

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JIM C. DAVALT,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendant.

IC 2007-027764

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed May 11, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on October 21, 2011. Claimant was present and represented by Joseph Jarzabek of Sandpoint. Thomas W. Callery of Lewiston represented State of Idaho, Industrial Special Indemnity Fund (ISIF). Employer/Surety settled with Claimant prior to the hearing. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs¹ and this matter came under advisement on February 23, 2012.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant suffered a personal injury arising out of and in the course of his employment;
2. Whether ISIF is liable; and, if so
3. Whether apportionment under the *Carey* formula is appropriate.

¹ Claimant did not submit a Reply Brief.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffered an accident causing injury that permanently aggravated his pre-existing neck condition and combined with a preexisting back condition so as to make him totally and permanently disabled pursuant to the odd-lot doctrine. ISIF's liability should be apportioned according to the *Carey* formula.

ISIF contends that it is questionable whether Claimant actually suffered a personal injury arising from an accident. His vague description of his alleged accident, and the injuries he allegedly suffered from that accident, as well as his late reporting thereof casts suspicion on the happening of that accident and resultant cervical injury. Even if the Commission finds that an accident causing an injury actually occurred, such injury was only a temporary aggravation of Claimant's significant pre-existing neck problems. Even if found to be a permanent aggravation, such did not combine with any other injury or injuries to render him totally and permanently disabled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Mary Barros-Bailey, Ph.D., presented at the hearing.
2. Claimant's Exhibits 1-16, admitted at the hearing.
3. ISIF's Exhibits 1-12, admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was about two weeks shy of his 70th birthday at the time of the hearing and was 65 years of age at the time of his February 2007 accident. He resides in Samuels, a small town near Sandpoint. His work history consists primarily of logging/construction. Claimant worked for his brother's logging company, then owned his own logging business, until he was physically unable to continue in approximately 1996. He then semi-retired and lived off proceeds of sales of portions of his property for logging and development.

2. Claimant decided to return to the work force in order to obtain health insurance and for the extra income. He began his employment with Employer, Walmart, in 2003 in maintenance in the grocery department. After being injured in a non-industrial motor vehicle accident, he was transferred to the dairy department.

PRE-EXISTING MEDICAL CONDITIONS

1990 Industrial Accident:

3. In August 1990, Claimant injured his neck when he fell from a logging truck. A Surety-requested panel evaluation performed in May 1991 diagnosed an acute cervical strain with cervical disc protrusion at C5-6 with associated left C6 radiculopathy. The panel recommended cervical surgery, but indicated that if Claimant declined (which he did), he would be considered at MMI and it assigned a 6% whole person permanent partial impairment (PPI) rating. It also imposed lifting/carrying restrictions of no more than 35 pounds occasionally and 25 pounds frequently. The panel recommended that Claimant not return to logging and or truck driving.

4. A Claimant-requested evaluation was also conducted in May 1991. The examiner noted that Claimant had been in the logging business for 20-25 years. The examiner diagnosed

cervical degenerative disc disease with left nerve root compression at C5-6. He noted that surgery has been “urged,” but not undertaken. The examiner assigned a 20% whole person PPI rating. He also opined that Claimant was incapable of returning to log truck driving.

1996 Escalator Incident:

5. In March 1996 while in Reno, Nevada, Claimant was descending on an escalator when it suddenly stopped and pitched him forward, causing him to fall to the ground. Claimant injured his neck, left foot/ankle, low back, and left hip. In April 1996, Claimant saw Cynthia Hahn, M.D., a neurosurgeon, at his family physician’s request. Claimant informed Dr. Hahn of his 1990 industrial accident, and indicated that his neck pain had improved in the past two years to the point that it did not bother him unless he was doing heavy lifting. However, following his escalator injury, his cervical symptoms were much worse than they were originally. After examining Claimant, Dr. Hahn concluded that he had re-aggravated his original cervical injury of 1990, and due to the length of time he had been experiencing symptoms, a cervical fusion was warranted. She warned that Claimant may not be able to return to logging with or without surgery. Claimant was not yet ready to make up his mind about the recommended surgery.

Increase in low back pain:

6. Robert E. Rust, Jr., M.D., is Claimant’s long-time family physician. His notes from April 29, 1996 reveal that Claimant had decided against the recommended surgery because “all of the disclaimers frighten him.” ISIF’s Exhibit 6, p. 662. While Claimant’s neck symptoms remained the same, by May 13, 1996, Dr. Rust noted that his back was “acting up” with more radicular pain down his right leg. Dr. Rust ordered a lumbar MRI which showed a herniated disc at L5-S1.

