by Claimant's treating physician, or, is care that is needed immediately after an injury and for a reasonable time thereafter. See *Bell v. Super 8 Lodge*, 1992 IIC 0211 (1992); *Richan v. Arlo G. Lott Trucking, Inc.*, 2011 IIC 0008 (2011). The Commission summarized this disjunctive inquiry implicated in Idaho Code § 72-432(1) as follows:

> To summarize, where the care at issue has been recommended by the "employee's physician," the question is whether the physician "requires" the care, and whether the required care is "reasonable." Where the care at issue has not been recommended by the employee's physician, the question is whether the care is "needed," and whether the needed care is "reasonable." Where care has been recommended by an employee's physician, it is up to that physician to determine whether the care is "required." The Commission is only empowered to review the required care for reasonableness. Where the care at issue is other than care required by the employee's physician, the Commission is empowered to determine whether the medical evidence establishes that the care is "needed," and whether the needed care is "reasonable."

The Commission went on to conclude that "needed" care is that care necessary to effect a cure of the injured worker's injury or occupational disease and restore the injured worker's ability to engage in gainful activity.

48. Here, Dr. Blair, the physician who "requires" the diagnostic testing in question is not Claimant's treating physician. However, the testing could still be ordered by the Commission if the care is "needed."

49. Neither Dr. Blair nor Dr. Bauer denigrated the quality of the 2016 MRI. Dr. Bauer testified that the CT myelogram is more useful to evaluate issues relating to bony structures, and

that the difference in the diagnostic accuracy of the MRI versus the CT is miniscule. He strongly suspected that the scans recommended by Dr. Blair would do nothing but duplicate the MRI findings.

50. Though not criticizing the quality of the MRI study, Dr. Blair testified that the findings were "borderline" on the question of whether Claimant's foraminal stenosis was surgical. His testimony strongly suggests that the CT myelogram will be useful in further informing this judgment and will provide different/additional data points to consider. His testimony suggests that the test will be additive rather than cumulative:

> Q: [By Mr. Peterson] Okay. And what would the myelogram post-myelogram CT tell us?
>
> A: How narrow the foramen are. If the foramen are narrow enough that they're actually cutting off the nerves. Because what the myelogram is is the radiologist performs the myelogram, injects X-ray dye into the spine into the spinal fluid. And then they put the patient into a CAT scan and see if the spinal fluid from the middle goes out through the nerves. If the spinal fluid is cut off, the dye will be cut off and then we know for sure that the nerve is being pinched.
>
> Q: Oh, okay. So just to make sure I understand. If you see the dye come outside the nerves on the foramen and then it's not impinging the nerves.
>
> A: That's correct.
>
> Q: Okay. And if it does not come out, then there's some kind of impingement on one of the levels in there?
>
> A: That's correct. It's a test we don't normally get because the MRI is a lot nicer. They don't have to have a needle put in their back, and the MRI usually we'll be able to tell one way or other. But I think in Mr. Kobrock's case, he's right on the border of whether it's impinged or not.

Blair Dep., 11/10-12/10. We find this testimony persuasive, and conclude that Claimant is entitled to the additional diagnostic study recommended by Dr. Blair.

51. The Commission is also asked to find that Claimant has established "reasonable grounds" for change of physician. See Idaho Code § 72-432(4). Although the Commission has

adopted a procedure to expedite treatment of request of change of physician (see JRP 20), that rule also provides that employee may pursue a change of physician through the normal hearing process. Claimant's request for change of physician was not raised as an issue in the Commission's notice of hearing. However, at hearing, the parties agreed that Claimant's request to have Dr. Blair recognized as his treating physician was an issue that should be decided by the Commission depending on how the threshold medical causation question was resolved. (Tr. 6/3-7/10). Even though we have concluded that it is appropriate to offer Claimant the CT myelogram recommended by Dr. Blair, this does not necessarily require that Dr. Blair be recognized as one of Claimant's treaters. The record does not support a conclusion that only Dr. Blair will know what the results of the CT myelogram portend. Neither Dr. Dazley, nor Dr. McEntire have indicated that they will not see or further treat Claimant. However, we do not know whether those physicians will be inclined to order the CT myelogram, while we know that Dr. Blair is inclined to do so. Accordingly, we recognize Dr. Blair as Claimant's physician for the limited purpose of ordering the study he has recommended. We reserve judgment on whether he should be appointed Claimant's physician for purposes of further treatment, pending further developments in this case.

52. In conclusion, we find that Claimant has met his burden of demonstrating that his pre-existing degenerative disease of the lumbar spine was permanently aggravated by one or both of the accidents of September 2016. Claimant is entitled to such reasonable medical care as may be required by his treating physicians for care of those injuries, including, but not limited to, the diagnostic studies required by Dr. Blair. Dr. Blair is recognized as a treating physician for purposes of ordering the CT myelogram alone. We decline to find Claimant to be medically stable at this time. However, inasmuch as Claimant does not appear, as of the date of hearing, to

have suffered any uncompensated wage loss during his period of recovery, we do not reach the question of his entitlement to additional time loss benefits. Because Claimant is not medically stable, issues of impairment and disability have been reserved.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered compensable industrial accidents on April 14, 2015, September 1, 2016, and September 21, 2016.

2. With respect to the accident of September 21, 2016, the requirement of written notice is excused by Employer's actual knowledge of the subject accident. The September 15, 2017 filing of the Complaint vitiates the need to make a written claim.

3. Claimant suffered from multilevel pre-existing degenerative disease of the lumbar spine. However, the subject accident permanently aggravated Claimant's lumbar spine condition.

4. Claimant is still in a period of recovery for his lumbar spine condition.

5. Benjamin Blair, M.D., is appointed Claimant's treating physician for the limited purpose of ordering the CT myelogram.

6. Claimant is entitled to the CT myelogram required by Dr. Blair.

7. All other issues are reserved.

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

DATED this ___25th___ day of __January__, 2019.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

____/s/_____
Aaron White, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:
_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____25th_____ day of ____January_____, 2019, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DENNIS R. PETERSEN
P.O. BOX 1645
IDAHO FALLS, ID 83403-1645

EMMA R. WILSON
1703 W. HILL ROAD
BOISE, ID 83702

_____/s/_____