BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES W. KERSHISNIK, Claimant, v. BLOUNT, INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2001-513476** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed August 18, 2014

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on August 8, 2013 in Lewiston, Idaho. Claimant was present in person and represented by William J. Fitzgerald of Lewiston. Employer ("Blount/ATK") and Surety (collectively, "Defendants") were represented by Kent W. Day of Boise. Oral and documentary evidence was admitted at the hearing, then one post-hearing deposition was taken. The matter was briefed and came under advisement on June 30, 2014.[1]

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.

[1] Blount, Inc., was purchased by ATK following Claimant's subject industrial accident.

ISSUES

Pursuant to the parties' stipulation at the hearing, the issues to be decided as a result of the hearing are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

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

   a. Medical care;

   b. Permanent partial impairment (PPI); and

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

3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

It will be noted that one of the agreed upon issues is whether Claimant's condition is, in some respect, mediated by either a pre-existing or subsequent superseding condition/injury. However, Defendants, both at hearing and in post-hearing briefing, clearly signaled that they did not believe that all of the noticed issues were actually at issue in the case:

> I think we can just leave them the way they are. I think some of them - - you know, as we go through the case and the briefing, some of them may be abandoned.
>
> . . .
>
> The issues that actually need to be addressed by the Commission include whether Claimant has proved any more than a lumbar strain, whether Claimant has any impairment arising out of the August 28, 2001 incident, whether there is disability in excess of impairment, if so how much, and any entitlement to additional medical care.

TR 5:15-18. At hearing, Referee Marsters advised the parties that any issues not addressed by the parties would be deemed abandoned:

> Okay. Sounds good to me. And with that, any issue that's not breached, it is deemed abandoned or waived, so you can say it out loud or you can just not do it, and we just won't decide it.

TR 5:19-23. As discussed *infra*, the evidence before the Commission does not support the existence of a preexisting low back condition which might be implicated in contributing to Claimant's symptomatology. However, the record does suggest the existence of a potential intervening/superseding event that might have contributed to the development of Claimant's current low back condition. On March 19, 2002, Claimant told Dr. Peterson that his back pain had been intermittent since the August 28, 2001 work injury. However, Dr. Peterson also memorialized the occurrence of an exacerbation of Claimant's work accident. On March 28, 2002, Claimant "misstepped" at work and felt a sudden increase in severe low back pain radiating down the left leg. Dr. Peterson's assessment included the following:

> acute exacerbation of low back pain in patient with history of low back injury secondary to industrial accident in August of last year.

Arguably, the March 18, 2002 "misstep" constitutes an intervening incident which may be implicated in explaining Claimant's current condition. It was only after the March 18, 2002 incident that radiological studies demonstrated the presence of an L4-5 disc herniation, and Claimant's complaints appear, at least per the medical records, to be more significant following that incident, notwithstanding that Claimant has testified that his low back discomfort was intermittent between August of 2001 and March of 2002.

However, Defendants have not raised the incident of March 18, 2002 as a defense to this claim, and in view of the foregoing we deem the issue of a superseding/intervening event to have been abandoned. Having said this, we recognize that it is Claimant who ultimately bears the burden of establishing a causal connection between the subject accident and his current condition. As developed in more detail, *infra*, we believe that Claimant has met his *prima facie*

case of showing that his current complaints are related to the subject accident, notwithstanding the occurrence of what may potentially constitute a superseding/intervening event occurring on or about March 18, 2002.

In his brief, Claimant requests attorney fees. As Defendants note, the issue of attorney fees pursuant to Idaho Code § 72-804 was neither noticed prior to the hearing, nor stipulated to by the parties at the time of the hearing. Therefore, it will not be addressed.

CONTENTIONS OF THE PARTIES

Blount/ATK is a bullet manufacturer. While working for Blount/ATK, Claimant suffered an industrial low back injury on August 28, 2001 when he was lifting a barrel and the handle broke. As the barrel spilled, he tried to catch it.

Claimant contends that his significant persistent low back pain and left-sided radiculopathy at the time of the hearing were caused by the August 2001 industrial accident and injury. As such, he is entitled to medical benefits for medications related to that injury, including prescription pain medication. Also, based upon restrictions assessed by William Fife, M.D., he claims 70% disability inclusive of impairment or, utilizing the restrictions assessed by Dr. Petersen, he claims total and permanent disability. Claimant primarily relies upon the vocational opinions of these physicians and Douglas Crum, CRC, vocational consultant.

Defendants counter that Claimant's current low back symptoms are not related to his August 2001 industrial injury, from which he reached medical stability in 2007, with no PPI and no restrictions. Therefore, he is entitled to no additional medical benefits. Further, no physician has assessed any PPI and the Commission is not qualified or empowered to do so *sua sponte*. Without PPI, Defendants argue, there can be no PPD.

Further, Claimant remains employed for Blount/ATK, earning substantially more now than at the time of the injury, and he will probably continue to work there. Defendants primarily rely upon the opinions of Paul Montalbano, M.D. and Mary Barros-Bailey, Ph.D., vocational consultant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition of Claimant taken February 21, 2007;
2. Joint Exhibits (JE) "1" through "15" admitted at the hearing;
3. The testimony of Claimant taken at the hearing; and
4. The post-hearing deposition of David Petersen, M.D., taken December 10, 2013.

