BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DRAYGO BAIRD, Claimant, v. J & R TIMBER PRODUCTS, LLC, Employer, and ASSOCIATED LOGGERS EXCHANGE, Surety, Defendants.	**IC 2010-005925** **IC 2010-003372** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed January 11, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the above entitled consolidated matter was assigned to Referee LaDawn Marsters, who conducted a hearing on June 30, 2011 in Coeur d'Alene, Idaho. Claimant was present in person and represented by Starr Kelso of Coeur d'Alene. Employer ("Shawn Pineda")[1] and Surety were represented by Alan K. Hull of Boise. Oral and documentary evidence was admitted, and post-hearing depositions were taken. The matter was briefed and came under advisement on September 12, 2012. Subsequently, on September 24, 2012, Defendants filed a Motion to Strike, to which Claimant replied on September 25, 2012. The matter was held in abeyance until October 15, 2012, when an order on Defendants' motion was entered and the case was again put under advisement. The undersigned Commissioners

[1] Claimant refers to his employer as Shawn Pineda Logging or Shawn Pineda.

have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The parties seek adjudication of the following issues:

1. As to each alleged injury date (October 19, 2009 and January 4, 2010):
    a. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
    b. Whether Claimant's condition is due in whole or in part to a preexisting injury/condition;
    c. Whether and to what extent Claimant is entitled to the following benefits:
        i. Medical care; and
        ii. Temporary partial and/or temporary total disability benefits (TPD/TTD); and
2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant, a sawyer, contends he suffered industrial injuries to his head, shoulder and neck on or about October 19, 2009, and to his low back on January 4, 2010. He has not worked since January 4, 2010 due to lingering pain from his injuries and asserts he is entitled to further treatment, including but not limited to follow-up diagnostic treatment for his head and neck injury and L1-2 disc herniation, as well as temporary total disability benefits until he reaches medical stability. Claimant also seeks an award of attorney fees for unreasonable denial of his claim because, among other things, Surety unreasonably relied upon Dr. Stevens' IME opinion

and improperly influenced Dr. Stevens and Dr. Ludwig, Claimant's treating physician. Claimant relies upon the opinions of Dr. Ludwig and Dr. McNulty to support his claims.

Defendants do not dispute that Claimant suffered industrial accidents on the given dates; however, they assert that he has completely healed from those events, so he is not entitled to further benefits related to these claims. They generally argue that Claimant is not a credible witness and that his primary motivation is procurement of narcotic pain medications. Therefore, his pain complaints are unreliable indicators of the severity of his current symptoms, including low back symptoms, which are similar to symptoms for which he was previously treated. Defendants stand firm in their reliance upon Dr. Stevens' opinions and maintain that their denial of Claimant's claims was reasonable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The prehearing deposition testimony of Claimant taken July 28, 2010;
2. Exhibits 1 through 20, labeled "Defendants [sic] Hearing Exhibits" but referred to herein as "Joint Exhibits", admitted at the hearing;
3. The testimony of Claimant, Elizabeth Bradbury, Kaleb Trinkle, Neeva McLeod and Sarah Neill taken at the hearing; and
4. The post-hearing deposition testimony of:
    a. John Michael McNulty, M.D., taken September 22, 2011;
    b. J. Craig Stevens, M.D., taken October 18, 2011;
    c. Karen D. Libsch, M.D., taken November 22, 2011;
    d. Raymond St. John, M.D., taken November 22, 2011;
    e. Hollys Nielsen, FNP., taken February 28, 2012; and

f. Michael Ludwig, M.D., taken September 22, 2011, October 19, 2011 and November 21, 2011.

MISCELLANEOUS MATTERS

Objections. The following objections are sustained: Defendants' objection at page 58 of Dr. Stevens' deposition; Claimant's objection at page 69 and Defendants' objections at pages 47 and 88 of Dr. McNulty's deposition; and Claimant's objection at page 55 of Dr. St. John's deposition. All other pending objections are overruled, including Defendants' objection at page 45 of Dr. St. John's deposition. Dr. St. John's records first produced at his deposition were the subject of records requests by both parties prior to the hearing, and neither party was aware of their existence prior to his post-hearing deposition. Neither party is prejudiced by admitting these records, even though the Rule 10 deadline had expired.

Claimant's Motion to Take Judicial Notice. On May 9, 2011, Claimant filed a Motion for the Industrial Commission to Take Judicial Notice, to which Defendants responded on May 17, 2011. That motion was denied by written Order of the Referee dated May 23, 2011. For whatever reason, neither party, nor the Referee, recalled entry of the Order at the time of the hearing, and the parties stipulated that a ruling could be issued concurrently with this recommendation to the Commission. Since an order had, in fact, already been issued, the parties' stipulation is moot. Therefore, no further action is taken herein on Claimant's motion.

FINDINGS OF FACT

BACKGROUND

1. **Claimant.** Claimant was 36 years of age and residing at Santa, Idaho at the time of the hearing. He was raised in the St. Maries area and left school in the tenth grade to go to work. He has worked in the logging industry since then, and was employed as a sawyer by

Shawn Pineda when he suffered workplace accidents on October 19, 2009 (neck, shoulder, head injury) and January 4, 2010 (low back injury). Claimant's job entailed falling and limbing trees.

2. From 2000-2003, Claimant attended rehabilitation for methamphetamine addiction. He explained that his girlfriend was ordered to attend, so he supported her by attending, too. He admits trying the drug on some occasions, but denies ever becoming addicted. Claimant has been convicted of possession of a controlled substance twice, in 2001 and 2008, and of possession of drug paraphernalia twice, in 2001 and 2009. He attended drug court from May 2001 through August 2004 in connection with the 2001 convictions. Claimant has also been convicted of many other misdemeanors, including one driving while impaired charge, ten driving without privileges charges, one petit theft charge, and a few disturbing the peace/resisting police officer charges, among others. None of Claimant's convictions are related to the illegal use or sale of prescription narcotics, or bear directly upon a credibility determination.

3. Also during this timeframe, Claimant often sought emergent care for pain related to tooth decay and other conditions for which narcotic pain relievers were prescribed. He gained a reputation among some medical care providers in the St. Maries general area for drug-seeking behavior. Part of the problem was that Claimant did not establish care with a primary provider or get his teeth fixed, even though he was often advised to do so. Claimant explained that he could not afford to pay for his healthcare, so he continued to visit emergency facilities that were obligated to treat him regardless of his ability to pay.

4. Claimant had neck complaints for which he sought medical treatment prior to his October 19, 2009 accident. Approximately six months previously, a cervical MRI was recommended. However, Claimant did not follow up on the recommendation. Claimant also

received treatment for low back pain radiating into his left leg before his January 4, 2010 accident.

5. At the time of the hearing, Claimant had neck pain when looking down for prolonged periods and moderate low back pain after walking three blocks or so, as well as radiculopathy into his left leg on "bad" days. Tr., pp. 116-117.

