BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT CLARK, Claimant, v. CLARENCE MCREYNOLDS, dba CMTB, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2010-009180** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed February 24, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Lewiston, Idaho, on April 26, 2011. Christopher Caldwell of Lewiston represented Claimant. Bradley J. Stoddard of Coeur d'Alene represented Defendants. The parties submitted oral and documentary evidence. The parties took post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on August 29, 2011 and is now ready for decision.

ISSUES

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

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

2. Whether the industrial accident caused the condition for which Claimant seeks

benefits;

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

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

A. Medical care; and

B. Temporary partial and/or temporary total disability benefits (TPD/TTD).

All remaining issues, including permanent partial impairment (PPI), permanent disability in excess of impairment (PPD), whether Claimant is totally and permanently disabled as an odd-lot worker, and the matter of attorney fees are reserved pending resolution of preliminary compensability issues.

CONTENTIONS OF THE PARTIES

Claimant asserts that on April 6, 2010 he injured his low back while working in Alaska on a trail-building project for Employer. While Claimant admits to having a history of low back problems, he avers that he was asymptomatic for the five years immediately preceding his 2010 industrial accident, but now suffers constant pain and needs surgical intervention. Further, Claimant asserts that he is entitled to income benefits during the period that he was off work due to his industrial injury.

Defendants dispute that Claimant suffered an injury in an industrial accident while working in Alaska but, if he did, it was nothing more than a lumbar strain, and Claimant returned to his time-of-injury condition within two weeks. Employer offered light-duty work following the alleged injury; Claimant declined and is not entitled to income benefits. Finally, Claimant has a long history of low back problems, including two prior surgeries; however, his condition did not change following his alleged accident, and Defendants are not responsible for medical

benefits for repair of a prior fusion that failed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, William Brown, Richard Brust, Thomas Gonzalez, and Clarence McReynolds, taken at hearing;

2. The pre-hearing depositions of Rance Moore, taken April 13, 2011, and Jeff Scott, taken April 15, 2011 in lieu of appearance at the hearing;

3. Claimant's Exhibits 1 through 6, admitted at hearing;

4. Defendants' Exhibits A through W, admitted at hearing; and

5. The post-hearing deposition of Jeffrey J. Larson, M.D., taken May 26, 2011.

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.

FINDINGS OF FACT

BACKGROUND

1. Claimant was forty-four years of age at the time of hearing. He lived with his girlfriend, Dina Smith, in Whitebird, Idaho.

2. Claimant obtained his high school diploma in Washington state, where he spent most of his life before moving to Idaho in 2008. Claimant worked primarily in the construction trades, including new residential construction, framing, siding, roofing, and construction management. Claimant briefly participated in a re-training program designed to improve his computer skills, but dropped out when he got a job as a construction superintendent.

3. Claimant did not work for significant periods of time in the years preceding his 2010 employment with Employer. He was off for two-and-a-half years following an industrial

injury in Washington in 2003. Claimant was laid off from his last full-time construction job in the fall of 2008 due to the collapse of the residential housing market. Following his move to Whitebird, Claimant did a few small project-type construction jobs (re-roofing, minor remodeling), but he did not have full-time employment until he went to work for Employer in March 2010.

EMPLOYER

4. Clarence McReynolds is the owner of CMTB, Inc.—Clarence McReynolds Trail Builder—and several other businesses, including a café and motel located near Whitebird. CMBT contracts throughout the western United States building trails on public lands. In 2010, CMBT was working primarily in Washington and Alaska.

THE JOB

5. In March 2010, Mr. McReynolds took a crew of five men, including Claimant, to a primitive base camp in a remote part of Prince of Wales Island, Alaska, near where CMBT had a contract to rebuild the One Duck Trail.[1] The camp was about two miles from the staging area for the construction project, and about twenty miles from the nearest small town. The camp consisted of three ocean-going cargo containers connected by a beam and tarp roof; neither running water nor shower facilities were included among the living amenities.

6. Weather conditions in Alaska in the early spring are inclement; it was constantly wet and bitterly cold. The crew worked eight hours a day, six-and-a-half days a week, in slick and muddy conditions, performing very heavy labor in steep, wooded terrain. Once a week, Employer gave the crew a half day to go into town, shower, and do laundry.

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[1] The crew consisted of foreman Thomas Gonzales, his two brothers David and Jose, Claimant, and Mr. McReynolds' grandson, Charlie Hickman.

7. The One Duck Trail was approximately one and a quarter miles long. It took a crew of four men forty-five days to complete the work. A good day's progress consisted of one hundred to one hundred fifty feet of trail. The project included demolition of old trail structures (bridges and cedar corduroy), clearing brush and trees, installing water bars and new corduroy, and laying the new trail materials. The job involved very heavy work under adverse conditions.

8. Mr. McReynolds spent about two weeks with the crew getting things set up and getting the work started. Once the project was underway, he left his foreman, Thomas Gonzales, in charge of the crew, and returned to Whitebird, arriving home on April 6.

THE ACCIDENT

9. On the morning of April 6, 2010, the trail cat (a piece of equipment resembling a small excavator/backhoe used in building trail) was awaiting repair. Thomas Gonzales directed Claimant and Charlie Hickman to remove old trail timbers[2] by hand while he went to town to pick up the part for the trail cat. Sometime around 10:30 or 11:00 a.m., Thomas returned to where Charlie and Claimant were working, told Charlie the trail cat was up and running, and directed him back down the trail to run the equipment. Thomas directed Claimant to continue working on the demolition.

10. Claimant told Thomas that it was particularly difficult to get the old boards loose and suggested it would be much faster to pop them up using the bucket of the trail cat, but Thomas told him to keep doing what he had been doing.

11. Shortly after Charlie left, Claimant popped one end of a timber off the spike on one end of the support structure and was pushing the timber up and away so the other side of the

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[2] Think of a deck, but constructed with sawed half logs fastened on top of cross-timbers with long spikes to create a stable and flat walking surface.

timber would come loose. Claimant stated:

> Well, when I was pushing one of the logs up and away from me, it was a real stubborn one and it – I just felt a pop in my low back and just pop, and it shot pain down both my legs and just about dropped me to my knees.

Tr., p. 71. Claimant walked down the trail toward the staging area where the rest of the crew was working. When he saw Mr. Gonzalez, Claimant told him that he had hurt his back. Claimant specifically recalled that Mr. Gonzalez asked whether Claimant needed medical care, to which Claimant replied, "Not right now. Let's just see how I do. I'm going to go sit in the truck. You guys just keep working, and I'm just going to go sit down for a while and turn the heat on . . ." *Id.*, at p. 75.