2002 Motor Vehicle Accident (MVA):

7. On January 2, 2002, Claimant was involved in an MVA wherein another vehicle struck Claimant's driver's side door as Claimant was pulling onto a highway from a parking lot. Claimant suffered a broken hand and neck pain. Cervical x-rays taken the next day revealed degenerative disc disease and spondylosis at C5-6 and C6-7. Claimant took some time off work. On June 11, 2002, Dr. Rust noted, "Pt. still has his old neck problems. His neck has flared up as a result of the recent accident. He never did have surgery as he didn't want to have it and it was quiescent until this last accident." *Id.*, p. 647. On July 2, 2002, Dr. Rust noted that Claimant's low back was still bothering him but that Claimant insists he will not have surgery on his neck or back.

Second 2002 MVA:

8. On November 27, 2002, Claimant's vehicle was rear-ended by another vehicle. Claimant's neck pain flared. He continued to see Dr. Rust for his cervical degenerative disc disease and low back pain, and other unrelated problems. In June of 2003, Dr. Rust referred Claimant to neurosurgeon William Ganz, M.D.

9. Claimant saw Dr. Ganz on June 27, 2003, with the chief complaint of right neck pain that radiated into his right upper extremity. Dr. Ganz ordered bilateral upper extremity EMG studies to better evaluate the radiating component of Claimant's pain in that region. The EMG was normal. After evaluating Claimant's condition, Dr. Ganz concluded:

I have gone over this study with Mr. DaVault and have explained that there is nothing that I would recommend doing surgically at this time. If he develops more significant pain in his neck or starts to develop balance problems, difficulty using his hands, or bowel or bladder dysfunction, then he may need to come back for reevaluation and consideration of decompression at the C5-6 osteophyte.

ISIF Exhibit 11, p. 1100.

10. Claimant continued treating with Dr. Rust. His cervical disc disease remained, for the most part, unchanged. Claimant was placed on methadone for pain control. He was eventually referred to Coeur d'Alene neurosurgeon Jeffrey Larson, M.D. Dr. Larson's November 23, 2004 chart note indicates that he had reviewed a November 4, 2004 cervical MRI that demonstrated a left paracentral C5-6 disc herniation that compressed the spinal cord. There was also diffuse disc protrusion at C6-7 with some stenosis and compression of the right C7 nerve root. Dr. Larson noted that this problem had worsened since his previous cervical MRI. A lumbar MRI of the same date revealed lumbar stenosis at L4-5 that appeared to be from spondylosis. There was no disc herniation. Based on the foregoing, Dr. Larson recommended cervical surgery:

I recommend that Mr. DaVault have an anterior cervical discectomy and fusion at C5-6 and C6-7 to treat the cervical spine problem. The symptoms and the imaging findings have worsened. He is going to hold off on surgery at this point until he gets his insurance situation squared away at work. In regards to his lower back, I think this is second in line to treating his cervical spine. The radicular symptoms are not constant. I would recommend waiting on treating his lower back until he has the cervical spine treated.

ISIF Exhibit 4, p. 413.

2005 Motor Vehicle Accident:

11. In October 2005, Claimant was involved in his third MVA when a truck crashed into the side of his car when he was parked. Claimant returned to Dr. Rust as a result of the accident because it caused his cervical disc disease and lumbar strain to flare up. Claimant reported to Dr. Rush that the MVA greatly exacerbated the pain in his neck and lower back with new symptoms of soreness and numbness in his left hand that now seemed permanent rather than intermittent as before. Claimant followed with Dr. Rush over the next several months without improvement. He began experiencing low back problems at work with bending. Dr. Rust

allowed Claimant to go from full-time employment to something less on two occasions and finally down to two or three days a week by June 2006.

THE LAST ACCIDENTS

The Ladder Incident:

12. On or about February 9, 2007,² Claimant “strained his body” when a ladder slipped and he tried to keep from falling (ladder incident). His explanations in his two depositions and at hearing as to exactly how this unwitnessed accident occurred, and what injuries he claims he suffered therein, leave much to be desired regarding details as will be discussed later.