MEDICAL TREATMENT

6. **Raymond St. John, M.D.** Dr. St. John is primarily an emergency room physician. He treated Claimant for multiple pain complaints related to his tooth decay, recurrent epididymitis and back pain at the St. Joseph's Hospital emergency department between 2001 and 2010. Throughout the period in which he treated Claimant, Dr. St. John suspected Claimant of drug-seeking behavior. Nevertheless, he continued to prescribe narcotic pain medications as needed by Claimant. Dr. St. John gave Claimant the benefit of the doubt because the conditions with which he presented could be very painful. He also encouraged Claimant on multiple occasions to establish care with a family physician so that his pain medications would be better managed.

7. **Hollys Nielsen, FNP.** Ms. Nielsen is a family nurse practitioner employed at the emergency department at Syringa General Hospital in Grangeville, Idaho. She was the initial medical care provider following both of Claimant's relevant accidents.

8. <u>October 19, 2009 Neck Injury.</u> Ms. Nielsen examined Claimant approximately two hours following his first industrial injury, on October 19, 2009.[2] Ms. Nielsen had only a vague recollection of Claimant at the time of her deposition on February 28, 2012.

[2] Reference to Claimant's "first industrial injury" is to his October 19, 2009 injury. His second industrial injury occurred on January 4, 2010.

9. Ms. Nielsen's understanding of Claimant's accident is that he was at work at about 11:30 a.m., felling a tree, when he was struck in the right shoulder and neck by a falling branch. Also, while running to avoid the debris, he hurt his knee. Claimant continued to work and his neck pain increased, so he sought treatment. Ms. Nielsen did not take an in-depth history because Claimant's injuries appeared localized. Claimant appeared alert and in no significant distress.

10. On exam, Claimant denied any symptoms in his extremities and also denied losing consciousness. He had tenderness in the C4-5 region and posterior right shoulder, as well as right-sided paraspinal spasms that extended into his right trapezius. He also had full range of motion and full sensation throughout the arm. Ms. Nielsen noted a hematoma on the right side of Claimant's scalp, which she recalled to be more in the neck area but did not note the exact location. Claimant scored a perfect "15" on the Glasgow coma scale, indicating no neurological impairment.

11. Ms. Nielsen ordered cervical x-rays, which identified degenerative joint and disc disease in the C4-6 region with disc space narrowing, and a small osteophyte formation with endplate sclerosis, none of which she opined were acute. She also ordered shoulder x-rays, which were normal, and diagnosed an absence of skull fractures or other abnormalities without conducting a formal closed-head injury examination.

12. Ms. Nielsen diagnosed cervical strain, right shoulder sprain, and muscle spasm in the right side of the neck and right trapezius. She discharged Claimant with instructions to apply alternating ice and heat and to take Motrin 600 to 800 milligrams, with food, every six hours for two to three days. She also wrote prescriptions for 20 Lortab pills (narcotic) for severe pain and 20 Flexeril pills to prevent muscle spasm, and instructed Claimant to follow up with additional

medical care if he did not note gradual improvement over five to seven days. Claimant did not thereafter follow up with Ms. Nielsen, or anyone else, regarding these injuries.

13. January 4, 2010 Back Injury. Ms. Nielsen also treated Claimant on January 4, 2010, when he was admitted to the Syringa Hospital emergency department for low back pain he attributes to his second industrial injury. According to Ms. Nielsen's understanding of that accident, Claimant was lifting his chainsaw and twisting to limb a tree when he had sudden onset of mid-back pain, with no "pop" sensation or sound. Claimant reported that the pain intensified gradually to the point where it was "unbearable and excruciating discomfort on time of arrival." Nielsen Dep., pp. 26-27. He denied pain, dysesthesia, weakness and other radicular symptoms in his legs, as well as bowel or bladder changes. Claimant was alert and talking, but in apparent discomfort sitting on a stretcher and bending forward.

14. On exam, Claimant had paraspinal spasm throughout his entire lumbar area, more prominent on the right than left. Straight leg raise testing from the supine position produced no significant pain reaction in Claimant which, according to Ms. Nielsen, was not necessarily indicative of no L1-2 disc herniation. His lower extremity reflexes were symmetrical and normal. Claimant was given intravenous narcotic pain medication at increasing doses until his pain subsided so x-rays could be taken. Ms. Nielsen opined that such medication was indicated by Claimant's presentation, sitting in a forward posture, and significant evidence of spasm on exam.

15. Lumbar x-rays demonstrated no bony injury, but did identify an anterior osteophyte formation at L3-4, a non-acute finding which Ms. Nielsen described as "a little bit of scar tissue and/or arthritis." Nielsen Dep., p. 30.

16. Ms. Nielsen diagnosed bilateral lumbar muscle spasm. Given Claimant required three doses of intravenous medication to control his pain, she offered to admit him for pain control, but Claimant declined. So, Ms. Nielsen wrote prescriptions for Lortab and Flexeril, and instructed Claimant to apply alternating ice and heat and to rest his back (no lifting, twisting or bending). She also advised Claimant to follow-up in three to five days if he was not improving. Records confirm that Claimant returned the following day; however, Ms. Nielsen did not thereafter treat him.

17. Ms. Nielsen is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Ms. Nielsen's presentation or credibility.

18. **Michael Ludwig, M.D.** Dr. Ludwig, a physiatrist, treated Claimant from February 1 through May 17, 2010 for low back pain that Claimant attributes to his January 2010 industrial accident. He gave his deposition across three different settings, on September 22, October 19, and November 21, 2011.

19. Dr. Ludwig ordered an MRI taken on February 4, 2010 which he persuasively opined demonstrated an acute disc extrusion at L1-2, as well as pathology at L3-4 that did not bear indices of an acute injury. His opinion is consistent with that of the radiologist who initially read and reported the MRI results.

20. On February 5, 2010, Dr. Ludwig recommended that Claimant obtain a surgical evaluation. He based his recommendation on a combination of Claimant's clinical presentation and the MRI findings. He would hesitate to recommend surgery in a case where the objective findings and imaging did not correlate well with the patient's subjective complaints. In Claimant's case, both the size and location of the extrusion demonstrated by his MRI support a surgical evaluation. "Two factors. One is its location. It's into a foramen, so it's compressing

against bony structures, as well as its size, where it's actually a pretty large disk extrusion. It's not a small remnant." Ludwig Dep., p. 87. Further, the imaging demonstrated a potential pain source. "[I]f the disk herniation occurs into a site where there's neural structures, they tend to be more symptomatic." *Id.* at p. 88. In addition, Dr. Ludwig apparently found Claimant's clinical presentation of severe pain behaviors, combined with objective or semi-objective clinical findings of low back hypertonicity and pain, sufficient to warrant a surgical recommendation, even after he became aware of Claimant's adverse history.

21. For a variety of reasons, including Claimant's car breaking down and Surety denying his claim in late March, Claimant never obtained a surgical evaluation during Dr. Ludwig's treatment period. Nevertheless, Dr. Ludwig continued to recommend this course, even after he learned Claimant's history of drug-seeking behavior in April 2010. He also continued to prescribe narcotic pain medication (Fentanyl patches) for approximately two months following this discovery, until he formally discharged Claimant from care.