12. Claimant spent the rest of the day sitting in the truck with the heater on. Over the course of the afternoon he had a conversation with a forest service employee and Mr. Gonzalez or other members of the crew checked on him periodically. When the crew was done for the day, they all returned to their camp for the evening. Claimant remained in the truck because he was "freezing" and it took a long time for the cargo containers to warm up. Later that evening Claimant asked Mr. Gonzalez to take him to town. He explained:

> I just needed somewhere more comfortable to stay. I wanted to soak in a hot bathtub and just be, you know – I don't have a vehicle up there anyway to go anywhere, so I thought it was best just to go stay the night in a motel and see how I did.

Id., at p. 78. Mr. Gonzalez took Claimant to town and paid for two nights at the motel.

13. Claimant's pain "got worse as the night went on. I couldn't sleep. I had pain that wouldn't stop down my legs, so I knew something was badly wrong . . ." *Id.*, p. 79. The following morning, Claimant took a taxi to the local medical center:

> I told [the treater] exactly how I did the injury, removing the log step, pushing away from me, and I told him that it feels like my fusion broke. That's exactly what it felt like. It felt like – I had a fusion in '04 and it just – I thought it broke.

Id., at p. 80. After Claimant returned from the clinic, Mr. Gonzalez arrived with the rest of the crew, and used Claimant's motel room to get showers. Mr. Gonzalez asked Claimant what he wanted to do, offering to let him return to the camp doing light-duty work (cooking, dishes, etc.). Claimant said he wanted to return to Idaho.

14. Employer made arrangements and paid for Claimant to return to Whitebird, which took a couple of days due to weather. After returning home, Claimant did not return to work for Employer, nor did he seek other work.

PRIOR MEDICAL HISTORY

15. The medical record in this proceeding establishes that Claimant was having back problems as early as the mid-1990s, when he was in his late twenties. In the fall of 1998, Claimant sought care for his back, complaining of low back pain for the past two years. Radiographic images from August 1998 show grade one spondylolisthesis of L5 on S1, together with mild degenerative changes, especially at L2-3.

16. Claimant received conservative care, including chiropractic, and a physical therapy evaluation, but did not follow through with the recommended physical therapy.

17. In early February 1999, Claimant presented with complaints of extreme low back pain. He told the treating physician that physical therapy had not helped his pain in the past, and that he had two visits with a chiropractor without relief. A steroid injection provided only minimal relief.

18. In March 1999, Claimant underwent a CT scan of his lumbar spine, which showed grade one spondylolisthesis L5 on S1, and spondylolysis at L5, and a large disc protrusion on the right filling the neural foramen.

19. Claimant's treating physician referred Claimant to an orthopedist (Richard Atwater, M.D.) for a surgical consult. Dr. Atwater took a history, reviewed radiographic images, and performed a physical. Dr. Atwater concluded that Claimant's history and physical did not correspond with his radiographic findings. Dr. Atwater did not believe that Claimant was a surgical candidate, but ordered a bone scan to rule out facet joint involvement, and ordered physical therapy. Four days later, Claimant's girlfriend called Dr. Atwater and declared that Claimant did not want physical therapy; he wanted surgery to fix his back. The bone scan, done a few days later, was negative. Dr. Atwater noted that Claimant's spondylolisthesis had existed for some time. He recommended a dramatic reduction in Claimant's activity level for ten days to two weeks, and referred Claimant to another orthopedist for a second opinion.

20. Claimant reported new pain complaints in late May 1999, and an MRI was ordered. It showed no change from previous radiographic images. In late June, Claimant saw Dr. Nussbaum, an orthopedist, who recommended conservative treatment and referral to a physiatrist. He considered that an L5-S1 fusion was a fallback position, which would require Claimant to quit smoking for some time before surgery became an option.

21. Claimant did not seek care for his back again until a year later, in April 2000. In the interim, he had continued working at his construction job, had not participated in physical therapy, and was still using tobacco products. Flexion/extension x-rays showed that Claimant's listhesis was stable on extension. Unfortunately, the flexion views were incomplete. The x-ray report described a grade two anterolisthesis of L5 on S1.

22. In early May 2000, Claimant self-referred to Robert H. Cancro, M.D. Dr. Cancro reviewed the imaging and expressed some surprise that Claimant did not report more radicular symptoms in light of the large extrusion occluding the right L5-S1 foramen. Nevertheless,

Dr. Cancro recommended conservative care, including exercise therapy. He opined that if Claimant's condition worsened, he would re-evaluate and consider surgical intervention by way of a Gill procedure. Just a few days after Claimant's first visit to Dr. Cancro, a chart note indicates that Claimant's wife called the office to report that Claimant wanted to proceed with the Gill procedure immediately. Pre-operative notes state that Claimant would be off work at least three months following the procedure.

23. On May 30, 2000, Dr. Cancro performed a bilateral Gill wide decompressive laminectomy and resection of cartilaginous material in Claimant's disc. At his first and only post-operative visit (a week after the surgery), Claimant reported excellent relief of his right radicular pain. Claimant did not return for additional follow-up, and did not use the back brace that Dr. Cancro had prescribed. Claimant returned to his construction work six weeks after his surgery.

24. By mid-December 2000, Claimant's right side radicular symptoms had returned, and Claimant was back in Dr. Cancro's office. On December 14, 2000, Dr. Cancro compared Claimant's new x-rays with prior imaging:

> Compared x-rays from yesterday, 12/13/2000 at VOA-Renton with CMC films of 5/4/2000. This shows the identical Grade 1-2 chronic anterior listhesis of L5 on S1 from spondylolytic pars. This then compares a preoperative x-ray with the present spine, indicating no laxity or slip as a result of the decompressive surgery. Further investigation of nerve root encroachment needs to be performed with an MRI.

D's Ex. H, p. 7.

25. Claimant did not return to Dr. Cancro until the spring of 2002, at which time he complained of "right greater than left low back pain with right buttock and right lateral leg pain, cramping lateral leg frequently with toes curling in flexion . . ." *Id.*, at p. 11. Dr. Cancro ordered a lumbar spine MRI, which showed "Grade 2 L5-S1 spondylolisthesis with mild to moderate

bilateral neural foraminal stenosis and potential impingement of L5 nerve root. There are milder degenerative changes present, L3-4 and L4-5." *Id.* Dr. Cancro referred Claimant for a series of injections to the right L5 nerve root at L5-S1. Apparently, Claimant received one injection "which proved to be very beneficial in regards to the pain." D's Ex. J, p. 1.