13. On February 12, 2007, Dr. Rust diagnosed cervical disc disease, chronic pain and a lumbar strain. Claimant requested a note to Employer again requesting less hours and less lifting. No mention was made of the ladder incident, but Claimant complained that he was having pain from lifting a lot at work lately.

14. Claimant next saw Dr. Rust on March 2, 2007, seeking his help in filing for FMLA leave. Again, no mention was made of the ladder incident and the FMLA form specifically states that the requested leave was not for worker’s compensation purposes. Claimant’s next visit was on March 13, 2007, at which time Dr. Rust noted that Claimant was “peacefully coexisting.” ISIF Exhibit 6, p. 619.

² February 9 and February 12 are listed in the record regarding Claimant’s accident. Because the giving of notice is not an issue, the Referee will use the February 9 date throughout these findings and proposed decision.

The Pallet Jack Incident:

15. Claimant testified at hearing that on March 20, 2007, while maneuvering a pallet jack he hurt his back, legs, and neck (pallet jack incident).³ At that point Claimant decided to file a workers' compensation claim. However, Claimant failed to file a FROI or file a Complaint for that incident, so it is not subject to adjudication in this forum at this time. Further, as far as the Referee can discern from the record, at the hearing was the first time Claimant mentioned the pallet jack incident.

16. Because he indicated that he was going to file a workers' compensation claim, Claimant was taken to Bonner General Hospital (BGH) by his supervisor on March 20, 2007 at which time the attending physician noted, "Slipped on ladder on approximately Feb. 9 . . . ladder tipped forward and braced self . . . approximately 65-pound box fell to platform of ladder . . . left leg slipped down one rung . . . felt pop in neck then, but minimal pain . . . numb the next morning." *Id.*, p. 609. Claimant was referred to Dr. Larson. Claimant was assigned stringent physical restrictions that Employer could not accommodate.

17. Claimant took two weeks off and, even though he had earlier opportunities, he did not report the ladder incident to Dr. Rust until March 23, 2007 at which time Dr. Rust noted that Claimant had experienced chronic pain since his industrial accident on February 9th. Claimant testified that he did not file a workers' compensation claim earlier because he began to feel better.⁴ There is no mention of the pallet jack incident.

18. A March 27, 2007 cervical MRI demonstrated focal disc protrusion at C3-4 that slightly indented the cervical spinal cord. This protrusion was judged by the radiologist to be

³ Claimant also testified that using the pallet jack by himself over time caused his symptoms.

⁴ Yet Claimant saw Dr. Rust three times for neck pain before mentioning the ladder incident.

larger than the one seen on a previous MRI. The MRI also showed at least a moderate encroachment upon the neural canal at C6-7 similar to the findings of the previous MRI.

19. Claimant first saw Dr. Larson for his neck condition post-ladder/pallet jack incidents on May 1, 2007 with chief complaints of numbness in his neck to his fingers and left arm pain. Dr. Larson diagnosed “new onset left upper extremity weakness and radiculopathy, neck pain, and cervical disc herniation, left C5-6, diffuse C6-7.” ISIF Exhibit 4, p. 407. As he did in 2004, Dr. Larson recommended an anterior cervical discectomy and fusion at C5-6 and C6-7. As before, Claimant did not elect surgery.⁵

20. Claimant followed up with Dr. Rust on September 24, 2007, complaining of low back pain and radiculopathy. The focus of treatment shifted from his neck to his back after a lumbar MRI revealed a large herniation at L3-4.

21. Claimant returned to Dr. Larson on November 27, 2007, complaining of low back pain and left side radiating pain. Dr. Larson noted, “In March of 2007 [he] had a dramatic increase in pain of [sic] his low back and was unable to perform his work responsibilities.” ISIF Exhibit 4, p. 403. The foregoing must be a reference to the pallet jack incident and not the ladder incident, which involved a cervical injury. A lumbar MRI revealed a large disc herniation at L3-4.

22. Claimant last saw Dr. Larson on December 10, 2007, at which time a lumbar epidural steroid injection was administered. Another MRI of the cervical spine was taken which demonstrated degenerative disc disease at C5-6 and, to a lesser extent, at C6-7. Dr. Larson once again recommended a cervical fusion at C6-C7; Claimant again refused.

⁵ Claimant testified that the surgery was scheduled, but due to some mental issues he was experiencing, he was unable to undergo the procedure.