22. For several weeks before Dr. Ludwig discharged Claimant from care, he assisted Claimant in applying for state financial assistance to obtain further medical care from Dirne Community Health Clinic. However, Claimant never obtained care from this facility because, although he was approved for treatment, he could not locate a spine surgeon who would accept him as a county assistance patient.

23. Dr. Ludwig did not view any of the surveillance videos in evidence, and he has not seen Claimant since May 3, 2010. He has not offered any opinions as to Claimant's condition on the date of the hearing.

24. Dr. Ludwig is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Dr. Ludwig's presentation or credibility.

25. **Karen D. Libsch, M.D.** Dr. Libsch, a family physician, treated Claimant from September 27, 2010 through the date of the hearing (approximately six months). Her treatment goal for Claimant was to help him manage his pain while tapering him off of narcotic pain medication. She also witnessed his tooth decay, describing it in an April 13, 2011 chart note:

> Mouth obviously swollen. He had multiple carious teeth, multiple infected teeth with visible purulent material, pus, coming out of the left – coming out of the lesion at the left upper gum and lower midline gum.

Libsch Dep., p. 13. Dr. Libsch required Claimant to enter into a pain medication contract, and she was aware that other physicians had refused to treat Claimant's pain, even with such an agreement. This history concerned her, as she has a low tolerance for patients who do not comply with medication restrictions. If a patient fails to comply with the terms of a pain contract, she refuses to prescribe any further narcotic pain medications for that individual. Dr. Libsch steadily tapered down Claimant's dosage every month. Claimant remained compliant with his pain contract and was able to significantly reduce his use of narcotics under Dr. Libsch's care.

26. Dr. Libsch is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Dr. Libsch's presentation or credibility.

SURETY'S ADJUSTMENT OF THE CLAIM

27. **Sarah Neill.** Ms. Neill had been a claims supervisor for Surety for six years at the time of the hearing. She confirmed that Shawn Pineda did not report either of Claimant's relevant accidents. She became aware of Claimant's January 2010 workplace accident on February 1, 2010, when she received his First Report of Injury ("FROI"). A letter from Claimant received on February 5, 2010 detailing both accidents was her first notice of the October 2009 event. Claimant wrote that in mid-October he was "hit on my neck, head with a top or limb from

the tree I was falling." J-E 20, p. 1. He also wrote that Shawn Pineda sent him to the hospital, after which Claimant filled out an accident report and turned it in with his time card. Claimant was billed $1,400 by the hospital. Because he could not pay, the bill was ultimately sent to a collection agency. Regarding the January 2010 accident, Claimant wrote, "I was limbing the tree I just fell and I guess either the weight of my saw, the way I was bent over under the limbs I was sawing or the combination messed my back up. Now even a month later I can't stand up straight, it hurts to get out of bed or even walk." DE-20, pp. 1-2. Claimant also stated that he had been paying for his own prescriptions and that he "spent every last dollar I had trying to get back-n-forth to the Doc hopeing [*sic*] to be back to work soon, so I can keep paying my bills." DE-20, p. 2. Claimant wrote that he had lost his home, had past-due utility bills, and also had lost his brand-new saw due to his inability to work. He had to have his parents retrieve him from Riggins (where he was working) back to St. Maries to live and get treatment. "Being in Riggins with no income made it imposible [*sic*] to go 80 miles round trip to keep seeing the Doctor." *Id.*

28. After investigating the claims, Ms. Neill was frustrated with Shawn Pineda. He had asserted that Claimant was not at work on January 4, 2010, so he could not have suffered a workplace accident on that day, but he did not follow up with supportive documentation or other evidence supporting his position. Ms. Neill testified that she wanted to be of service to Claimant, so she scheduled Claimant to come to her office on March 1, 2010 so he could complete a First Report of Injury regarding his October 19, 2009 workplace accident.

29. Based upon his February 5, 2010 letter, Ms. Neill anticipated Claimant would demonstrate significant pain behaviors at their March 1 meeting. However, Ms. Neill did not detect any. In addition, "he appeared to be on some sort of drug, talking very fast, eyes lit up. Just something wasn't right about his mood, I guess, and effect [*sic* – "affect"]. Tr., p. 233.

30. Also on March 1, 2010, Ms. Neill emailed Molly Cyr, administrative scheduling nurse, a message authorizing Dr. Ludwig's referral to Dr. Larson, so Ms. Cyr arranged an appointment with Dr. Larson for March 9. Although she had already investigated the claim and determined that Surety had no basis to dispute that the workplace accidents did occur, Ms. Neill began investigating Claimant's past medical and criminal records following their March 1 meeting because his behavior threw "red flags" onto his claim. Tr., pp. 234-235. By March 10, she determined that Claimant must undergo an Independent Medical Evaluation ("IME") on March 24 with Craig Stevens, a physiatrist, before Surety would authorize further treatment.

31. Meanwhile, Claimant missed his appointment with Dr. Larson due to car trouble. He notified Ms. Cyr on or about March 10, and asked her to reschedule the appointment. Rather than reschedule the appointment, Ms. Cyr emailed Ms. Neill on March 10, and Ms. Neill advised that Claimant should not receive further treatment until after the IME. She had already advised Claimant that he was not to see Dr. Larson until after he saw Dr. Stevens:

> [By Ms. Cyr:] "Did Draygo contact you? He left me [*sic*] message today saying he had car trouble and wanted me to reschedule Larson. I called back and left him [*sic*] message to call you. Let me know the plan."
>
> [By Ms. Neill:] "I did talk to him and informed him he is not to see Larson at this time. He is scheduled for an IME on March 24th. Once we have the results we will determine what further treatment is needed. By the way, we checked his criminal record and it is not good. I suspected as much. It appears that he is not an honest person and I am extremely concerned about this claim."
>
> [By Ms. Cyr:] "Thanks for the update. Just let me know the plan. I appreciate your help."

Ludwig Dep., Exh. 2.

32. Thereafter, Dr. Ludwig did not rescind his referral to Dr. Larson, and Claimant did not indicate that he did not wish to see Dr. Larson. Nevertheless, Ms. Cyr did as Ms. Neill instructed. She made no attempt to reschedule Claimant's appointment with Dr. Larson.

33. Following Ms. Neill's receipt and review of Dr. Stevens' IME opinions sometime on or after March 24, 2010, Surety formally denied further treatment and Ms. Neill retained Confidential Investigations to conduct undercover surveillance on Claimant. Ms. Neill believed Dr. Stevens' opinions to be consistent with Claimant's medical records and her own observation of Claimant in her office on March 1, 2010.

34. Subsequently, Surety paid the bills outstanding in Dr. Ludwig's office, out of what Ms. Neill described as "fairness", because the bills were incurred before Dr. Ludwig became aware that the claim was denied.

35. **Neeva McLeod.** At the time of the hearing, Ms. McLeod had been a claims adjustor for Surety for two-and-a-half years. Ms. McLeod first met Claimant when he came to Surety's office on March 1, 2010. She greeted Claimant and he followed her upstairs to the second floor, where she showed him to Ms. Neill's desk. Ms. McLeod observed that Claimant had no trouble exiting his vehicle and climbing the three steps into the building, and that he took the interior stairs up to her office two-at-a-time. She did not observe any evidence suggesting that Claimant was in severe pain.