26. More than a year later, in August 2003, Claimant presented at the offices of Chester Jangala, M.D., complaining of low back and right leg pain following an industrial injury. Dr. Jangala noted:

> Even through [Claimant] has a significant back injury history, I think it would be more logical to consider this a new injury rather than an exacerbation or natural progression of a pre-existing problem. There was a specific incident that resulted in a change in his objective status. If this injury involves the same area as his previous surgery, then an aggravation to a pre-existing problem would need to be considered.

Id., at p. 2. Dr. Jangala ordered a lumbar MRI and specifically asked the radiologist to compare the imaging with Claimant's two prior MRIs. The MRI report, dated August 14, 2003, was read as:

> 1. Status post laminectomy, L5-S1, with grade 2 anterolisthesis of L5 on S1, resulting in bilateral neural foraminal narrowing with impingement of the exiting nerve roots.
> 2. At L4-5 disk protrusion and facet disease result in mild narrowing of the spinal canal and narrowing of the inferior portion of the neural foramina bilaterally. Along with facet disease, this abuts the left exiting nerve root and may impinge it. This also abuts the right exiting nerve root at this level.

Id. The report did not address the changes, if any, among and between Claimant's two prior MRIs and the instant imaging; however, from a lay perspective, the reports of these studies appear to be nearly identical except for the intervening laminectomy. Claimant initially received conservative care for his 2003 industrial injury. In late September 2003, Dr. Jangala counseled him regarding medical options:

> I talked to [Claimant] in detail about this and told him that the only way to definitively try and fix his pain would be to do a lumbar fusion. However, this would involve him possibly not ever working again as a framer or even any type of work. There are definitely risks to the surgery and it should be considered as a measure of last resort. I think that he would prefer to change the type of work he does and institute the more conservative measures first.

Id., at p. 7.

27. In mid-December 2003, Dr. Jangala provided an update to WLIS (Washington Labor and Industrial Services) stating that he had not been able to evaluate Claimant's condition because Claimant had not followed up on recommendations and referrals. Dr. Jangala also suggested that WLIS schedule Claimant for a work-hardening program and a physical capacity evaluation. Then, on January 5, 2004, Dr. Jangala took Claimant off work until the middle of March 2004. There is no related chart note to illuminate Dr. Jangala's thinking.

28. On February 13, 2004, Claimant saw Ali J. Naini, M.D., for a neurosurgical consultation. Presenting complaints included right L5 radiculopathy, recurring. Claimant advised Dr. Naini of his previous low back problems, but told Dr. Naini that he had done very well postoperatively "with no residual symptoms or problems aside from some occasional lower back pain" until his August 2003 industrial injury. D's. Ex. L, p. 3. Claimant told Dr. Naini that since his August 2003 industrial injury "he has been unable to work and has undergone an extensive course of non-operative therapy without success. There has been 'really bad' numbness/tingling that is present '95% of the time' in his Right lateral lower leg. . ." *Id.* On exam, Dr. Naini observed right L5 dermatomal numbness, but strength and reflexes were normal and symmetric bilaterally. Dr. Naini reviewed the August 14 MRI imaging and report, noting the grade two spondylolisthesis. Dr. Naini diagnosed a grade two L5-S1 spondylolisthesis "with severe, debilitating pain as well as correlating neurological and MRI findings." *Id.,* at p. 5. Dr. Naini discussed Claimant's treatment options, and Claimant wanted to proceed with a

medical work-up with an aim toward surgery. Dr. Naini ordered flexion and extension x-rays and a three-dimensional CT of the lumbar spine.

29. Claimant returned to Dr. Naini for follow up in early March 2004. Dr. Naini reviewed the CT scans, noting that they showed a grade two L5-S1 spondylolisthesis with bilateral defects in the pars interarticularis. Flexion/extension x-rays showed no instability. Dr. Naini's chart note for the visit includes this assessment:

> Mr. Clark continues to experience severe, debilitating pain due to his overt L5-S1 spondylolisthesis. He has failed a long course of non-operative therapy and would like to proceed with surgery [L5-S1 fusion (PLIF) with pedicle screws] as soon as he has obtained approval from his insurer.

Id., at p. 12. Claimant returned to Dr. Naini in late April 2004, and advised that he wanted to proceed with surgery for his low back. Dr. Naini discussed one non-operative option and five operative options with Claimant. Claimant opted to undergo L5-S1 laminectomy, decompression and posterior lumbar interbody fusion/pedicle screw fixation using bone bank donor bone as well as iliac crest bone grafting to the transverse process.

30. Dr. Naini performed the surgery on June 3, 2004. Dr. Naini encountered "an immense amount of firm, partially calcified scar tissue compressing the thecal sac from the lower border of the L4 lamina down to the S1 level." *Id.*, at p. 20. The fibrotic tissue was so dense, and so intractable, that Dr. Naini was unable to enter the disc space between L5 and S1 to perform the posterior lumbar interbody fusion and realignment that he had planned. Instead, he performed a decompressive laminectomy from the lower border of L4 to L5 and S1, a resection of compressive scar tissue and remaining portion of intraspinous facets at L5-S1, and bilateral foraminotomies, and transverse process fusions at L5-S1.

31. Despite the difficulties encountered by Dr. Naini, he described Claimant's outcome as "excellent, with a mechanically stable spine *that should be reinforced with a fusion*

in the future, and fully decompressed nerve roots as evidenced by complete resolution of the patient's leg pain after surgery." *Id.,* at p. 24 (emphasis added). Claimant's post-operative course was complicated by alcohol withdrawal symptoms, which kept him hospitalized for six days. Upon discharge, Dr. Naini advised Claimant that he would need a lengthy recovery, including three months of light-duty. Dr. Naini also cautioned that Claimant should not return to the heavy lifting required of his former occupation "because of the risks of recurrent injury to the site of his Grade II spondylolisthesis." *Id.,* at p. 30.

32. Claimant's first documented follow-up visit was in mid-July 2004, five-and-a-half weeks after his surgery. Claimant stated that he had no leg pain and that his low back pain was resolving. Dr. Naini concluded that Claimant had an excellent operative outcome and he expected Claimant to continue to do well in the future. Dr. Naini specifically cautioned Claimant regarding his activities. Claimant did not return for additional follow-up care with Dr. Naini. When WLIS contacted Dr. Naini in December 2004 regarding Claimant's condition, he noted in response: "Sorry, but I have not seen [Claimant] for over 4 months and am not presently treating him." *Id.*, at p. 32.