23. Claimant returned to Dr. Rust on September 24, 2007 complaining of low back pain and radiculopathy. Dr. Rust ordered a lumbar MRI that showed significant spinal stenosis and nerve root irritation.

DISCUSSION AND FURTHER FINDINGS

ISIF asserts that it is “confusing” whether Claimant suffered an accident resulting in permanent injury on February 9, 2007. They frame the issue this way: Taken as a whole, the medical record and the testimony at hearing demonstrate that the Claimant cannot meet his burden of proof that on a more probable than not basis his longstanding cervical degenerative spine condition was permanently exacerbated or accelerated as a result of the February 9, 2007 cheese [ladder] incident at Walmart to render the Claimant totally disabled. ISIF’s Post-Hearing Brief, p. 18.

An accident is defined as 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). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special*

Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as having “more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

A pre-existing disease or infirmity of the employee does not disqualify a workers’ compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983).

24. The Referee is not persuaded that the alleged accident, if it occurred, is responsible for causing permanent injury to Claimant. Drs. Rust and Larson have indicated, based upon what Claimant told them, that he was involved in some sort of industrial accident; however, the Referee cannot discern from the record just exactly what the doctors were told. If Claimant told them anything similar to what he testified to under oath at hearing about his accident, their respective “causation” opinions are foundationally suspect. Claimant’s hearing testimony in its entirety regarding his accident is as follows:

Q. Okay. What happened in February of 2007 with the cheese?

A. Well, I was on a - - I was in the cooler. And they had it way up on the high platform up there. And we had to use a, you know, real tall ladder. And so it was one that had four legs on it. So when you go to put it up, you had to put it up against the side of it there. You had to stand on the platform. You had to stand on the platform. You had to get the cheese.

Well, they - - they put a pallet up there - - I think they put it up there with an electric forklift that they had there. And it was - - I don’t know. It was, like, four feet high by four foot by four foot, like that. So when you start taking the cheese off of there, the farther you go down, you would take it off of the front parts of it and off the sides. But then when it got down so low, when you got to lean over to grab the case to pull it over to you. And anyway that’s - - that’s when it - - when it did it.

Because generally there are two of us working at all times at night. And they had - - and then they changed that later on and they had me by myself two nights. And that’s when that happened. Because once before when there were two of us there, I was getting the cheese off of there, and the fellow was down

there and he would hold on to the ladder. Because you'd have to reach way back. And the ladder did tip with me when that happened. Because you got to bring it down, and you got to set it down, and then you got to walk down, and then you hand it to the person down below.

Well, I didn't have anybody there. So the ladder - - when I set it down there, the ladder tipped. And the ladder was like - - one of the legs was kind of - - was about that far off the floor. (Indicating). And when you set it on this side on the entrance going in, it would always tip into the - - towards where you're pulling. But when you have to put it on this side to get the ones that are back in there, then that put that leg out here.

So when I set it on the corner - - because there's a little safety thing on it. When I set it on there, that thing tipped, and I slipped. Because the ladder was going to start going over. And I - - I just I was just starting to let go of it. And that's - - that's when it - -when that there happened.

Hearing Transcript, pp. 53-55.

25. The descriptions of his "accident" given by Claimant in his two pre-hearing depositions are just as vague as was his hearing testimony with respect to how slipping on a ladder (if that is what happened) resulted in any injury. About all that can be taken away from those descriptions is that a ladder somehow slipped or that he somehow slipped on the ladder. Another problem here is that Claimant failed to report the ladder incident until March 20th, in spite of having three opportunities to so inform Dr. Rust. And, again, the record does not indicate what he told Dr. Rust regarding the ladder incident. Further, the March 15, 2007 FMLA request specifically states that the requested leave was not related to workers' compensation and was for lumbar, not cervical complaints. What the attending physician recorded on March 20th at BMH merely speaks of a ladder slipping and Claimant feeling a pop in his neck, which is contrary to Claimant's later testimony that he "strained his body" without further particulars.