OBJECTIONS

All pending objections posed in the depositions are overruled.

FINDINGS OF FACT

After considering the above evidence and the arguments of the parties, the Commission submits the following findings of fact and conclusions of law.

BACKGROUND

1. Claimant was 36 years of age at the time of the hearing and residing in Lewiston. He had no history of treatment for back problems prior to August 2001. He has at all relevant times been a smoker with hypertension, which he treats with medication. As well, he has at all relevant times been obese.

2. When he was 24, Claimant was lifting a barrel of parts at Blount/ATK, a bullet manufacturer, when the handle broke. As he tried to catch the spilling barrel, he felt pain in his low back. At the time of hearing, Claimant continued to have low back pain.

His treatment history related to his low back condition is discussed, below.

3. Claimant has been employed at Blount/ATK for the majority of his worklife. He began as an operator, where he was required to do heavy lifting and perform repetitive movements, and later became a set up machine worker, where the job is not as physically demanding. Previously, he worked as a gas station attendant, dishwasher, pizza delivery driver, and, briefly, as a roofer. Claimant is a high school graduate and has one year of college in pursuit of a degree in criminal justice.

INDUSTRIAL ACCIDENT

4. Claimant's subject industrial back injury occurred on August 28, 2001. The next day, he obtained medical treatment from William England, M.D., a family practitioner at an express care clinic, for "a pulling sensation from the midline low lumbar back." JE-75. Claimant was diagnosed with low lumbar back pain that appeared muscular, taken off work for a few days, and given a pain pill prescription. Claimant followed up on September 4, 2001 with Sherry Stoutin, M.D., a family practitioner at the same express care clinic. He was "still experiencing minor stiffness but otherwise the worst of the pain is gone and feels capable of going back to work." JE-76. On exam, Claimant had ongoing low-grade stiffness in the small of his back, but he had full flexion and extension and lateral range of motion without difficulty. He had no radicular symptoms, and his neurovascular system was intact. Dr. Stoutin diagnosed low back strain and released Claimant to full-duty work with the admonition that he should follow up for reevaluation if he had problems. He did not need any more prescription pain medication.

5. Claimant did not report any additional back problems in 2001. However, in November he was evaluated for numbness and tingling in his hands and feet by William

Bozarth, M.D., a neurologist. Testing, including a brain MRI, failed to confirm any demyelinating disease. Upon occasionally misstepping or jarring himself, Claimant had an electric sensation in his lower extremities, but he did not experience this sensation in his upper extremities. Regarding Claimant's back injury, Dr. Bozarth reported that he had no radiation of symptoms from his low back into his lower extremities. Claimant also reported chest congestion, coughing, and headache in November, and he was treated for early pneumonia. Nerve testing was performed in December 2001. Claimant's upper and lower extremity numbness symptoms apparently resolved on their own.

6. On March 19, 2002 Claimant returned to Valley Medical Center where he was evaluated by David Peterson, M.D. On the occasion of that visit, Dr. Peterson recorded the following concerning Claimant's presenting history and symptoms:

> Seen today for problems with low back pain. Bill originally injured his back at work on 8/28/01 and was seen by Dr. England the subsequent day. Since that time he's had intermittent exacerbation of symptoms and yesterday while at work he essentially misstepped and had sudden exacerbation of severe low back pain radiating down the left leg. He has no numbness or tingling on the leg but has a burning sharp sensation that is much worse when he coughs or sneezes. He knows of no new injury to the area. Pain has been intermittent since his injury in August. He is not on any antiinflammatories or pain pills at this time. This is a workman's comp related injury.

JE-86. On exam, Dr. Peterson noted that Claimant was exquisitely tender over the left SI joint area and deep in the left gluteal area. Claimant's deep tendon reflexes were brisk and symmetrical at the ankles and right knee and decreased at the left knee. Straight leg raising was positive at 45 degrees on the left and negative on the right. Muscle strength and tone were normal in the lower extremities, and Claimant's gait was normal. Dr. Peterson diagnosed Claimant as suffering an acute exacerbation of low back pain with a history of low back injury secondary to an industrial accident occurring in August of 2001. Dr. Peterson took Claimant off

work for three days, speculating that he might be able to return to his usual duties in the next week.

7. Claimant's symptoms did not resolve. He was seen by Frances Hedrick, M.D., another express care clinic family physician, on March 20, 2002. Dr. Hedrick noted, among other things, that Claimant had "talked with the Nurse in Employee Health at work before he had this re-injury, and they had discussed Physical Therapy, but he never did do this." JE-87. On examination, among other things, Claimant's left lateral bending was limited due to pain. He was in moderate discomfort as he changed positions. He could not stand up straight without pain. He could bend forward to only about 30 degrees. He had reduced function in his left leg. Dr. Hedrick diagnosed left lumbar strain, now with radicular symptoms. He referred Claimant to physical therapy and prescribed pain pills. Blount/ATK approved this.