33. In September 2004, Claimant began treating with Kyle Oh, M.D., of Kirkland Spine Care—evidently on a referral from Dr. Naini, though there is no record of the referral in Dr. Naini's files. Dr. Oh sent Claimant to physical therapy, though according to the hearing record Claimant only attended four physical therapy sessions from September 29 through October 7, 2004. Dr. Oh followed Claimant monthly through December, extending his physical therapy orders in October and November, though there is no evidence that Claimant continued receiving physical therapy. Dr. Oh also acted as a liaison between Claimant and WLIS vocational consultants. Dr. Oh consistently reported to the vocational consultants that Claimant

had permanent light-duty work restrictions. In mid-December 2004, Claimant told Dr. Oh that he did not wish to continue with physical therapy. Dr. Oh advised Claimant that if he did not want to reinjure his back, he needed to continue to strengthen his muscles. Dr. Oh discharged Claimant from physical therapy, but strongly encouraged him to keep up with his home exercise program.

34. Dr. Oh prepared his closing report on Claimant's industrial injury on January 12, 2005. He reported to WLIS that Claimant was medically fixed and stable from his industrial injury. Dr. Oh gave Claimant a partial permanent disability rating, noting:

> Patient did have a non-work related low back injury in 2000, at which time he did undergo a lumbar laminectomy. However, *patient recovered from this injury completely and was able to return to his regular job in construction/carpentry without any significant problems until he injured his low back at work on 8/2/2003*. Therefore, this should not be considered a pre-existing condition, and patient should be given the full Category IV rating.

D's. Ex. N, p. 21 (emphasis added). Dr. Oh also noted that Claimant should not return to construction work and would have a permanent light-duty work restriction.

35. Claimant returned to Dr. Oh in late September 2005, with complaints of worsening low back pain. He advised Dr. Oh that he had dropped out of his vocational training program and taken a job as a construction superintendent, but after three weeks of work, Claimant's low back symptoms got worse. Dr. Oh started the process for Claimant to re-open his WLIS claim. On October 6, 2005, Claimant filed his application to reopen his claim in which he stated that he was unable to work because of low back pain and stiffness. Claimant withdrew his request in early November 2005 when he got a job as a construction manager for Norris Homes.

CLAIMANT'S CONDITION PRIOR TO APRIL 2010

36. It does not appear that Claimant sought treatment for his low back complaints from November 2005 until the spring of 2010. Claimant did, however, continue to complain about low back pain, at least after moving to Whitebird in 2008. Dick Brust, a friend and neighbor of Claimant, learned in the summer of 2009 about Claimant's back problems. While doing some work for Mr. Brust, Claimant told him that his back hurt and that "he had an operation on it but it didn't do any good." Tr., p. 25. Rance Moore, a retired law enforcement officer who lives in Whitebird, is acquainted with Claimant, and considers him a friend. Mr. Moore himself has back problems, was aware of Claimant's back complaints, and occasionally asked Claimant how his back was doing, to which Claimant generally responded that his back bothered him. While cutting and drilling timbers for bridge construction in Alaska, Claimant told Mr. Gonzalez about his prior back injuries. Claimant also complained about the problems he was having with his back to Charlie Hollifield, who cautioned his grandfather (Employer in this proceeding) about taking Claimant on the Alaska project. Employer was also aware of Claimant's back problems through conversations with Claimant's girlfriend, who worked for Employer in the café.

37. Once Claimant began working in Alaska, he complained daily about his low back to Mr. Gonzalez and other members of the crew. Mr. Gonzalez observed that Claimant "don't want to do that kind of job," and he did not expect Claimant to "last very long here." *Id.,* p. 163.

POST-INJURY MEDICAL CARE

38. Claimant first sought care for his April 2010 back injury at the SouthEast Alaska Regional Health Consortium, where he presented on April 7, 2010 complaining of pain going down both legs to the toes. Lumbar x-rays showed a grade two spondylolisthesis at L5 on S1

with bilateral facet joint hypertrophy at the L5-S1 level, worse on the right. Claimant left the clinic with Tylenol 3 for pain relief.

Dr. Griffis

39. Back in Whitebird, Claimant sought care from Syringa Hospital and Clinics, where he saw Danny Griffis, M.D, on April 12. Dr. Griffis made two objective findings on exam—mild tenderness to palpation over the left lateral lower lumbar spine to S1, and a positive right side straight-leg raise. Dr. Griffis sent Claimant for a physical therapy evaluation, with re-evaluation in two weeks. Dr. Griffis released Claimant to light-duty work effective April 19.

40. Claimant attended the physical therapy evaluation on April 15 and two therapy sessions before he returned to see Dr. Griffis on April 20. Claimant reported improvement in his symptoms, and Dr. Griffis found no tenderness on palpation. In the interim, Dr. Griffis obtained and reviewed the x-rays taken in Alaska. Dr. Griffis continued Claimant's physical therapy and his light-duty work restrictions.

41. On May 3, 2010, Claimant called Dr. Griffis' office complaining that his symptoms were getting worse with physical therapy, stating "I know something is wrong." D's Ex. Q, p. 8. Dr. Griffis ordered an MRI. On May 13, Dr. Griffis wrote a letter "To whom it may concern," stating that he learned that Surety denied the MRI he had ordered "because there was no accident." *Id.,* at p. 9. Dr. Griffis noted that such a finding was contrary to the history provided by Claimant, observed that conservative treatment was not effective, and opined that the MRI was necessary to evaluate Claimant's injury.

42. A week later, on May 20, Claimant had a lumbar MRI showing:

> L4-5: There is a slight retrolisthesis of L4 and L5 with loss of disc height. There is a circumferential disc bulge superimposed upon bilateral facet arthrosis and ligamentum flavum redundancy. Posteriorly disc bulging impinges approximately 5 mm upon the central spinal canal where it is superimposed upon bilateral facet

> arthrosis. There is no thecal sac narrowing. There is significant right neural foraminal narrowing with impingement of the exiting right L5 nerve root. There is moderate left neural foraminal narrowing with impingement of the exiting left L5 nerve root.
>
> L5-S1: There is an approximately 11 mm anterolisthesis of L5 on S1. This contributes to the formation of a posterior 9 mm disc bulge superimposed upon bilateral facet arthrosis. This does not impinge the decompressed thecal sac. There is very significant right neural foraminal narrowing with impingement of the exiting right L5 nerve root. There is significant left neural foraminal narrowing with impingement of the exiting left L5 nerve root.

