BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL E. DAVIS, Claimant, v. U.S. SILVER-IDAHO, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-031273** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **FILED DEC 20 2012** ***THIS DECISION HAS BEEN MODIFIED BY THE ORDER GRANTING RECONSIDERATION FILED JULY 3, 2013***

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 February 2, 2011, and June 9, 2011. Claimant was present and represented by Starr Kelso of Coeur d'Alene. Alan K. Hull of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on May 15, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

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

1. Whether Claimant suffered a compensable industrial accident on September 4, 2008, and, if so

2. Whether Claimant is entitled to temporary total disability (TTD) benefits and the extent thereof; and

3. Claimant's entitlement to medical care pursuant to Idaho Code § 72-432(1).

CONTENTIONS OF THE PARTIES

Claimant contends that he permanently aggravated his admitted preexisting lumbar degenerative disk disease (DDD) when he attempted to stand from a kneeling position while repairing track in Employer's silver mine. He seeks epidural steroid injections and physical therapy as recommended by the physicians involved with this case. Claimant also seeks TTD benefits from the time he was taken off work until he is released to return to work by his physician.

Defendants argue that Claimant's current complaints are nothing more than the natural progression of his underlying DDD. While three physicians; a neurosurgeon, a physiatrist, and an orthopedic surgeon agree that ESIs may be beneficial for both therapeutic and diagnostic purposes, two of the three have opined that the need of such injections did not arise out of any accident Claimant may have suffered. Therefore, Claimant is not entitled to the benefits he seeks.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Employer's mine manager, Mark Schram, gypo (contract) miner, Ron Dionne, and Employer's human resources director, Betsy Roy (fka Breach).

2. Joint Exhibits (JE) 1-26.

3. The post-hearing depositions of: Jeffrey McDonald, M.D., taken by Defendants on September 19, 2011; John M. McNulty, M.D., taken by Defendants on September 22, 2011; and Robert H. Friedman, M.D., taken by Defendants on December 9, 2011.

All objections made during the taking of the above-referenced depositions are overruled.

FINDINGS OF FACT

1. Claimant was 53 years of age and resided in Osburn, Idaho, at the time of the hearing. Claimant has extensive underground mining experience beginning in 1975. He has worked as a gypo miner as well as in salaried supervisory positions from 2000 to 2007. In February 2008, Claimant agreed to be a supervisor or shift boss for Employer. As such, Claimant was required to assign jobs and "Get them underground as soon as we could." Hearing Transcript, p. 104.[1] Claimant would also accomplish or assist with the accomplishment of rail repair, helping with explosives, check headings daily, and "Just whatever it takes to get the job done, you do it." *Id.*, p. 105.

2. On September 24, 2008, a work order, or "Pass-Down," indicated that Employer was experiencing a problem with a switch and rail at the 4600-foot level[2] of the mine where a rail car had de-railed the prior shift. Claimant assumed the task of

[1] For some reason, Volume I of the hearing transcript is entirely in capital letters. Therefore, quotations from the transcript are not 100% accurate, in that the Commission has chosen not to use all caps when quoting the transcript.

[2] At his deposition, Claimant testified that the rail work occurred at the 3600-foot level. He clarified the confusion at hearing by testifying that he was confused because he had recently done rail work at the 3600 level, but upon later checking documentation, he learned that the repair work was actually at the 4600-foot level.

repairing the rail:

> I was down putting the fish plates[3] together and driving spikes, and I was on my hands and knees, actually, and I didn't have all the spikes in yet, but I basically stood up, and when I tried to stand up, I couldn't. I was just - - I don't know what I did. I was just locked in place. I couldn't move.
>
> Q. How come you couldn't move?
>
> A. My back was just like it was locked just like something was there that wouldn't let me stand up. I mean, just - - I forcibly had to bring myself up. I grabbed hold of the rib, which is the side of the drift. So I was on my hands and knees, and I kind of walked up the rib to stand up. I couldn't stand straight up. You know, I slumped over pretty good. I knew I'd done something wrong. I knew I'd done something right there. You know, I haven't had that happen before, not like that. So . . .
>
> Q. And you say "not like that." Tell us what you mean by that.
>
> A. By it happening just all of a sudden like that, locking me up. I've never experienced that before.[4]
>
> * * *
>
> Q. Okay, Dan. I guess you were working your way back. And you were going to tell us what you did after you got up onto your feet.
>
> A. Okay. You know, getting up on my feet was painful. You know, I definitely knew I did something. I don't know what. But something happened there.
>
> Q. Where was the pain?
>
> A. Pain in my lower back.
>
> Q. Where at? Anyplace particular or - -
>
> A. It's down towards the tailbone.

Hearing Transcript, pp. 114-115, 118.