8. On March 26, 2002, Claimant was again evaluated by Dr. England. Claimant told Dr. England that he had not experienced any new accident since August 2001. Dr. England diagnosed recurring left lumbar back pain that he continued to believe was muscular in nature. The next day, he was seen by Dr. Stoutin, who noted Claimant was unable to get out of bed due to severe left sided back pain with radiculopathy. Dr. Stoutin took Claimant off work for three days and ordered an MRI to evaluate "[l]eft radicular lumbar back pain with flare in recent days." JE-91.

9. On March 29, 2002, Dr. Stoutin noted Claimant was taking Vicodin every four to six hours, that his pain increased on sitting for too long, as well as on standing for too long. "He has noticed that the back pain is diminishing but the leg pain, posterior thigh and medial thigh has continued and is actually escalating. He also has some numbness

down into the calf and foot." JE-93. On exam his flexion and extension were still limited on the left, as were his left lower extremity deep tendon reflexes and straight leg raise. Dr. Stoutin prescribed more pain medication and kept Claimant off work.

10. On April 1, 2002, Claimant underwent a lumbar spine MRI. The reading radiologist, Chris Reisenauer, M.D., opined, among other things, that Claimant had moderate degenerative disc changes at L1-2 without disc herniation or nerve root impingement. At L4-5, he had a small dorsal left lateral disc protrusion resulting in left neural foraminal narrowing potentially encroaching upon the intraforaminal left L4 nerve root, which may account for Claimant's left lower extremity radiculopathy complaints. (See JE-63.) Dr. Stoutin reported, "The MRI does come back showing a small left lateral disc protrusion at L4, L5 that does result in neural foraminal narrowing at the L4 nerve root probably responsible for his radiculopathy." JE-97.

11. On April 2, 2002, Dr. Stoutin noted that Claimant's low back pain had almost completely resolved, but his posterior left thigh and leg pain continued. She kept Claimant off work for a few more days, then returned him to work with restrictions. By April 9, Claimant's symptoms were significantly improved, though not entirely resolved. He did not need any Vicodin. Dr. Stoutin returned Claimant to full duty. "If there is significant escalation of his pain then may need to do an intervention but at this point hopefully this will heal up…." JE-97. By April 16, Claimant was tolerating full duty. "He is a little more sore than he was on lighter duty but is able to do this without acute exacerbation of his radiculopathy. He is tolerating the discomfort with just Naprosyn, is not taking any narcotic pain medication at this point." JE-99. Dr. Stoutin continued Claimant's medication and physical therapy.

12. Claimant was seen in August and September 2002 for non-industrial toenail problems, then in November 2002 for a right-sided groin strain he sustained while hunting. "He was out hunting deer and had a buck in his sites and he took a shot and after that had to basically try to track it down by climbing up a mountainside….No back pain." JE-104.

13. Claimant was treated for non-industrial conditions in February and May 2003. No back problems were noted. In September 2003, however, Claimant sought treatment for *right*-sided low back pain that he attributed to sitting during an eight-hour meeting at work. He called it a "flare" and associated it with his year-and-a-half-long history of chronic back pain. "Tends to get real sore when he wakes up in the morning. Tends to calm down a little bit throughout the day. He works at ATK and does a lot of heavy lifting and doesn't think he will be able to do all that lifting and moving. He hasn't been using any OTC medication." JE-110. On exam, Claimant had no sciatic notch pain; he did have tenderness along his paraspinal muscles from L1 through L4 on the right. A lumbar strain was diagnosed, and Claimant was taken off work for a few days. Back stretches were recommended, as was follow-up with his regular physician. Claimant's right-sided symptoms apparently resolved without follow-up care.

14. Claimant again sought treatment for left-sided back pain on January 5, 2004. On exam, Dr. Petersen detected muscle spasm and tenderness along the paraspinal muscles along the left side of Claimant's spine from L2 to L4. Dr. Petersen prescribed pain pills and returned Claimant to full duty the following day. In one week, Claimant returned to Dr. Petersen with continuing symptoms. He had returned to work as recommended, but had to stay home for the following three days due to increased back pain. Dr. Petersen diagnosed "Low back pain with increasingly symptomatic left sided radicular symptoms

consistent with nerve root impingement at either L3 or L4," and ordered another MRI. JE-113.

15. Claimant underwent another lumbar spine MRI on January 12, 2004. Dr. Reisenauer reported that Claimant's L4-5 disc herniation had increased in size and was now "producing moderate left neural foraminal stenosis impinging upon intraforaminal left L4 nerve root, likely accounting for patient's left lower extremity radiculopathy." JE-65. He also noted that Claimant had moderately advanced degenerated disc changes at L1-2 with anterior disc and spur complex, but without herniation. Gregory Dietrich, M.D., orthopedist, also reviewed the MRI scan and opined that Claimant had a herniation at L4-5 with neuroforaminal stenosis. "this is really quite an impressive disc herniation and certainly would cause L4 radiculopathy." JE-297.