36. Ms. McLeod testified that Surety accepted both of Claimant's claims even though employer initially disputed the January 4, 2010 back injury claim.

SURVEILLANCE RECORDINGS

37. **Elizabeth Bradbury.** Ms. Bradbury, a retired undercover police detective, is an investigator, employed by Confidential Investigations since March 2010. She conducted video surveillance of Claimant, recordings of which are in evidence, at Surety's request.

38. Using a mobile eyewear recording device, Ms. Bradbury observed and recorded Claimant on March 31, 2010, in Albertson's in Coeur d'Alene, as well as in the store parking lot.

She saw him run approximately 20 yards across the parking lot, among other things. (*See* her report at JE-15A, p. 2 (boldface print) and the video recording at JE-16A).

39. **Kaleb Trinkle.** Mr. Trinkle, a former bounty hunter, has been employed as an investigator with Confidential Investigations since 2003. He conducted video surveillance of Claimant, recordings of which are in evidence. Mr. Trinkle recorded Claimant on a number of occasions:

a. March 31, 2010: Mr. Trinkle observed and recorded Claimant riding with a female driving around St. Maries to various locations, and then to Kootenai Medical Center in Coeur d'Alene, where she dropped him off. When Claimant left the building, he walked down the street until the woman picked him up. (*See* his report at JE-15A, pp. 1-2 and the video recording at JE-16A).

b. June 4, 2010: Mr. Trinkle observed and recorded Claimant being dropped off by his parents at, apparently, his girlfriend's apartment. Later, he saw them take two small dogs for a walk to a park which he opined was about two miles away and Claimant opined was only one. During this time, a third party notified Claimant that he was being videotaped, pointing out Mr. Trinkle's vehicle to Claimant. (*See* his report at JE-15B, pp. 4-5 and 8-9, and the video recording at JE-16B).

c. June 28, 2010: Mr. Trinkle observed and recorded Claimant walking with a cane and a limp at his attorney's office in Coeur d'Alene, then at the M&M Court Reporting office. Departing from M&M, Claimant's parents drove him to KMC. After a half hour or so, he emerged, walking briskly to his parents' vehicle. They drove around to different locations, and Claimant's father was seen using the cane. Claimant ambulated without a cane and without a limp, at one point carrying a case of water on his shoulder from a

store to the vehicle, and on another occasion, running across a street. (*See* his report at JE-15C, pp. 14-15, and the video recording at JE-16C).

d. June 4, 2011: Mr. Trinkle was initially unable to locate Claimant, then learned that he had moved to Santa, Idaho. (*See* his report at JE-15D).

e. June 14, 2011: Mr. Trinkle observed and recorded Claimant travelling with a companion into St. Maries. He also observed Claimant walking without a cane or a limp while carrying shopping bags. Mr. Trinkle set up to observe and record Claimant, but he was not visible from 7:00 a.m. until 2:30 p.m. on June 18 at his girlfriend's apartment, so he concluded his surveillance for that day. He similarly set up, but recorded no activity on June 23. (*See* his report at JE-15D, pp. 16-23, and the video recording at JE-16D).

f. June 15, 2011: Mr. Trinkle observed and recorded Claimant at his Santa residence jacking up a full-sized truck and changing a tire, walking uphill, climbing over the bed of a truck, hopping down off the back of a truck, standing on his toes to work on something under the hood of a truck, climbing onto the front bumper of a truck with his knees to work on something under the hood, individually picking up four tires on rims and placing them into the bed of a truck, rolling tires down a hill, carrying a jack and a gas can, balancing on a log to work on something under the hood, and other activities. Upon completion, Claimant drove away in a truck. Mr. Trinkle set up to observe and record Claimant, but he was not visible from 7:00 a.m. until 2:30 p.m. on June 18 at his girlfriend's apartment, so he concluded his surveillance for that day. He similarly set up, but recorded no activity on June 23. (*See* his report at JE-15D and video recording at JE-16D).

40. Mr. Trinkle explained at the hearing how, formerly unbeknownst to either party, he had edited all of the video recordings to exclude excessive "dead space" where Claimant was not visible. Following the hearing, Mr. Trinkle provided the full, uncut versions of his recordings on a hard drive, which is in evidence and identified as JE-21, pursuant to the Referee's order at the hearing allowing such supplementation.

INDEPENDENT MEDICAL EVALUATIONS

41. **J. Craig Stevens, M.D.** Dr. Stevens, a physiatrist, conducted an IME at Defendants' request on March 24, 2010, and provided deposition testimony on October 18, 2011. In preparing his report, Dr. Stevens reviewed Claimant's medical records, interviewed Claimant, and performed an examination. He also administered pain disability questionnaires relevant to both of Claimant's injuries.

42. Dr. Stevens had no independent recall of his meeting with Claimant, except with respect to one incident. Upon arrival at Dr. Stevens' office, located at that time on the second floor, Claimant was upset and aided in ambulation by his significant other. Even though there was an elevator next to the stairs, he believed he could not take it, apparently because someone unaffiliated with Dr. Stevens, on the first floor, had directed him to the stairs. While climbing the stairs, Claimant's foot caught on the lip of a step, significantly increasing his back pain.

43. Dr. Stevens explained that he is always a little suspicious of false accusations by individuals on whom he conducts IMEs and, given Claimant's presentation after his stair mishap, he "was obviously very cautious" when he performed his exam, ultimately omitting certain tests. Stevens Dep., p. 36. "I'm always a little leery when I do an IME, a physical examination, because some patients will say that they were injured in the course of an exam. And so I'm very cautious when I do such an exam." *Id.*

44. Regarding Claimant's drug-seeking history, Dr. Stevens opined that it renders Claimant's pain reports unreliable; however, he acknowledged that Claimant's history does not rule out the possibility that he suffered a serious, pain-inducing injury.

45. October 19, 2009 Neck Injury. Claimant reported no neck pain prior to the exam, but he was tender to touch wherever Dr. Stevens palpated and demonstrated only minimal rotation and lateral flexion ranges. Dr. Stevens did not attempt to passively move Claimant's head/neck because he was concerned that Claimant would later accuse him of causing a new injury.

46. Dr. Stevens noted Claimant had a history of treatment for neck pain and chronic headache reaching back to 2006, reducing the likelihood that his current complaints were related to his industrial accident.

47. Dr. Stevens concluded that Claimant had suffered an industrial cervical strain and head contusion, both of which had resolved to pre-injury status, and that he had no objectively demonstrated preexisting condition of the cervical spine.

48. After observing surveillance video footage taken on July 28, 2010, Dr. Stevens' opinion did not change. The images of Claimant carrying a case of bottled water on his shoulder, Dr. Stevens opined, were not consistent with behavior normally seen in an individual with a significant back or neck condition. He acknowledged, however, that he did not know whether Claimant was taking any pain medication at the time, and that Claimant may have been lifting the case out of necessity.