Id., at p. 10. On May 21, Dr. Griffis again wrote "To Whom This May Concern" including a summary of the MRI results. Dr. Griffis opined that the impingement on the L5 nerve root was causing Claimant's pain. Dr. Griffis requested authority to refer Claimant to a neurosurgeon, and once again asked Surety to pay for the MRI. Dr. Griffis then sent Claimant to Donald S. Soloniuk, M.D., a neurosurgeon.

Dr. Soloniuk

43. Claimant first saw Dr. Soloniuk on June 10, 2010. Dr. Soloniuk took a history, examined Claimant, and reviewed the May 20 MRI scan. Dr. Soloniuk understood that Claimant had been asymptomatic following his 2003 fusion and was of the opinion that the L4-5 retrolisthesis was a new finding that was likely the cause of Claimant's pain. He considered that, ultimately, Claimant would require a decompression and fusion at L4-5 down through L5-S1, but wanted a CT myelogram to more fully assess the extent of nerve root involvement. Claimant had the CT myelogram on October 6, 2010. On November 4, 2010, Dr. Soloniuk wrote to Dr. Griffis regarding Claimant's condition, noting, in particular:

> We did obtain a myelogram, post myelographic CT scan. I reviewed this carefully with [Claimant] and we did talk about the findings on the study. The scan gives evidence of significant changes at the L4-5 and L5-S1 levels. There is evidence of the laminectomy and attempt at lateral mass fusion. In addition there is fairly significant granulation tissue in the epidural space and especially surrounding the nerve roots. The listhesis is I think overall contributing to the

> associated nerve root involvement. Based on the post myelographic CT scan [Claimant] very definitely does have a pseudoarthrosis. There is evidence of bone placed from the lower body of L4 through the proximal sacrum. This bone however did not fuse and I am somewhat doubtful as to whether he had a complete fusion at any time. Based on the findings on the MRI scan I think that the best option in [Claimant's] case would be to consider proceeding with a re-exploration at the L4-5 and L5-S1 levels with re-fusion utilizing interbody cages and pedicle rods and screws.

D's. Ex. R, p. 11.

Dr. Larson

44. In early November 2010, Defendants scheduled Claimant for an independent medical evaluation with Jeffrey Larson, M.D., a neurosurgeon practicing in Coeur d'Alene. Surety provided Dr. Larson with copies of all medical records in its possession, as well as Claimant's MRI scans from June 1999, August 2003, May 2010, and the October 2010 CT myelogram. Dr. Larson reviewed the medical records, took a patient history, and performed an exam. On exam, Claimant demonstrated a normal gait, negative straight-leg raise, and equal motor strength in both lower extremities in every muscle group. Dr. Larson did observe diminished sensation in the right L5 distribution in the lateral aspect of Claimant's right calf and the dorsum of Claimant's right foot. Surety's questions to Dr. Larson, and Dr. Larson's responses are summarized below:

1. What are your diagnoses of Claimant's current complaints, and are the diagnoses related to the alleged April 6, 2010 injury within a reasonable degree of medical probability?

   Answer:

   a. Degenerative disc disease L4-5 – unrelated to the April 2010 injury;
   b. Stenosis L4-5 – unrelated to the April 2010 injury;
   c. Spondylolisthesis L5-S1 – unrelated to the April 2010 injury;
   d. Stenosis L5-S1 – unrelated to the April 2010 injury; and
   e. Lumbar strain – related to the lumbar injury.

2. Has Claimant reached medical stability from the April 2010 injury?

Answer:

Yes.

3. If Claimant is stable, please rate him for PPI according to the AMA guides and apportion between pre-existing and current conditions.

   Answer:

   Claimant has not sustained any permanent partial impairment as a result of the lumbar strain he sustained in April 2010.

4. Does Claimant have any new restrictions as a result of the April 2010 industrial injury?

   Answer:

   Claimant has no new restrictions based on the industrial injury of April 6, 2010. "[Claimant's] current condition is similar in every regard to the pre-existing conditions noted extensively in the medical records."

D's. Ex. T, p. 20.

45. On November 19, 2010, Dr. Larson responded to a query from Surety regarding Dr. Soloniuk's diagnosis that Claimant had a pseudoarthrosis at L5-S1. Dr. Larson agreed with Dr. Soloniuk that Claimant had a non-union from his April 2004 surgery by Dr. Naini, noting in particular that Dr. Naini had been thwarted from his original intent to perform an instrumented fusion. However, Dr. Larson pointed out that the non-union had nothing to do with Claimant's instant industrial accident. He concluded his response by opining:

> In summary, my opinion has not changed. Any surgery directed at L4-5 and L5-S1 does not relate to the alleged injury of April 6, 2010, but rather to pre-existing findings well documented in the medical records preceding the alleged injury. This injury is consistent with lumbar strain by way of mechanism, imaging findings, objective findings, and subjective complaints.

Id., at p. 24.

Dr. McNulty

46. Claimant obtained his own IME in March 2011. John M. McNulty, M.D., conducted the evaluation. Dr. McNulty's review of Claimant's pre-injury medical records was limited to the May 2000 and June 2004 operative reports, and the January 2005 impairment rating. His review did include the medical records generated after the April 2010 industrial injury, including the imaging reports, if not the images themselves. Claimant told Dr. McNulty that he "had a full work release and did well" following his first lumbar surgery in 2000. D's. Ex. S, p. 2. Claimant told Dr. McNulty about his 2003 industrial injury and subsequent fusion, stating: "That procedure consisted of a fusion at L5-S1 level. He stated he did not have any work restrictions as a result of the second surgery." *Id*. On exam, Claimant exhibited no tenderness to palpation; straight-leg raise was negative bilaterally; sensation to pinprick was intact in lower extremities bilaterally; and calf muscles measured 39.5 cm bilaterally.

47. Dr. McNulty made the following findings:

> It is clear based on the history present as well as radiographic findings that [Claimant's] pseudoarthrosis at L5-S1 preceded his work-related injury on 04/07/2010 [*sic*]. Based on the records available to me, it appears he recovered from his spinal fusion surgery and was able to return to work in a heavy job duty category. The information available to me is that he was performing strenuous physical work for approximately 2 weeks prior to his injury. In addition, there was not any medical care for his back after he recovered from his surgery in 2004 until his work-related injury in 2010. For these reasons, he most likely sustained a permanent aggravation of a pre-existing pseudoarthrosis and spinal stenosis resulting in his current condition. In summary, his work-related injury appeared to be the straw that broke the camel's back. I agree with Dr. Soloniuk's assessment that he is a surgical candidate and is currently not at maximal medical improvement.