16. Dr. Petersen returned Claimant to light-duty work on January 15, 2004. Claimant was evaluated by Dr. Hedrick on February 2, 2004, who noted Claimant was still on light duty, that he had an appointment scheduled with a neurosurgeon, and that he had undergone an epidural steroid injection (ESI) which was tremendously helpful. Claimant's pain was now localized to the low back at the L4 level, mostly on the left side. Dr. Hedrick cancelled Claimant's neurosurgery consultation and recommended that he follow through with his pain clinic regimen. Claimant's condition continued to improve until February 17, 2004, when he reported to Dr. Stoutin that his pain escalated after he began working on a new machine at Blount/ATK. Dr. Stoutin noted, "L4 disc herniation with exacerbation of pain secondary to present job." JE-121. Dr. Stoutin adjusted Claimant's restrictions and returned him to light-duty work.

17. By March 8, 2004, Claimant had undergone two ESIs without significant long-term improvement. Claimant was taking two hydrocodone pills per day to control his pain. Dr. Stoutin referred Claimant to Dr. Dietrich for a surgical consultation. Prior to his consultation with Dr. Dietrich, Claimant's pain waxed and waned. On March 22, Dr. Stoutin reduced his lifting limit to ten pounds.

18. Claimant was evaluated by Dr. Dietrich on April 1, 2004. He recorded the following concerning Claimant's history and the progression of his symptoms:

> His history is that of having a work-related injury, August 2001. He was lifted [*sic*] a barrel of brass cases when the handle broke and he apparently caught the weight of the barrel, straining his back. He was diagnosed with a disc herniation at the L4-5 level, into the neural foramen. He was treated non-operatively and he actually did reasonably well with improvement of his pain. He continued to have intermittent flare-ups of symptoms. About four months ago he developed a marked flare-up of pain into his left sided back, into the buttock and down the leg….His symptoms continue now on a daily basis. He rates his worst pain at 8/10, average is 5/10. It is aggravated with sitting, with standing; relieved somewhat with stretching and with medication…

JE-295.

19. Dr. Dietrich reviewed Claimant's MRI scan. "He does have a large disc herniation in the far lateral region, at L4-5. It significantly compromises the L4-5 neuroforamen on the left and would cause significant compromise at the left L4 root." JE-296. Dr. Dietrich proposed treatment options, including a far-lateral discectomy surgery. Claimant elected to undergo this procedure.

20. At the instance of Defendants, Claimant underwent an Idaho Code § 72-433 exam performed by Walter Fife, M.D., on May 12, 2004. Among other things, Dr. Fife's report specifically references Dr. Peterson's chart note of March 19, 2002, which described the exacerbating "misstep" incident of March 18, 2002. After examining Claimant, Dr. Peterson

diagnosed Claimant suffering from a painful low back, related to his work on a more probable than not basis. He acknowledged that while Claimant had radiologic evidence for an L4-5 disc herniation, there was no evidence on clinical examination of weakness in an L4 nerve root distribution. While Dr. Fife's statement that Claimant's low back condition is "work related" is equivocal on the question of whether or not Claimant's condition is specifically related to the August 28, 2001 accident, this ambiguity is resolved in Dr. Fife's answer to questions posed by Defendants:

> Is the Condition due in whole or in part to the accident?
>
> The condition relating to his back is related to his accident on a more-probable-than-not basis, which has never resolved and has been shown to have gotten worse on MRI examination.

JE-314. Dr. Fife entertained a number of treatment recommendations for Claimant, but recommended a conservative approach, since there was very soft evidence for a nerve root injury that might otherwise make Claimant a good surgical candidate. In summary, he recommended continued conservative treatment and supportive care as needed for flare-ups.

21. Dr. Fife further opined that Claimant was not a surgical candidate and that his symptoms should continue to be treated conservatively. He explained that, although there was evidence of a herniated disc at L4-5, there was insufficient evidence of weakness on exam in the L4 nerve root distribution, no evidence of alteration in the knee jerk, and no evidence of positive findings on either straight leg raising or the femoral nerve stretch test. According to Dr. Fife, the primary source of Claimant's pain was degenerative disc disease with related sciatica. He assessed restrictions, applicable indefinitely, of no repetitive bending and no lifting over 20 pounds. Relying upon Dr. Fife's opinion, Surety denied benefits for the surgery recommended by Dr. Dietrich.

22. On June 17, 2004, Dr. Dietrich conducted a preoperative evaluation in which he reversed his former surgical recommendation.

> He does have this large disc into the neuroforamen and we have scheduled him for a microdiscectomy. Unfortunately, I do not think a microdiscectomy would solve his back pain problems. We discussed this extensively. I think if we were truly going to make his back pain better than [*sic*] considering a fusion is the way to proceed. He would like to avoid this and I certainly understand and agree if we can avoid a fusion at all, this would be ideal. Bill does want to return to work. He wants to keep working at ATK so I have gone ahead and released him to return to work. I will see him back at any point if I can be of any additional help.

JE-139. Claimant transitioned to Methadone to control his pain, with hydrocodone for breakthrough pain, and antidepressants, managed by Dr. Stoutin.