49. January 4, 2010 Low Back Injury. Claimant presented with "no lumbar range of motion whatsoever, maintaining his back in a very rigid posture" and wearing two Fentanyl patches of unknown dosage or duration, because Dr. Stevens did not ask about them. Stevens

Dep., p. 38. Claimant reported his pain at a level of "10" and, when asked where, he pointed to the lower right part of his back extending into his right leg.

50. Dr. Stevens did not have Claimant bend forward 90 degrees or shift to the left or right with his hands guiding because he was concerned that Claimant would later accuse him of causing a new injury. Claimant reported diffuse tenderness to palpation in his low back muscles, but Dr. Stevens did not detect any spasm. Dr. Stevens noted symmetrical knee and ankle reflexes, an absence of numbness in the lower extremities, and symmetrical calf and thigh circumferences. He was unable to perform any reliable motor testing because Claimant complained of severe pain with any touching or manipulation.

51. Dr. Stevens concluded it improbable that Claimant suffered a permanent injury to his low back as a result of his industrial accident for the following reasons:

a. Claimant's February 4, 2010 MRI evidenced only minimal degenerative disc changes with, at most, a disc bulge" (Stevens Dep., p. 39);

b. Claimant's complaints on exam of right-sided back and leg pain were inconsistent with Dr. Ludwig's report identifying left-sided symptoms that he opined were consistent with the MRI findings of left-sided disc pathology;

c. "A profound degree of inconsistency in his presentation," which led Dr. Stevens to question whether Claimant's pain complaints were more likely related to drug-seeking motivation;

d. His opinion that L1-2 disc extrusion is inconsistent with Claimant's leg pain reports because, while this condition may induce pain in the groin, upper

medial thigh pain, or lower abdomen, it is not associated with symptoms radiating further into the leg;[3]

e. Disc extrusions and degenerative disc disease are not accompanied by pain in half of the affected population;

f. Claimant's purported mechanism of injury, pulling a stuck chainsaw out of a tree, was insufficient to result in a herniated disc; and

g. Claimant is most likely depressed and suffering from an unspecified personality disorder which could account for his pain reports.

52. Dr. Stevens concluded that Claimant suffered a lumbar strain which had resolved to baseline, with no resultant permanent injury and, consequently, no permanent impairment. He also diagnosed mild to moderate preexisting lumbar degenerative disc changes with left-sided bulges at L1-2, which did not account for his current chief complaint of right leg pain.

53. After observing surveillance video footage taken on March 31, 2010, one week after Dr. Stevens' IME, and thereafter, Dr. Stevens' opinion did not change. Although he acknowledged that he could not tell from a video what Claimant was feeling or whether he had taken any medication, he saw nothing to indicate Claimant had back or neck pain. He opined that the images of Claimant changing tires on a truck on June 15, 2011 demonstrated body mechanics not generally employed by those with back pain, including excellent lumbar flexibility. "So bending 90 degrees at the waist, changing a tire it looks like. That's behavior - - normally with back pain you'd expect someone to kneel down, keeping their back vertical." Stevens Dep., p. 69. "He's not only - - he's fully hip flexed and fully lumbar flexed. He literally had his chest on the surface of his knees - - of his thighs in that position." *Id.* at 70. Dr. Stevens

[3] Dr. Stevens did note that Claimant's leg symptoms were consistent with L4-5 right-sided pathology. Although Claimant's MRI demonstrated a right-sided disc bulge at this level, Dr. Stevens opined that the bulge was too small to account for Claimant's symptoms.

also opined that Claimant's strength in lifting a tire on a rim up into the back of a truck was impressive, and, in observing Claimant jump down from the back of a pickup, he opined that such activity would cause intense pain in someone with active disc disease, yet Claimant displayed no pain behaviors. In addition, Dr. Stevens observed "good upward reach, downward push strength. No halting or - - you know, no sudden halting in the movement due to pain was apparent." *Id.* at 78.

54. Dr. Stevens' opinions are credible. However, they are also troubling because they are based, in part, upon preconceptions about Claimant as an IME subject, generally, and his temporary condition after having tripped on the stairs, specifically, that influenced the manner in which he conducted his examination. In addition, Dr. Stevens' preexisting suspicions about Claimant's honesty are consistent with concerns conveyed by Surety in its March 15, 2010 letter, described below. Dr. Stevens' IME approach may be understandable. Nevertheless, his examination was not as thorough as those conducted by Drs. Ludwig and McNulty, who were not inhibited by factors unrelated to Claimant's medical condition. Further, Dr. Stevens does not address how or whether Claimant's clinical presentation, having just reinjured his back, may have masked symptomatology observed by other physicians, but not by Dr. Stevens. The weight of evidence in the record establishes that Dr. Stevens' opinions are less persuasive than those of Drs. Ludwig and McNulty.

55. **John Michael McNulty, M.D.** Dr. McNulty, an orthopedic surgeon, conducted an IME on May 17, 2011, at Claimant's request, and provided deposition testimony on September 22, 2011. In preparing his report, Dr. McNulty reviewed Claimant's medical records, interviewed Claimant, and performed an examination. In addition, Dr. McNulty treated Claimant from time-to-time before his relevant industrial accidents. He was aware of Claimant's

reputation in the medical community around St. Maries for drug-seeking behavior, and he testified that he, himself, would refer Claimant elsewhere for management of his pain medications. "In patients that I maybe operated on or I know for long standing [*sic*], I know they're legitimate, I do. But somebody like Mr. Baird, I wouldn't." McNulty Dep., p. 38. Along those lines, Dr. McNulty acknowledged that Claimant's pain complaints cannot be presumed to be a reliable indicator of the level of pain he may be experiencing.

56. October 19, 2009 Neck Injury. Claimant explained that his neck became more symptomatic after he injured his back. He reported trouble looking upward and pain when looking to the left. Following examination, however, Dr. McNulty "didn't have anything that would point to a disk herniation in his cervical spine." McNulty Dep., pp. 24-25. He also found inadequate evidence with which to diagnose chronic cervical spine pain related to his workplace injury. Dr. McNulty noted that Claimant returned to work as a sawyer and his work activities would have exacerbated his injury, yet Claimant's medical records evidence only initial treatment, but no continuing cervical complaints.

57. January 4, 2010 Low Back Injury. During the interview, Claimant denied any preexisting problems or medical treatment related to his low back, other than occasional low back pain after work. Similarly, Dr. McNulty relied upon a medical history negative for prior low back conditions in preparing his opinion. However, during his deposition he was prompted to recall that he had treated Claimant in 2003, and had ordered an MRI, related to low back pain radiating into Claimant's left leg, progressively worse. Dr. McNulty opined that the disc bulges that he noted from the 2003 MRI were age-consistent and, thus, "normal" findings. Eventually, Dr. McNulty recommended a panel evaluation with respect to that prior work-related injury. In correcting his earlier testimony, Dr. McNulty opined that Claimant did have prior episodes of

low back pain but, with a normal-appearing MRI, his pain was musculoligamentous rather than radicular in nature. Dr. McNulty also acknowledged that he treated Claimant later in 2003 for a motor vehicle accident resulting in low back pain radiating to his left hip.