Id., at p. 5.

48. Dr. Soloniuk had the opportunity to review Dr. McNulty's IME report, and on April 6, 2011, he prepared a check box letter indicating he agreed with Dr. McNulty's IME

findings. There is nothing in the record to suggest that Dr. Soloniuk had an opportunity to review Dr. Larson's IME report, and Dr. Soloniuk was not deposed.

Dr. Larson

49. Dr. Larson had the opportunity to review Dr. McNulty's IME report, and on April 7, 2011, he signed a letter setting out his disagreement with Dr. McNulty's findings. Dr. Larson expressed three primary concerns: 1) Dr. McNulty was not a *practicing* spine surgeon; 2) imaging, objective findings, and Claimant's subjective complaints were the same in 2010 and 2011 as they were in 1999, 2000, 2003, and 2005; and medical records from July 2005 describe on-going low back pain with an inability to do any lifting or significant bending, while later that same year, Claimant attempted to reopen his WLIS claim stating under penalty of law that his back condition had worsened.

50. In his deposition, Dr. Larson discussed his findings, and his disagreement with Dr. McNulty, at some length. Dr. Larson agreed with Dr. Soloniuk that Claimant was a *candidate* for low back surgery, though he disagreed with Dr. Soloniuk as to the proper surgical approach, and whether the surgery would provide Claimant much in the way of pain relief. However, Dr. Larson clearly was of the opinion that Claimant's potential need for surgery had nothing to do with the April 2010 accident. Dr. Larson pointed out that images of Claimant's lumbar spine taken in 1999, 2000, 2003, and 2010 were virtually identical in what they revealed about the condition of Claimant's lumbar spine—that with the exception of artifacts from the two spinal surgeries, Claimant's L5-S1 spondylolisthesis and L4-L5 anterolisthesis were unchanged. In all views, the images showed compression of the L5 nerve root, worse on the right. Dr. Larson pointed out that Claimant's pain complaints also remained consistent from the 1990s to the time of hearing—low back pain with radiating pain into his legs, right worse than left, and

some loss of sensation in a distribution consistent with compression of the L5 nerve root. Dr. Larson also noted that objective findings on exam were remarkably consistent across the eleven years beginning when Claimant first sought care for his low back—Claimant's low back pain never completely resolved. Heavy work made him more symptomatic. Despite the years of low back problems, Claimant's strength in his lower extremities remained symmetric and within the normal range for someone of his age, with no evidence of muscle wasting. Dr. Larson concluded that in virtually every respect by the time he saw Claimant in November 2010, his condition was just as it had been in 2005—the last medical record concerning Claimant's low back until his April 2010 injury.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT/INJURY

51. In order to have a compensable workers' compensation claim, a claimant must establish that he or she suffered an injury from an accident arising out of and in the course of his or her employment:

> "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

Idaho Code § 72-102(17)(b). "Injury" is defined by Idaho Code § 72-102(17)(a) and (c):

> (a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by worker's [*sic*] compensation law.
>
> * * *
>
> (c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

The record in this proceeding includes substantial reliable evidence to support a finding that an accident occurred on April 6, 2010 while Claimant was working for CMBT, Inc., on the One Duck Trail in Alaska.

Accident

52. The only evidence disputing the occurrence of an accident is the testimony of Mr. McReynolds, who was not in Alaska at the time that the event occurred. By the time of the hearing, however, Mr. McReynolds had formed some strong opinions about Claimant:

> Q. And how would you characterize his job performance?
>
> A. If I had did [*sic*] what I thought I should have did [sic] to myself, I would have sent him home the first day he was there.
>
> Q. Why do you say that, sir?
>
> A. He cried about it. He come with a full half-gallon coffee cup to the project that big around you know, and we just don't work that way. I would have sent him home, but I already had 12, $1500 in him getting there.
>
> ***
>
> Q. When you were in Alaska, did you ever have occasion to learn about any health problems that [Claimant] was experiencing?
>
> A. No. The only thing was just like he just said, every day he cried about how hard it was, how tough it was, and how bad his back was hurting.
>
> Q. And when you say "cried," you don't mean that literally, do you?
>
> A. Practically, yes.
>
> Q. Okay. What specifically – I mean, how would he say – describe the problem with his back, sir.
>
> A. He just said that his back was killing him. Just there was two things wrong. It was wet every day and it was cold and it was tough. And as far as crying about his back hurting, my back way broke way worse [*sic*] than his ever thought about being. I ain't going to tell you about it, but I have trouble working just through the day.

Tr., pp 181-182.

53. Thomas Gonzalez was the foreman of the trail crew, and he was working on the trail on April 6, 2010. Mr. Gonzalez' testimony was largely consistent with Claimant's version of events, including the kind of work Claimant was doing, and when the accident occurred. While Claimant's chronic complaints over the first weeks caused Mr. Gonzalez and the rest of the crew to doubt whether he was capable of the heavy sustained labor required to *complete* the project, Mr. Gonzalez testified that Claimant did an acceptable job until his injury. Once Claimant reported the injury to Mr. Gonzalez, Mr. Gonzalez neither acted nor spoke in a way that suggested he disputed the occurrence. In sum, apart from Mr. McReynolds' general feelings of disapprobation toward Claimant, there is no basis for disputing the fact that an accident occurred. Mr. McReynolds was clearly irritated that he invested several thousand dollars in an employee who, ultimately, did not meet his expectations; and Claimant's assertion that he needed lumbar surgery as a result of his accident merely fueled Mr. McReynolds' simmering annoyance. The Referee did not doubt that the appallingly miserable working conditions contributed to Claimant's desire to throw in the towel and go home to Whitebird. However, if that was Claimant's only goal—getting home, getting warm, and getting dry, he could have accomplished that goal without ever seeking additional medical care. Mr. McReynolds' opinion that Claimant fabricated the accident is just that—an opinion—he has no firsthand knowledge regarding the events of April 6, 2010.

Injury

54. While the extent of Claimant's injury remains at issue, even the Defendants' IME doctor concedes that Claimant did sustain an injury—a lumbar strain, that required some diagnostic workup, some treatment, and some period of restricted work duty. Dr. Larson opined that the mechanism of the injury was consistent with the objective findings and subjective

symptoms, and was the type of injury he would expect in someone with Claimant's history who was performing the heavy work that Claimant was doing. There is substantial evidence to support a finding that Claimant sustained an injury to his low back as a result of the April 2010 accident.