23. On June 7, 2004, upon learning of Surety's denial, Dr. Stoutin noted, "I certainly strongly disagree with the findings, as the degenerative disc disease that they are describing is at L1, and his symptoms are not nearly that high, and not consistent with where the degenerative disc disease is seen. I do believe that this is radicular pain that would benefit from surgical decompression." JE-135. Dr. Stoutin noted Claimant had taken 60 Lortab pills in about three weeks' time. She also prescribed an anti-depressant to assist with Claimant's pain. "…I believe that he may benefit from an antidepressant in terms of altering pain modalities and helping with sleep. This may actually allow him to need fewer narcotic pain medications to control his pain." *Id.*

24. On November 1, 2004, Dr. Stoutin noted Claimant had lost 30 pounds. His pain was localized to his low back, and he was having very little discomfort due to radiculopathy. Dr. Stoutin referred Claimant back to the pain clinic because he wondered if there was any treatment, other than prescription medication, available. Surety denied Dr. Stoutin's pain clinic referral. Claimant continued to have pain, which escalated when he tried to discontinue his Methadone in February 2005. Dr. Stoutin started Claimant on Cymbalta, which did not entirely

relieve his pain, but did greatly improve his outlook. Dr. Stoutin maintained Claimant on Cymbalta, and restarted his Methadone and other medications. Surety approved one pain clinic visit.

25. On April 25, 2005, Claimant was again evaluated at the pain clinic. An interferential stimulator for his back and a surgical consultation were recommended.

26. During the second half of 2005, Claimant's pain worsened, and he continued to have pain flares. His pain was worse with cold weather. Dr. Stoutin recommended surgical intervention or a spinal cord stimulator. Surety had discontinued his Cymbalta, after which his condition noticeably deteriorated. "The Workman's Comp has denied paying for Cymbalta, so he has been out of this. He feels that this may be contributing to the problem and his wife certainly feels as though he is functioning worse without the Cymbalta." JE-152. Dr. Stoutin provided samples as she was able. She continued to try to obtain approval for surgery.

27. Claimant's pain persisted through 2006, and Surety continued to deny benefits for Cymbalta. He trialed Provigil, which significantly improved his condition. However, this drug was expensive and Surety denied benefits for it, as well, so Claimant did not take it regularly.

28. On March 29, 2007, Claimant again sought treatment from Dr. Dietrich for back pain. "The pain that he describes is across the lumbosacral junction. It is occasionally down into his left lower extremity, but by far and away the bulk of his pain is axial. His symptoms are primarily related to activities. He has had to give up much of the recreational activities that he has previously enjoyed because any activities aggravate his symptoms such that he then spends several days trying to recuperate….Occasionally, he has some pain down the left lower extremity…." JE-298. Dr. Dietrich again changed his opinion. (Recall, he flip-flopped in 2004 as to the effect of Claimant's L4-5 condition on his low

back symptoms.) This time, he opined that the L4-5 herniation is likely responsible for Claimant's persistent low back pain, as well as his intermittent radiculopathy.

29. On April 5, 2007, Claimant underwent another lumbar spine MRI. Adam K. Olmstead, M.D., the reading radiologist, sided with Dr. Reisenauer's previous findings. He reported, "Leftward foraminal posterolateral soft disc protrusion at L4-5, as the dominant finding, strategically positioned to abut the exiting L4 nerve root and containing annular tear. The above likely accounts for the patient's left-sided radiculopathic syndrome." JE-66.

30. On April 19, 2007, Dr. Dietrich again evaluated Claimant, who was primarily experiencing back pain, with some left-sided radiculopathy including numbness, tingling, and discomfort.

> He is still working full time, but really that is about all he can do. Any amount of activities markedly limits him. A vigorous mowing of the lawn will put him down for a day or two. Playing with his kids or lifting his kids will put him down for a day or two with marked increase in back pain.

JE-300. Claimant sought additional options, so Dr. Dietrich recommended a second opinion from Paul Montalbano, M.D., a neurosurgeon.

31. On June 27, 2007, Claimant was evaluated by Dr. Montalbano, but as an IME at Surety's request rather than a second opinion addressed to Dr. Dietrich. After examining Claimant, reviewing his medical records and viewing his MRI images, Dr. Montalbano opined on October 22, 2007 that there is no evidence of a herniated disc on either Claimant's April 2002 MRI or his January 2004 MRI, among other things. "I do not believe that Mr. Kershisnik carries a diagnosis of an L4-5 disc herniation. There is no evidence of a significant disc protrusion/herniation. There are no other medical conditions that relate to the August 28, 2001 injury." JE-318. He opined Claimant was medically

stable as of June 20, 2007, and could return to work without any restrictions. He found no basis for a PPI rating.

32. Claimant developed increased fatigue and depression in 2007. Dr. Petersen prescribed antidepressant medication, which did not seem to help as much as the Cymbalta. He admonished Claimant not to self-medicate with alcohol, as he had begun to do. On September 7, 2007, Dr. Petersen opined that Claimant's back condition (with medication), was stable.

33. In May 2008, after reviewing Claimant's 2007 MRI scan, Dr. Dietrich disagreed with Dr. Montalbano's interpretation of Claimant's imaging, but deferred to him regarding medical stability. Dr. Dietrich hedged as to a surgical recommendation.