58. On exam, Claimant reported low back pain that he rated at a level of 4 on a scale of 1-10, and that he had both good days and bad days in regard to his pain. He had low back pain radiating into his left buttock and weak-feeling legs. He could walk about three blocks before needing to sit and rest, but could only sit for about ten minutes before having pain in his back. Claimant also noted some infrequent right-sided symptoms. Dr. McNulty noted clinical evidence of, among other things, muscle spasm in the lumbar region and pain in Claimant's low back on seated straight leg raise that did not radiate beyond the proximal thigh. He saw no evidence of sensory loss.

59. Claimant was unable to lie flat on the examining table, so Dr. McNulty did not perform the straight-leg raise test. Claimant also had trouble getting on and off of the examining table and changed positions frequently. In addition, Claimant had a forward flexed posture, favored his lower left extremity and walked with an antalgic gait. Dr. McNulty opined that all of these behaviors were consistent with significant back trouble. When Claimant left, Dr. McNulty watched him walk to his car and noted that his gait did not change when he (presumably) did not know he was being observed.

60. Dr. McNulty initially concurred with Dr. Ludwig's opinion that Claimant's L1-2 disc extrusion was an acute injury, unrelated to degenerative change, and that "medical treatment would be appropriate for him, repeating the MRI, and that he's a surgical candidate." McNulty Dep., p. 26. However, after viewing some of the surveillance footage in evidence, including images taken on June 15, 2011, in which Claimant was changing tires on a truck, and

acknowledging that drug seeking behavior and smoking are both contraindications that must be considered in determining whether to operate on a patient, Dr. McNulty revised his opinion:

> …The difficult part in Mr. Baird's case is an L1/L2 disk herniation has poor correlation with physical findings. We don't have an absent reflex. We don't have a consistent sensory loss. The - - when I reviewed the literature, it showed back pain radiating into the buttock. Mr. Baird's MRI that I reviewed - - and let me just check the date on that. That's what I wanted to do. 2/24/10.[4] Okay. So that wasn't - - it's a year and a half - - showed an impressive finding. I was impressed on the finding. As well as was Dr. Ludwig.
>
> You know, I would say that surgery on Mr. Baird has a much larger risk than surgery on anybody else because of some of the factors that you mentioned. The complexity of correlating physical findings with actual MRI findings is difficult.
>
> I cannot say with any definite certainty, you know, whether or not he needs surgery or doesn't need surgery. I would phrase it that way. It's a difficult case.

McNulty Dep., pp. 73-74. After a little more time to consider the matter, Dr. McNulty opined that, while the MRI findings initially prompted him to concur with Dr. Ludwig's surgical recommendation, the surveillance video leads him to question that conclusion:

> So based on my evaluation on 5/17/2011, even though he has a history of drug seeking and I think I knew he smoked, I thought he was a good surgical candidate based on that.
>
> After watching the surveillance video, it raises some concern [*sic*] the extent of symptoms that Mr. Baird is currently having, or at least was having one month after I saw him.
>
> Thinking this over, what I would suggest would be to repeat his MRI and see if the disk has absorbed or get some better objective findings what that disk looks like.
>
> His MRI was based in 2010, a year and a half ago. And based on that MRI, you know, I would say he would definitely need surgery. He's functioning a little better - - at least in that small tidbit of - - that we saw him on the surveillance video, would raise some concern about how much the disk is actually bothering him. I would say "raise concern," wouldn't eliminate concern.

[4] The MRI was actually taken on February 4, 2010.

> And I think after reviewing this and watching him on the surveillance video, I would recommend repeating the MRI. Let's see how bad this thing really looks and then make a determination whether or not he does or does not need surgery.

McNulty Dep., pp 78-79. Dr. McNulty further opined that, if a follow-up MRI shows that Claimant's L1-2 disc extrusion has not resorbed, but that it is as large as it was on the prior MRI, then "despite his risks for a suboptimal outcome, I think surgery should be considered for him just based on the pathology that is visible on the MRI." *Id.* at 79.

61. Regardless of the surveillance video footage or what future imaging might show, Dr. McNulty remained firm in his opinion, based on his February 2010 MRI and his understanding of Claimant's workplace accident, that Claimant suffered an industrial acute herniation in January 2010. He specifically rejected Dr. Stevens' opinion that Claimant, at most, suffered a disk bulge, and emphasized that this position is inconsistent with not only his own opinion, but those of the radiologist and Dr. Ludwig, as well. Dr. McNulty also explained that he ruled out degenerative changes because, in the absence of a prior fracture, they are very uncommon at L1-2 and L3-4. "So that's not consistent with degenerative change there. That's consistent with more of an acute injury." McNulty Dep., p. 86.

62. Dr. McNulty's testimony demonstrates a nuanced understanding of Claimant's condition. Although he was not aware of Claimant's prior lumbar spine history and treatment or the surveillance video footage at the time he prepared his report, he appropriately adjusted his opinion in light of this information at his deposition. Dr. McNulty is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Dr. McNulty's presentation or credibility.

CLAIMANT'S CREDIBILITY

63. Defendants argue strenuously that Claimant is not credible and, therefore, his subjective symptom reports are not reliable. With respect to his relevant medical conditions, Drs. Stevens and McNulty agree. Along these lines, the record supports findings that Claimant:

a. Attempted to exaggerate his October 19, 2009 injury by claiming that he lost consciousness when the more reliable contemporaneous chart note indicates that he did not;

b. Failed to report prior low back problems and treatment when asked by medical care providers following his January 4, 2010 injury;

c. Exhibited "drug-seeking behavior" in the past that concerned a number of care providers;

d. Inaccurately downplayed his reasons for participating in drug rehabilitation for methamphetamine addiction for approximately three years;

e. Demonstrated functional ability and a paucity of pain behaviors at Surety's office on March 1, 2010 that appeared to lay people to be inconsistent with a significant low back problem; and

f. Functioned arguably better in surveillance video footage taken in March and June 2010, and significantly better in surveillance video footage taken in June 2011, than he did during examinations by Drs. McNulty and Stevens.

64. However, there is important evidence supporting a conclusion that Claimant did suffer an injury as a consequence of the January 4, 2010 accident:

a. The February 4, 2010 MRI demonstrates an L1-2 herniation with nerve impingement that Dr. Ludwig characterized as "acute", and that both he and Dr. McNulty attributed to the January 2010 accident;

b. Dr. McNulty opined that Claimant's marked improvement demonstrated by the surveillance videos could be due to improvement of his herniation through resorption of the extruded disc material. Also, Claimant does not deny that he has "good days and bad days", and the videos do not capture evidence of his condition following the depicted events. These videos place into question the extent of Claimant's pathology at the time of the hearing, but they do not establish that Claimant did not, or does not, experience significant low back pain.

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).

REASONABLE MEDICAL CARE

Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment. *Wichterman v. J.H. Kelly, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007). It is clear that in order to recover medical benefits, the injured worker must prove <u>both</u>

that the need for medical care is causally related to the accident and that the medical care is "reasonable." See *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006).