26. The only evidence of record regarding a connection between the ladder incident and Claimant long-standing cervical problems are as follows:

Dr. Rust's notation on March 23, 2007 of "Chronic pain – Industrial." ISIF Exhibit 6, p. 618. In another chart note by Dr. Rust wherein he referred Claimant to Dr. Larson on May 1, 2007 a handwritten entry apparently by Dr. Rust indicates, "Definitely from work – not pre-existing." ISIF Exhibit 12, p. 1204. Without knowing exactly what Claimant told Dr. Rust regarding the ladder incident, it is not possible to discern the foundation for his conclusory opinion, especially in light of Claimant's significant preexisting cervical problems where cervical surgery was recommended on more than one occasion by more than one doctor. Moreover, in arriving at his conclusions on causation, Dr. Rust was evidently unaware of the March 2007 pallet jack incident, an incident described by Claimant as significant in the genesis of his complaints. While no magic words are necessary to show that a doctor's opinion was held to a reasonable degree of medical probability, nevertheless, such opinions must be expressed plainly and unequivocally. See *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211 217 (2001). Dr. Rust's "opinion" fails to reach the *Jensen* standard and is afforded no weight.

27. As noted, Claimant was seen by Dr. Larson on or about May 1, 2007, on referral by Dr. Rust. Dr. Larson had last seen Claimant on November 23, 2004. Since Dr. Larson ultimately opined that Claimant's findings on exam correlate well with the ladder incident of February 2007, close review of his clinical exam and underlying assumptions is warranted.

28. Dr. Larson took the following history of illness on the occasion of his May 1, 2007 examination of Claimant:

HISTORY OF PRESENT ILLNESS: Mr. Davault is a 65-year-old male who was originally evaluated in our office on October 13, 2004. At that time he had been in a motor vehicle accident in 2002 and did sustain neck pain as well as right arm symptoms. Mr. Davault did have improvement of neck and arm symptoms at that time and therefore did not undergo any procedures. Mr. Davault states that on February 12, 2007, he had been working at WalMart up on a ladder when he subsequently slipped. He had been lifting 65 pounds worth of cheese off a high shelf when the ladder slipped. He can recall trying to catch himself from falling

off the ladder and straining his neck and left arm. He was evaluated by Dr. Rust 2 to 3 days after the accident and Dr. Rust did take him off work at that time. He reports he had 10 days of rest, and upon returning to work began to note significant weakness in his left arm. The patient has developed neck and left arm pain as well as right shoulder numbness and tingling. He has been limited in activities due to overall discomfort. He has not noted any specific change in bowel or bladder function. He states currently he has 50% neck pain and 50% arm pain. Much of his pain is related to the left arm with numbness and tingling radiating from the neck all the way to the fingertips. He does have numbness and tingling into his right shoulder. He describes his worst pain as a 9 on a 0 to 10 scale with the least being a 5 and the average being a 6. He has tried electrical stimulation on his own though no epidural steroid injections or physical therapy to include cervical traction. He is currently taking 2 to 4 tablets of Tylenol daily. He reports a significant allergy to multiple medications that cause hives. He will alternate between 2 to 3 different narcotic pain medications of 1 to 2 tablets a day to help with severe pain. He is taking 1 to 2 tablets of Valium daily.

PAST MEDICAL HISTORY: The patient does have a history of hypertension as well as borderline diabetes. He has the history of recurrent hives.

...

OCCUPATIONAL HISTORY: The patient was hired in 2003 by WalMart to work in the dairy stocking area. He last worked March 20, 2007, after his injury while working on February 12, 2007.

ISIF Exhibit 4, pp. 404, 405.

29. Dr. Larson's report makes it clear that he also had the opportunity to review the MRI study of March 27, 2007. That study was read by the radiologist as showing slight progression of a C3-4 lesion, as compared to an earlier MRI of November 4, 2004. The March 27, 2007 study also demonstrated significant findings at C5-6 and C6-7. However, the radiologist who reviewed the March 27, 2007 MRI did not comment on any interval change at these levels, as compared to the 2004 study. Nor does Dr. Larson's report suggest that he felt that there was any interval change at C5-6, C6-7, when comparing the 2004 study to the 2007 study. Interestingly, although the radiologist felt that there was an interval change identified at

C3-4, Dr. Larson commented that a comparison of the 2004 and 2007 studies demonstrated stability at C3-4.