> [I]f someone is this limited, I think that considering the next possible step might be reasonable, and I think a surgery to include possible decompression for the neurogenic symptoms, as well as fusion for the back pain portion is not unreasonable. I clearly was hesitant to jump in and consider surgery. This is obviously the reason that I even recommended a second opinion, and the reason was that I was not confident he would be improved….[In 2007] I was certainly hesitant to consider surgery for Mr. Kershisnik.

JE-301. Also, Dr. Dietrich opined that Claimant has likely suffered some PPI. "The patient is symptomatic and so I do think that he probably does have an impairment rating. I do not do impairment ratings, and so I would not be willing to rate this individual but certainly he does have an injury and continues to be symptomatic." JE-302.

34. Also in May 2008, Claimant developed bilateral foot pain suspicious for neuropathy secondary to diabetes. Following blood testing, Dr. Petersen diagnosed Type 2 Diabetes and recommended that Claimant, who weighed 276 pounds at the time, should lose 50 pounds, to start. He recommended an end goal of 190 pounds. Although Claimant lost some weight initially, he had regained it by the time of the hearing. Claimant's medical

care for the rest of 2008 focused primarily on his Diabetes. His back condition remained stable with medication.

35. In 2009, Claimant's back pain, worse with cold weather, continued, as did his depression symptoms. He also had anxiety symptoms for which he took Risperdal. His back condition remained stable with medication.

36. In 2010, Claimant's back symptoms were "under good control," yet his depression worsened. JE-248.

37. In 2011 and 2012, Claimant denied problems from current pain in terms of his depression and back. He was having trouble with fatigue, however. On May 18, 2012, Dr. Petersen again opined Claimant's back pain was stable. Claimant was taking Methadone and two hydrocodone pills per day. "He typically misses one or 2 [*sic*] days of work per month do [*sic*] to acute flares of chronic low back pain." JE-258. On November 30, 2012, following testing, Dr. Petersen diagnosed low testosterone and prescribed Depo Testosterone injections. "He has typical symptoms including decrease in libido, strength and moods. He does have risk factors including chronic pain, pain medications and obesity. He also has history of depression." JE-275. On January 4, 2013, following treatment, Claimant reported, "significant improvement in mood, energy, libido and strength. Weight is up 14 pounds over the last 6 weeks. He otherwise is quite pleased." JE-282. As a result, Dr. Petersen subsequently reduced Claimant's antidepressant prescription. Claimant's back condition remained stable, but not pain-free, with medication.

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). 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).

38. 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). In his Complaint, and throughout these proceedings, Claimant has claimed that his time-of-hearing low back symptomatology was caused by the August 2001 industrial injury.

39. 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 558, 560-561, 511 P.2d 1334, 1336-1337 (1973), *overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

40. 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).

41. On the question of whether Claimant has met his burden demonstrating that his current complaints are causally related to the August 28, 2001 accident, we find that the evidence, on the whole, supports such a relationship. This conclusion is necessarily premised on a finding that Claimant's most significant injury is his L4-5 disc herniation, and that this disc herniation is causally related to the subject accident. We find Dr. Montalbano's conclusion that Claimant has no evidence of an L4-5 disc herniation to be unsupported by the record as a whole. In particular, the findings of the radiologists who have reviewed the several MRI studies performed on Claimant's low back since 2002 uniformly identify a disc herniation at L4-5.

42. As to the import of the "misstep" incident of March 18, 2002, we find that while the evidence tends to support that such an incident occurred, the great weight of medical evidence fails to attach any significance to this event. Despite receiving a history from Claimant concerning the occurrence of the March 18, 2002 incident, Dr. Peterson has opined that Claimant's chronic low back pain is referable to the August 28, 2001 accident. As significant, is the finding by Claimant's own Idaho Code § 72-433 physician, Dr. Fife, to the effect that Claimant's chronic low back pain is referable to the August 28, 2001 accident. Dr. Fife's report makes it clear that he reached this conclusion even after having reviewed Dr. Peterson's chart note of March 19, 2002, in which the "misstep" event is described. Dr. Montalbano, Defendants' other Idaho Code § 72-433 exam physician, did not address whether there was or was not an

intervening event breaking the chain of causation between the subject accident and Claimant's current complaints. We conclude that Claimant has met his burden of establishing that his low back condition is referable to the subject accident.

MEDICAL STABILITY

43. From time to time, various surgeries have been entertained for treatment of Claimant's low back condition. Claimant has been cautious about these suggestions, and to date, has declined surgical intervention for treatment of his pain. The medical record further establishes that while Claimant's pain waxes and wanes depending on activity, this pattern has been more or less stable for a number of years. We find that Claimant is medically stable at the present time, but caution that our finding in this regard does not necessarily support a conclusion that Claimant will forever remain stable. For example, should Claimant decide, in the future, that he does desire to undergo surgical treatment, nothing in our decision today would prevent Claimant from asserting a future claim that his state of medical stability no longer obtains.

44. As to the date of medical stability, Dr. Montalbano has stated that Claimant reached a point of maximum medical improvement as of the date of his June 20, 2007 evaluation of Claimant. At the time of his deposition, Dr. Peterson expressed his disagreement with Dr. Montalbano's conclusion in this regard, but then conceded that Claimant had been more or less stable since some time in 2006. (Peterson Depo., 25/3-18). Dr. Peterson's testimony is somewhat ambiguous. We conclude that the appropriate date of medical stability is June 20, 2007, the date of Dr. Montalbano's exam. We do not address the issue of Claimant's entitlement to TTD benefits in addition to those paid to date, since these benefits are not at issue.