CAUSATION

55. The burden of proof in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires the employer to provide reasonable medical treatment, including medications and procedures.

56. Claimant asserts that his industrial injury permanently aggravated his chronic and pre-existing low back condition, necessitating the need for an L4-S1 fusion. Defendants assert that Claimant suffered a lumbar strain/sprain as a result of his industrial accident. However, the lumbar strain/sprain did not permanently aggravate his underlying condition and, in fact, it resolved within a couple of weeks, leaving Claimant in precisely the same condition he was in before the injury. Thus, the causation question in this proceeding presents two alternatives: Did the accident cause a permanent aggravation for which surgical intervention is required, or did the accident cause a temporary exacerbation that resolved in a short period with conservative

treatment?

Did Claimant's Injury Permanently Aggravate His Pre-existing Condition?

57. For the reasons set out below, the Commission finds that the overwhelming weight of the evidence establishes that Claimant's possible need for a lumbar fusion is not causally related to his April 2010 industrial injury.

Claimant's Reported History

58. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility. The Referee found Claimant credible in most respects. However, when it came to his medical history, the Referee thought his statements reflected wishful thinking, not accurate reportage. Claimant's medical records establish a long history of non-compliance and denial when it comes to his back. Before his first surgery, his surgeon told Claimant that he would be off work three months. Claimant attended one post-operative follow up just a week after the surgery, never returned to the doctor, and returned to his heavy labor construction job six weeks after his surgery. Not surprisingly, within a few months his low back and right radicular complaints returned. Although he told his treaters that he had extensive conservative care, his chart notes indicate he did not actually go to physical therapy, and was non-compliant with prescribed home exercise programs, and ignored work restrictions. After his 2003 fusion, Drs. Naini and Oh *repeatedly* advised Claimant that he had *permanent light-duty* work restrictions, yet he returned to construction work and later told his physicians that he had no work restrictions after his 2003 surgery.

59. Although Claimant minimized his low back history when providing medical narrative to new physicians, he was not nearly so reticent about voicing his low back complaints to friends, co-workers, casual acquaintances, and even his doctors once he was in a treating

relationship. The Referee did not doubt that Claimant's low back was painful much of the time from his earliest complaints in the late 1990s to the date of hearing. In fact, Dr. Larson says as much:

> Q. I know. I want to make sure I understand your testimony though. Are you saying because he had back pain or leg pain in 2005 that he must have had leg pain in March of 2010?
>
> A. I can assure you and I will testify that he's had, in my opinion, he would have had pain intermittently in that time frame. That's because he has compression of these nerve roots and he's always – until that, he's always going to be able to find a position to stun that nerve. He's always going to find. He's not permanently hurting. He has no weakness. His reflexes are intact. It's not – necessarily a nerve damage situation, but he has compression of that nerve root that hasn't changed since 1999.
>
> Q. And would it be your opinion that the spinal stenosis is what's causing the leg pain?
>
> A. What's causing the leg pain is when he stands up – so if he sits down in a sitting position and he move it out he can get out of it [*sic*]. If he stands up, it closes it off. So it's a stenosis. It's foraminal stenosis. So it's a – spinal stenosis refers to the canal. Foraminal stenosis is where the nerve roots take off and go through those little holes to get out. That's where it's stenotic.

Dr. Larson Depo., pp. 41-42.

Medical Records

60. The medical records in this proceeding were notable for the fact that they included a number of radiographic images going back to 1999, when Claimant first began seeking treatment for his low back complaints. The excellent radiographic record shows that in 1999 Claimant exhibited significant pathology in his low back, especially considering his age at the time. Claimant's underlying pathology, the L5-S1 retrolisthesis, and the resulting stenosis and compression of the L5 nerve root remained extant in films taken in April 2010. The medical records confirm that the 2000 laminectomy provided short-term relief from radicular symptoms, but did nothing to remedy the underlying spondylolisthesis. Similarly, the attempted 2003 fusion

may have provided some relief from the radicular symptoms, but did not remedy the underlying spondylolisthesis, stenosis, and nerve root compression. Essentially, the images show that the low back Claimant had in 2010 was the same low back he had in 1999, 2000, and 2003, except for the radiographic evidence of the two surgical interventions.

Expert Opinions

61. If the medical records are so clear, why do Drs. McNulty and Soloniuk disagree with Dr. Larson regarding causation? The answer lies in understanding the facts and assumptions upon which the physician's opinions rest. Dr. Soloniuk did not have any of Claimant's prior medical records, and did not see any of Claimant's earlier imaging results as compared with the 2010 imaging. He relied on Claimant's assertion that he had fully recovered from his 2003 fusion, had no restrictions, and remained asymptomatic until the April 6, 2010 injury. As discussed previously in the findings, Claimant's version of his history did not paint an accurate picture. Dr. Soloniuk's lack of background information is understandable, but of particular concern when it comes to his recommendations for surgical intervention. He was unaware that Dr. Naini had *attempted and failed* to perform a PLIF in 2003. Information in Dr. Naini's operative report regarding the amount of fibrotic tissue in Claimant's spine and the difficulty it posed to a successful surgical result are of particular concern where the 2010 imaging shows large amounts of granulation or scar tissue in and around the spinal processes.

62. Dr. McNulty had a bit more information when he offered his opinion, including the May 2000 and June 2004 operative reports, the January 2005 impairment rating, and the medical records on and after April 7, 2010. His review did not include the imaging from 1999, 2000, or 2003, and once again, Claimant's version of his medical history was inaccurate.

63. Also relevant, though less of a factor in making the material finding, is the

differing medical expertise of the two IME doctors. Dr. Larson is board-certified in neurosurgery, and maintains an active surgical practice which includes a full schedule of spinal surgeries. Dr. McNulty is a board-certified orthopedic surgeon. As an orthopedic surgeon, Dr. McNulty is qualified to diagnose Claimant's lumbar pathology, though Dr. Larson doubted he would ordinarily perform the type of surgical intervention contemplated in this matter.

64. To the extent that Dr. Soloniuk and Dr. McNulty opine that Claimant needs surgery *because of* his failed fusion and his L5-S1 spondylolisthesis, there is no doubt that both of those conditions were extant *before* Claimant's 2010 injury.

Claimant Sustained a Low Back Strain/Sprain as a Result of the April 2010 Accident.