30. Correlating Claimant's radiological findings with Claimant's clinical exam led

Dr. Larson to the following synthesis:

TREATMENT OPTIONS: Mr. Davault is a 65-year-old male who had new onset left upper extremity pain and weakness as well as neck pain after a February 12, 2007, injury while working at WalMart. He had slipped off a high ladder and caught himself causing his neck and arm symptoms. The patient does have significant new onset weakness in the left intrinsic, left biceps, and left triceps muscles compared to his previous evaluation in 2004. I do feel that the new physical exam findings correlate with his injury on February 12, 2007. The patient has found that he has become more and more limited in daily activities due to the weakness. He is left handed and it is difficult for him to do daily activities. The patient is taking narcotic pain medications as well as Tylenol daily with minimal improvement. I have recommended to the patient that he undergo an anterior cervical discectomy and fusion at C5-6 and C6-7 due to the new onset of weakness as well as the significant pain in his neck and left arm. I have discussed the risks of surgery with the patient that include but are not limited to bleeding, infection, nerve injury, paralysis, failure of fusion, and worsening of his condition. The patient would like to discuss this further with his workmen's [sic] compensation claims manager. He will also be following up with Dr. Rust in regards to that. I did discuss with the patient if he notes any increase in pain or weakness that he needs to followup [sic] immediately. We will be awaiting authorization for surgery. The patient will call if he has any questions or concerns in the meantime.

ISIF Exhibit 4, p. 407. For the reasons set forth below, the Referee rejects Dr. Larson's conclusion that Claimant suffered additional cervical spine injury as a consequence of the February 2007 accident.

31. First, Dr. Larson's report of May 1, 2007, does not reflect that he received a history from Claimant concerning the 2005 MVA. It will be recalled Claimant gave a history to Dr. Rust that this accident greatly exacerbated his neck and low back symptomatology. In particular, Claimant told Dr. Rust that the 2005 MVA increased the symptomatology Claimant had previously been experiencing on an intermittent basis in his left upper extremity. The

occurrence of the 2005 MVA is of particular significance in view of the fact that it occurred between the dates of the 2004 and 2007 MRI studies. To the extent that the 2007 study demonstrates an interval change in Claimant's cervical spine, Dr. Larson's conclusions concerning the significance of the February 2007 accident in producing such changes are undermined by his ignorance of the intervening MVA of 2005.

32. Second, it will be noted that Dr. Larson took a history from Claimant that Claimant experienced significant resolution of his neck and arms symptoms following the 2002 MVA. As noted, this assumption is not substantiated by the medical records.

33. Next, concerning the February 2007 ladder incident, Dr. Larson evidently took a history from Claimant that Claimant experienced symptomatology in his neck and left arm immediately following the ladder incident. This understanding is belied by Claimant's hearing testimony, and the medical records that were generated in the immediate aftermath of the February 2007 accident, none of which reflect that Claimant associated the onset of neck and upper extremity pain with any mishap or event.

34. Finally, by the time the March 27, 2007 MRI was performed, and by the time Claimant was evaluated by Dr. Larson on May 1, 2007, the "pallet jack" incident of March 20, 2007, had already occurred. Claimant described this incident as causing significant additional pain/discomfort in his neck, but failed to describe this alleged incident to Dr. Larson. Hearing Transcript, p. 58.

35. Although Dr. Larson has opined that the February 2007 ladder incident was a significant event, reasonably correlated with Claimant's symptomatology, for the reasons stated above, this opinion lacks adequate foundation to constitute medical proof establishing, on a more

probable than not basis, that Claimant suffered a permanent aggravation of his underlying cervical spine condition as a consequence of the February 2007 ladder incident.

36. After a careful review of the evidence, the Referee finds that Claimant has failed to prove that he permanently aggravated his underlying cervical condition in the ladder incident.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that his underlying cervical spine condition was permanently aggravated by his February 9, 2007 industrial accident. Therefore, Claimant cannot meet the “combining with” component of his prima facie case against the ISIF.

2. The Complaint against ISIF should be dismissed with prejudice.

3. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __3rd ____ day of May, 2012.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __11th ____ day of __May____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JOSEPH JARZABEK
PO BOX 1049
SANDPOINT ID 83864

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JIM C. DAVALT,

Claimant,

v.

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,
Surety,

Defendant.

IC 2007-027764

ORDER

Filed May 11, 2012

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove that his underlying cervical spine condition was permanently aggravated by his February 9, 2007 industrial accident. Therefore, Claimant cannot meet the "combining with" component of his prima facie case against the ISIF.
2. The Complaint against ISIF should be dismissed with prejudice.
3. All other issues are moot.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 11th day of May, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __11th__ day of __May__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JOSEPH JARZABEK
PO BOX 1049
SANDPOINT ID 83864

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

ge

_____/s/_____