PERMANENT PARTIAL IMPAIRMENT

45. As Defendants have pointed out, Dr. Montalbano does not believe that Claimant is entitled to an impairment rating for the reason that Claimant has no physical findings sufficient to warrant an impairment rating. The other physicians who have treated/evaluated Claimant have expressed opinions that are, at the very least, consistent with an award of permanent physical impairment. Dr. Fife, the physician who performed Defendants' first Idaho Code § 72-433 exam, recognized that Claimant suffers from an L4-5 disc herniation, that he requires ongoing treatment and that he will likely have permanent limitations/restrictions. Although Dr. Fife did not express an opinion on the question of whether Claimant had, or likely would have, a permanent physical impairment as the result of his low back condition, his observations are consistent with such an award. Dr. Peterson is of the view that Claimant is likely entitled to a PPI rating, but testified that he does not do ratings.

46. Claimant's L4-5 disc herniation and his chronic back pain are well and consistently documented in medical records which cover a multi-year time frame. Notwithstanding that the record is devoid of the opinion of a physician specifically quantifying the extent and degree of Claimant's permanent physical impairment, we are convinced that a permanent physical impairment exists. Based on the Commission's experience, we doubt that an unoperated lesion would entitle Claimant to a PPI rating greater than 10%. However, we need not be any more specific concerning Claimant's permanent physical impairment since we find, as developed below, that wherever in this range Claimant's impairment might fall, he has suffered disability in excess of permanent physical impairment.

DISABILITY OVER AND ABOVE IMPAIRMENT

47. "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) or 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. 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, 766 P.2d 763 (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, 896 P.2d 329 (1995). Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 425, *et seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

48. In evaluating the extent and degree to which the subject accident has reduced Claimant's wage earning capacity, it is first important to identify the relevant limitations/restrictions upon which to rely in undertaking that evaluation. Here, the limitations/restrictions which have been proposed by Claimant's treating/evaluating physicians

run the gamut, from light duty to unrestricted activity. For the reasons stated above, we reject Dr. Montalbano's stated conclusion that Claimant has no limitations/restrictions and may resume employment without restriction. Simply, this is entirely inconsistent with Claimant's credible testimony, as supported by other of Claimant's treating/evaluating physicians. With the exception of Dr. Montalbano's opinion, the medical record and Claimant's testimony establishes that Claimant suffers from chronic low back pain of a waxing and waning type which severely impacts his ability to function. On his best days, Claimant must observe the limitations/restrictions he recounted to Dr. Barros-Bailey or subject himself to the possibility of a flare. On his worst days Claimant is essentially debilitated and unable to work due to a flare of chronic pain. We believe that the limitations/restrictions described by Dr. Fife, which limit Claimant to light duty work, are the best expression of Claimant's permanent limitations/restrictions.

49. Dr. Barros-Bailey proposed that if one disregards the fact that Claimant is currently employed at a relatively high wage with his time of injury employer, light duty restrictions would result in a 50% loss of his pre-injury labor market. Dr. Barros-Bailey also believes that were Claimant forced to look for work in the labor market at large he would suffer a significant wage loss, although her report does not specify whether her wage loss assessment is based on medium or light restrictions. Assuming that Claimant has permanent restrictions against engaging in physical activity more onerous than light duty work, Dr. Barros-Bailey's gestalt is that Claimant has suffered disability of 54.5% of the whole person, inclusive of impairment.

50. Doug Crum, who performed a vocational evaluation of Claimant's residual employability at the instance of Claimant, proposed that prior to the subject accident Claimant

had access to 15.6% of the total jobs in his labor market. Assuming the limitations/restrictions proposed by Dr. Fife, Mr. Crum opined that Claimant has lost access to 82% of his pre-injury labor market. Mr. Crum also proposed that Claimant has suffered wage loss as a consequence of the accident. He compared Claimant's time of injury wage of $11.90 per hour to what Claimant could now be expected to earn in his residual labor market should he lose his job at ATK. Mr. Crum felt that Claimant could do no better than $10.00 per hour in his residual labor market, thus leaving Mr. Crum to conclude that Claimant has wage loss of 15.9%. We note that Claimant's time of injury wage is from 2001, thus making a comparison with Claimant's anticipated current wages in other employment somewhat problematic. Ultimately, Mr. Crum opined that Claimant has suffered a 70% disability under the assumption that his work related limitations prohibit working at anything more onerous than light work.

51. Both Mr. Crum and Dr. Barros-Bailey also considered the impact of Claimant's periodic need to take one to three days off when dealing with flares of low back pain. Claimant testified this may add up to five to six days every six months. TR-38. Mr. Crum assumed a higher number of missed days. JE-341. We believe that Dr. Barros-Bailey has adequately explained that such time loss from work at Blount/ATK is not likely to be fatal to Claimant's continued employment. Claimant has kept his job despite missing time from work. On the other hand, Mr. Crum has stated that for such other employment as Claimant might obtain should he lose his job at Blount/ATK, missing one to two days of work per month might not be tolerated by a new employer. We accept Claimant's hearing testimony that, on average, during the last six months he missed five to six days of work. This is lower than the number of missed days assumed by Mr. Crum, and therefore challenges his conclusions about the impact of this lost time on Claimant's ability to maintain employment with an entity other than Blount/ATK.