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment is reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

The Idaho Supreme Court has held that medical treatment is reasonable when three circumstances exist: 1) the claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 3) the treatment received was within the physician's standard of practice, and the charges were fair, reasonable and similar to charges in the same profession. *Id.* However, the *Sprague* standard anticipates a situation in which treatment has already been rendered, and the *Sprague* analysis is not readily applicable to care, like that at issue in the instant matter, that is prospective in nature. *See*, *Richan v. Arlo G. Lott Trucking, Inc.,* IC 2007-027185 (Feb. 2011); and *Ferguson v. CDA Computune, Inc.*, *et. al*., consolidated case numbers IC 2001-005778, IC 2001-021764, IC 2004-504577 and IC 2004-000161 (filed Feb. 2011).

65. Head, neck and shoulder injuries. Claimant suffered injuries to his neck, head and shoulder when he was struck by falling debris at work on October 19, 2009. Claimant argues that he has met his burden of proving that the subject accident permanently aggravated his pre-existing cervical spine condition. However, he offers no medical opinion to support this claim. On the contrary, Dr. Stevens opined that Claimant's cervical spine injury was temporary and has

healed completely and, although Dr. McNulty found adequate evidence to diagnose a chronic cervical spine strain with limited range of motion, he did not find sufficient grounds to relate Claimant's ongoing symptoms to his industrial injury.

66. Further, no follow-up treatment was recommended, except by Ms. Nielsen on the day of the injury. She advised Claimant he should seek additional medical care if he did not gradually improve over five to seven days. Claimant did not follow up and did not report neck problems again until well after his January 2010 industrial accident. Instead, he returned to work, which Dr. McNulty opined was a significant indicator, that his cervical injury had healed. For his part, Claimant testified that his neck did improve following his October 2009 injury, but then became worse after his January 2010 industrial accident.

67. Claimant cites his inability to pay for follow-up treatment, Shawn Pineda's failure to report the accident to Surety, and the complicating factor of Claimant's subsequent January 4, 2010 low back injury, as excuses for why he did not seek follow-up treatment. An absence of evidence is insufficient, as a matter of law, to meet Claimant's burden of proving his case by a reasonable medical probability. Further, the opinions of Drs. Stevens and McNulty are consistent and persuasive. Claimant has failed to meet his burden of proving his cervical spine symptoms are related to either of his industrial accidents.

68. Claimant also argues that his head wound was inappropriately treated by Ms. Nielsen, who provided medical care on the day of the injury. He posits that he developed new symptoms, such as dizziness and black and white spots in his fields of vision, as a result of this wound and treatment therefor is compensable. Again, however, Claimant offers no medical opinion in support of his position. Further, the Referee found Ms. Nielsen's contemporaneous chart note, reporting that Claimant did not lose consciousness, more persuasive than Claimant's

subsequent claims that he did.

69. Claimant has failed to establish that he suffered any permanent head injuries as a result of either of his industrial accidents, or that further diagnostic treatment related to his head injury is reasonable.

70. Claimant does not argue that he suffered any particular shoulder injury as a result of his industrial accidents, and there is insufficient medical evidence in the record to prove that he did. The Commission finds, therefore, that Claimant has failed to prove that he sustained any permanent injury to his head, neck or shoulder as a result of either of his industrial accidents.

71. Low back injury. Claimant's medical history is significant for well-documented drug seeking behavior as far back as the early 2000s. The medical records in evidence, and discussed at length by Defendants at the pages of 3 through 15 of Defendant's brief, document Claimant's manipulation of the medical system in order to obtain narcotic pain medication. Claimant is not a reliable historian. Claimant demonstrates greater functional ability when he thinks he is unobserved than when he presents for medical evaluation. All these factors militate against making any decision on this case based on Claimant's subjective recitation of his symptomatology. However, the fact that Claimant may be an unreliable historian does not necessarily mean that he did not suffer an injury as a consequence of the January 4, 2010 accident. Here, there is substantial, competent and objective medical evidence which supports a finding that Claimant did suffer a low back injury as a consequence of the subject accident. The MRI of February 4, 2010 was thought by both Dr. Ludwig and Dr. McNulty to demonstrate the existence of an acute injury at L1-2 consistent with the described mechanism of injury. There is no persuasive evidence denigrating the relationship between the subject accident and the acute disc injury. While it is certainly true that Claimant has overstated the extent and degree of his

symptomatology at various points since the January 4, 2010 accident, the objective medical evidence nevertheless leads the Commission to the conclusion that an acute L1-2 disc injury did occur on that date. The Referee finds that Claimant has established, by a preponderance of the evidence, that he suffered an L1-2 disc herniation with nerve impingement on January 4, 2010.

72. Following the February 4, 2010 MRI, both Dr. Ludwig and Dr. McNulty felt that the MRI findings, when correlated with Claimant's clinical presentation and subjective complaints, strongly suggested that Claimant was a candidate for surgical revision of the lesion. However, as made clear by the deposition testimony of Dr. McNulty, the video surveillance of Claimant now calls that judgment into question. Whether, or to what extent, Claimant requires further medical care for the L1-2 lesion is unknown. Certainly, the medical testimony suggests that invasive treatment should be approached with some caution. Nevertheless, having found that Claimant did suffer a low-back injury as a consequence of the subject accident, Claimant is entitled to such further medical evaluation/treatment as may be deemed necessary by his physician for care of his low back injury.

TEMPORARY TOTAL DISABILITY (TTD)

73. Idaho Code §§ 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled until such time that the worker becomes medically stable. Only the low back injury is relevant here because Claimant does not assert any right to TTD benefits related to his October 19, 2009 industrial accident. (*See* Claimant's Opening Br., p. 11).

74. Dr. Stevens opined that Claimant's low back condition became medically stable by March 24, 2010 and that he has not suffered any permanent impairment. However, his opinion is based upon an understanding of Claimant's L1-2 injury that is inconsistent with the weight of the medical evidence in the record. Further, Claimant consistently reported severe low

back pain and radiculopathy symptoms throughout his treatment by Dr. Ludwig, which ended on May 17, 2010. Dr. Stevens' opinion is inadequate to establish that Claimant was medically stable as of March 24, 2010. Dr. Ludwig never returned Claimant to work and continued to recommend follow-up by a spine surgeon throughout this period.

75. Under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once a claimant establishes by medical evidence that he is within a period of recovery from the industrial accident, he is entitled to TTD benefits *unless* and *until* evidence is presented that he has been medically released for light work and (1) that an employer has made a reasonable and legitimate offer of suitable employment to him or that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing, and which is consistent with his physical abilities.

76. Claimant has proven that he was in a period of recovery after his January 4, 2010 industrial accident that persisted through at least May 17, 2010. Evidence in the record suggests that Claimant may have reached medical stability at some time prior to the hearing, and that further diagnostic testing will help parse this out. Nevertheless, *Malueg* requires a finding that Claimant is entitled to TTD benefits from January 4, 2010 to his date of medical stability, unless Defendants adduce proof sufficient to allow curtailment of benefits. Here, Dr. Stevens opined that Claimant could return to work. However, that evidence was unpersuasive. Even if it was sufficient to satisfy the threshold *Maleug* inquiry, no proof has been presented from which it could be found either that an employer made Claimant an offer of suitable employment, or that other suitable employment was reasonably available in Claimant's general labor market. As such, the default case is that Claimant is entitled to time loss benefits effective January 4, 2010, through the date of medical stability, with credit for payments already rendered, unless and until

Defendants can meet their burden of proof.