65. Having determined that Claimant did suffer an injury in April 2010, but not a permanent aggravation of a pre-existing condition, the Referee is left to conclude that Claimant's injury was a lumbar strain/sprain as diagnosed by Dr. Larson. As discussed in the initial findings, there was no clinical or radiographic evidence of an acute change in the physiology of Claimant's lumbar spine after the April 2010 accident. Dr. Larson did believe that all of the objective evidence and subjective complaints were consistent with a medical finding of a lumbar strain/sprain. He opined that Claimant's injury resolved within two weeks or so of the injury, and the Referee finds Dr. Larson's opinions clear, convincing, and logical.

PRE-EXISTING CONDITION

66. Based on the previous discussion, the Referee finds that Claimant's low-back pathology, in particular his spondylolisthesis, foraminal stenosis, and pseudoarthrosis all pre-existed his April 2010 industrial injury. Claimant did suffer a lumbar strain/sprain that resolved within a few weeks of the injury.

MEDICAL CARE

67. Idaho Code § 72-432 requires that an employer provide such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 779 P.2d 395 (1989).

68. In his deposition, Dr. Larson opined that the diagnostic studies done subsequent to the April 2010 injury were reasonable and appropriate. He did note that he would not have ordered a CT myelogram for a lumbar strain, but since Dr. Soloniuk did not have a complete medical history, a CT myelogram was not an unreasonable diagnostic in light of the MRI images.

69. Claimant is entitled to payment of, or reimbursement for, the medical care he received from April 7, 2010 through November 4, 2010. This includes billings from the SouthEast Alaska Regional Health Consortium, Syringa Therapy Services, Syringa Hospital and Clinics (imaging, Dr. Griffis), Neurosurgery and Spine Care Specialists, PLCC (Dr. Soloniuk), and the provider who conducted the CT myelogram.

TTDs

70. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial temporary disability during a period of recovery. Once a claimant reaches a point of medical stability, he or she is no longer in a period of recovery and the claimant's

entitlement to temporary total or temporary partial disability benefits comes to an end. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

Here, Dr. Larson, the physician whose opinion the Commission has found to be the most persuasive, has testified that as a result of his lumbar strain, it would have been appropriate to take Claimant off work altogether for two weeks following the April 6, 2010 accident. (*See*, Dr. Larson Depo., p. 49/6 – 12). It is important to recognize, however, that Dr. Larson's testimony in this regard does nothing to establish Claimant's date of medical stability; it only establishes his views on the period of Claimant's total disability from work. However, in his report dated November 3, 2010 (*See*, D's Ex. T), Dr. Larson states that Claimant is at a point of medical stability. Even so, the report is silent on the question of <u>when</u> Claimant reached a point of medical stability, if, indeed, Dr. Larson harbored the belief that Claimant's date of medical stability could be pegged to anything other than the date of his exam of Claimant. In the absence of any evidence suggesting a date of medical stability other than the date of Dr. Larson's November 3, 2010 letter, the Commission concludes that Claimant was in a period of recovery from April 7, 2010 through November 3, 2010. Employer is obligated to pay time loss benefits to Claimant during his period of recovery, unless Employer can demonstrate compliance with the test announced in *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

In *Malueg*, the Idaho Supreme Court approved a test formulated by the Commission to determine when, and under what circumstances, TTD benefits can be curtailed by an employer. Affirming the Commission's approach, the Court stated:

> We agree with the following test set forth by the Commission:
>
> > In the opinion of the commission, once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that

> (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which Claimant has reasonable opportunity of securing and which employment is consistent with the terms of this light duty work release.
>
> *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

71. Having determined that Claimant was in a period of recovery from April 7, 2010 through November 3, 2010, under *Malueg, supra*, he is entitled to TTD benefits "unless and until evidence is presented that he has been medically released for light work . . ." Defendants bear the burden of demonstrating that during Claimant's period of recovery, he was released to light duty work. Here, Dr. Larson has testified that he would have considered Claimant wholly unable to work for approximately two weeks following the subject accident. This is consistent with the medical record generated in Idaho following Claimant's return from Alaska. In Idaho, Claimant was first seen for treatment at Syringa Hospital and Clinics, where he was examined by Danny Griffis, M.D., on April 12, 2010. Dr. Griffis released Claimant to light duty work effective April 19, 2010. Therefore, the evidence establishes that Claimant was medically released for light work as of April 19, 2010. However, in order for Defendants to curtail time loss benefits, they must additionally show that (1) Employer made a reasonable and legitimate offer of employment to Claimant which he was capable of performing under the terms of his light work release and which employment was likely to continue throughout his period of recovery; or (2) there is employment available in the general labor market which Claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release. Defendants have failed to meet their burden of proof in this regard. First, although it is true that Employer offered to accommodate Claimant with light duty work while he was still in Alaska, and before he returned to Idaho, that offer of work was made during a period of time

when Claimant was wholly incapable of work. There was no offer of employment made by Employer after Claimant was medically released to return to modified duty on or about April 19, 2010. Moreover, there is no showing whatsoever that Employer was prepared to offer work to Claimant which would have continued through his period of medical instability. For these reasons, we conclude that Defendants have failed to meet the burden of proof established by *Malueg, supra*, and that Claimant is entitled to TTD benefits at the appropriate rate from April 7, 2010 through November 3, 2010.

CONCLUSION OF LAW

1. Claimant suffered a low back strain/sprain as the result of an industrial accident on April 6, 2010, which resolved within two weeks.

2. Claimant's pre-existing lumbar conditions were long-standing and were not permanently aggravated by his April 2010 industrial accident.

3. Claimant is entitled to payment of, or reimbursement for, the medical care he received between April 7 and November 4, 2010, as detailed in the findings.

4. Claimant is entitled to TTD benefits from April 7, 2010 through November 3, 2010.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Claimant suffered a low back strain/sprain as the result of an industrial accident on April 6, 2010, which resolved within two weeks.

2. Claimant's pre-existing lumbar conditions were long-standing and were not permanently aggravated by his April 2010 industrial accident.

3. Claimant is entitled to payment of, or reimbursement for, the medical care he

received between April 7 and November 4, 2010, as detailed in the findings.

4. Claimant is entitled to TTD benefits from April 7, 2010 through November 3, 2010.

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

DATED this _24th____ day of __February_____, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th____ day of _February_____, 2012, 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:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501-0607

BRADLEY J STODDARD
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COEUR D ALENE ID 83816-0896

amw __/s/_____