52. Against these opinions we must also be cognizant of the fact that Claimant has continued to enjoy full-time employment at Blount/ATK ever since the injury, at a relatively high wage. Although he has moved on to a lighter duty job, and although Blount/ATK continues to accommodate him even in this lighter duty job, the fact that Claimant has demonstrated success in this long-term employment is another nonmedical factor which we must take into consideration in evaluating Claimant's present and probable future ability to engage in gainful activity. In all, we conclude that as a result of the subject accident, Claimant has suffered disability of 30% of the whole person, inclusive of PPI.

ENTITLEMENT TO MEDICAL TREATMENT

53. Among the noticed issues is Claimant's entitlement to medical care. However, Claimant has given only fleeting treatment to this issue, stating that Defendants should be required to pay Claimant's ongoing medication expenses related to his back pain. (*See* Claimant's Brief at p. 2). At page 18 of his Brief, Claimant requests that the Commission order that Defendants be held responsible for "medical costs paid including the ongoing medication costs. …" As developed above, the medical records reflect that at some point between the date of Dr. Fife's examination and that of Dr. Montalbano, Defendants denied responsibility for the payment of certain of Claimant's medications. Dr. Peterson testified that Cymbalta, Celexa and Wellbutrin were all prescribed for treatment of depression associated with Claimant's chronic pain:

> Possibly before that. Let's see. Yes, he was started on Cymbalta for depression as well as back pain, depression associated with chronic pain, and he did have a good response to the medication. And that is - - that's documented in the note dated 9/7/2007.
>
> And you said that the prescription for Cymbalta was - - well, that - - that the depression was related to chronic pain and treatment of chronic pain?

> Yes.
>
> Okay. Does it - - did you at some - -well, at about that same time, was there a prescription for Wellbutrin?
>
> Actually, there were prescriptions for both Wellbutrin and Celexa, were provided - - his insurance company did not want to provide the Cymbalta, so the generic medications, Celexa and Wellbutrin, were tried.

Peterson Depo 12/16-13/9.

54. While Claimant suffered from hypertension prior to the subject accident, Dr. Peterson also testified to his belief that "some" of Claimant's problem in this regard is tied to chronic pain.

55. Finally, Dr. Peterson testified that the medication he prescribed to treat Claimant's low testosterone is likely related to some combination of Claimant's chronic pain, narcotic pain medications, antidepressants, or some combination of these factors. (Peterson Depo 14/19-15/10).

56. While Dr. Peterson has proposed that the prescriptions for Cymbalta, Wellbutrin and Celexa were necessary to treat Claimant's depression caused by chronic pain, there is no testimony or proof which establishes that Claimant's depression is compensable under the provisions of Idaho Code § 72-451. Therefore, the evidence before us is insufficient to require Defendants to pay the costs associated with Claimant's prescriptions for Cymbalta, Celexa and Wellbutrin through the date of hearing.

57. Nor are we persuaded that Dr. Peterson's testimony is adequate to support an award to Claimant for the expenses associated with his prescription use of hypertension medications. Claimant suffered from hypertension on a pre-injury basis. While Dr. Peterson testified that "some" of Claimant's hypertension is related to chronic pain, we deem this

testimony, without further explanation, to be inadequate to meet Claimant's burden of proof. Claimant is not entitled to medical expenses associated with treatment for hypertension.

58. Finally, Claimant's low testosterone was thought by Dr. Peterson to be related to some combination of Claimant's chronic pain, his use of narcotic pain medications and his use of antidepressants. Without further medial testimony in support of this proposition, we are unable to ascertain whether these expenses are associated with a compensable condition. As noted above, Claimant has put on no proof that his depression, if extant, is causally related to the subject accident per the provisions of Idaho Code § 72-451.

59. Concerning ongoing medical care, Claimant is entitled to that ongoing treatment for the conditions that we have found to be related to the subject accident, per the provisions of Idaho Code § 72-432.

CONCLUSIONS OF LAW

1. Claimant has met his burden of proving that his current low back condition is causally related to the subject accident of August 28, 2001.

2. Claimant became medically stable on or about June 20, 2007.

3. Claimant is entitled to disability inclusive of impairment of 30% of the whole person.

4. Claimant is not entitled to recover past medical expenses for prescriptions related to treatment of hypertension, low testosterone or depression.

5. Claimant is entitled to such additional medical care to which he may be entitled per Idaho Code § 72-432 for care of his compensable low back condition.

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

DATED this _18th__ day of ___August_____, 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 __18th_ day of ___August_____, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

WILLIAM FITZGERALD
1026 F STREET
LEWISTON ID 83501

KENT W DAY
LAW OFFICES OF HARMON & DAY
P O BOX 6358
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ka _/s/_____