ATTORNEY FEES

77. Idaho Code § 72-804 provides that if the Commission determines that an employer contested a claim for compensation made by an injured employee without reasonable ground or the employer neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee the compensation provided by law or without reasonable grounds discontinued compensation as provided by law, the employer shall pay reasonable attorney fees in addition to the compensation provided by law.

78. Claimant seeks attorney fees on a number of grounds. Defendants argue that an award of attorney fees is unwarranted:

> Contrary to the argument made by Claimant's counsel that the benefits were terminated without a basis, that is entirely false. When the two adjusters from Associated Loggers Exchange observed Claimant's physical abilities as he visited their office, their suspicions were immediately raised. They conducted an investigation, had an independent medical evaluation performed and, based upon the opinions of the independent medical evaluator, denied further treatment. They did not cut Claimant's benefits off without cause. They did not deny him a visit to the neurosurgeon until their investigation proved it was not necessary, and in fact had authorized an evaluation with Dr. Larson, which Claimant missed and Dr. Larson refused to reschedule.[5] It is clear that they had excellent bases for termination any additional medical care at the time they did.

Defendants' Brief, pp. 42-43.

79. As set forth, below, the record contains a preponderance of substantial, competent evidence that establishes Surety did unreasonably curtail Claimant's benefits. Therefore, the Referee finds that an attorney fee award is warranted in this case.

80. On February 5, 2010, after reviewing Claimant's February 4, 2010 MRI, Dr.

[5] This comment, though semantically correct, is strongly suggestive, through its context, that Dr. Larson would not treat Claimant because of some bad behavior on Claimant's part. This implication is *not* supported by the record. Dr. Larson did not testify. The only evidence on this point was offered by Claimant, who testified that he had called several spine surgeons, including Dr. Larson, all of whom declined to treat him because he was on county assistance.

Ludwig diagnosed an acute L1-2 disc extrusion into the foramen which "correlates with his current symptoms and appears to be acute." DE 6, p. 16. As a result, he recommended a neurology consultation. Dr. Ludwig's recommendation was clear, based upon objective evidence, and consistent with the attending radiologist's review of Claimant's MRI. Yet, Surety did not authorize the evaluation until March 1, the date on which Claimant met with Ms. Neill in her office.

81. On or about March 1, 2010, Ms. Neill sent an email to Ms. Cyr authorizing Dr. Ludwig's referral of Claimant to Dr. Larson for a neurological consultation. Ms. Cyr arranged for Claimant to be seen by Dr. Larson on March 9, 2010. Claimant missed this scheduled appointment due to car trouble. In the interim, Ms. Neill's investigation into Claimant's medical and criminal history caused her to become more skeptical of Claimant's assertion of a work-related low back injury. She declined to reset the neurological consultation with Dr. Larson recommended by Dr. Ludwig, Claimant's treating physician. There is some evidence in the record suggesting that in explaining herself to Dr. Ludwig, Ms. Neill told Dr. Ludwig that she would not authorize the referral because Claimant's claim was being denied. Although Ms. Neill would not authorize the referral to Dr. Larson, she did arrange for Claimant to be evaluated by Dr. Stevens, and it was based on Dr. Stevens' subsequent report that Ms. Neill made her decision to continue denial of the claim.

82. Claimant asserts that Surety acted unreasonably in obtaining Dr. Stevens' opinion by providing him with records, and perhaps other direction, that caused Dr. Stevens to generate a biased report that did little but fulfill Surety's expectations. Per Claimant, it is therefore unreasonable for Surety to rely upon Dr. Stevens' report as providing the medical predicate upon which to perfect Surety's ongoing denial of the claim.

83. Under Idaho Code § 72-433, Surety is authorized to require Claimant to present himself for medical evaluation. It is part of the culture of workers' compensation to refer to such exams as "independent medical exams", although there is nothing in the provisions of Idaho Code § 72-433 specifying that such exams are intended to be "independent", i.e. free from the influence of the parties. Rather, it seems clear that the statute was crafted to require the injured worker to submit to a medical examination requested by the employer, in order to enable Employer to test the recommendations of Claimant's treating physicians and otherwise prepare defenses in a contested case. Abuses of the Idaho Code § 72-433 exam are discouraged by recognizing that tainted opinions will not be found to be persuasive by the Commission. The examination performed by Dr. Stevens was performed at the instance of Employer, and Employer was entitled to provide Dr. Stevens with whatever medical and other records it desired Dr. Stevens to review in connection with the physical examination. The Commission is not persuaded that Surety intentionally provided Dr. Stevens with false information foundational to Dr. Stevens' ultimate opinion. Although Dr. Stevens' opinion may have provided an appropriate medical predicate upon which Surety could perpetuate its denial, we find that Surety took certain actions in adjustment of the claim prior to receipt of Dr. Stevens' report which do provide the basis for an award of attorney's fees under Idaho Code § 72-804.

84. As noted, Ms. Neill originally authorized the referral made by Dr. Ludwig to Dr. Larson. Claimant missed this appointment scheduled for March 9, 2010, due to car trouble. Dr. Ludwig attempted to reset the evaluation, but was thwarted in this regard by Ms. Neill who had begun to develop deeper suspicions about the claim based on her investigation into Claimant's medical and criminal background. Ms. Neill declined to authorize the referral, explaining that the claim was denied.

85. In light of the fact that the occurrence of the subject accident has not been disputed, Ms. Neill's skepticism does not constitute a basis upon which to decline to authorize the referral for evaluation made by Dr. Ludwig. In order to reasonably contest Dr. Ludwig's medical recommendation, something in addition to suspicions or skepticism is required; Surety could not properly refuse to abide by the recommendation of a treating physician absent an appropriate medical predicate discrediting the recommended care.

86. We find that the actions taken by Surety prior to the preparation of Dr. Stevens' report constitute an unreasonable interference with, and delay of, the recommendations of Claimant's treating physician. Claimant is entitled to an award of attorney's fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to prove that further medical care related to his October 19, 2009 head, neck and shoulder injuries is reasonable.

2. Claimant has proven that he is entitled to additional reasonable and necessary medical care for his L1-2 spinal disc herniation, specifically including a surgical evaluation.

3. Claimant has proven that he is entitled to TTD benefits through the date on which he becomes medically stable, with credit for payments already rendered, or until Defendants adduce proof sufficient to meet their burden under *Malueg*.

4. Claimant has proven he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial of his claim from March 10, 2010 through the date of the hearing.

5. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision,

file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See*, *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

6. All other issues are reserved.

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

DATED this _11th_____ day of __January_____, 2013.

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 _11th____ day of ___January_____ a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon:

STARR KELSO
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ALAN K HULL
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/s/_____