3. Claimant was able to use the rib for support and eventually got to his feet and

[3] Fish plates are used to fasten one end of a rail to the next.

[4] Claimant testified that previously his back pain had come on gradually: "It's always been over time it got sore from whatever, you know, but it had just gotten sore over time to where I went in and had it looked at." Hearing Transcript, p. 116.

slowly made his way to "the station," where he got into the "cage" and was transported to the surface. Once there, Claimant took a hot shower, then called mine general foreman Mark Schram at his home and informed him of what had happened. He then filled out a minor injury report that indicated he injured his low back "While doing track repair, I was on my hands and knees and couldn't stand up. It was like I was froze [sic] in place." J.E. 24, p. 22. Claimant, at Mr. Schram's request, finished his shift "on top."

4. Claimant returned to work the following day and had a conversation with Mr. Schram regarding what had happened; Claimant was still in pain and worked from the top again that day and the next. Claimant could not remember when he went back underground, but believed it was on September 7.

5. Mr. Schram testified that it was not unusual for shift bosses like Claimant to repair rails. He further testified that on the evening of the date of the accident, Claimant called him at his home and reported the same. The next day, September 5th, Mr. Schram discussed the matter with Claimant:

> Oh, sure. Yeah. I remember he was obviously in a lot of pain, and I think we discussed - - he obviously couldn't go underground. It was either that day or the next day, they asked him to go into - - I remember to the top station to run an errand, to do something, to check on something. And he's looking at them like "I can't walk." You know. When he was in the office. He was leaning on the counters and stuff. He was obviously in a lot of pain. And he did - - went in to top the No. 3 station, but he couldn't wear his belt, he couldn't tighten his belt and put it on his waist and tighten it up, so he put it on his shoulder and went in.

Hearing Transcript, pp. 45-46. Mr. Schram had never seen Claimant exhibiting that type of pain before.

6. On September 8, 2008, Claimant presented to Shoshone Medical Center complaining of chest pain. He had experienced intermittent undiagnosed chest pains for

some time and worried that he may be having a heart attack. Although his back was still hurting after the rail incident, Claimant testified that he thought he mentioned back pain at the time of this visit, but the records generated do not so document. However, it is clear that the focus of this visit, for both Claimant and the ER staff, was on Claimant's potentially life-threatening chest and heart situation. *See*, J.E. 14, p. 43.

7. Claimant next sought medical care on September 15, 2008, from Frederick Haller, M.D. Dr. Haller's note for that visit indicates, "He states the Medrol Dose Pak did help a bit, but not that much." J.E. 9, p. 18. Claimant testified that he does remember the Dose Pak, but does not remember when he got it. Dr. Haller diagnosed two problems: 1) carpal tunnel syndrome and 2) degenerative disk disease with myelopathy in the lumbar spine. He ordered a lumbar MRI.

8. As developed *infra*, Claimant has a history of a low back injury going back to 1984. In 2002, Claimant underwent MRI evaluation of his lumbar spine that study was read in pertinent part as follows:

> L1-L2: There is bilateral facet arthropathy however no foraminal narrowing or spinal stenosis.
>
> L2-L3: Central disc protrusion is identified resulting in mass effect on the thecal sac. In addition there is bilateral facet arthropathy. These findings result in minimal narrowing of the central spinal canal. The neural foramen are patent.
>
> L3-L4: An annular tear is noted with minimal very small central protrusion. Bilateral significant facet arthropathy is seen however the neural foramen and central spinal canal are patent.
>
> L4-L5: An annular tear is noted with minimal very small central protrusion. Bilateral significant facet arthropathy is seen however the neural foramen and central spinal canal are patent.
>
> L5-S1: Extensive bilateral facet arthropathy is noted and there is a minimal

broad based posterior disc bulge. These findings result in encroachment of both neural foramen. The central spinal canal is patent.

Impression:

Facet arthropathy at multiple levels which results in neural foraminal narrowing predominantly at L5-S1. Disc disease with a disc protrusion at L2-L3.

J.E. 13, p. 2.

9. In 2005, Claimant's low back was again imaged via MRI. That study was read in pertinent part as follows:

No focal disc herniation or spinal stenosis noted at L1-L2.

At L2-L3, there is a diffuse central disc bulge narrowing the canal slightly. This indents the thecal sac slightly. Minor facet degenerative change noted.

At L3-L4, there is a central annulus disc bulge. This looks less prominent than at L2-L3. No distinct lateral recess stenosis noted.

At L4-L5, there is a minimal central disc bulge encroaching on the thecal sac. No central spinal stenosis and no lateral recess stenosis noted.

At L5-S1, there is no focal disc herniation or definitive lateral recess stenosis. There is some narrowing due to lateral disc in the right lateral recess with minor change in the left lateral recess but I am not certain these findings are significant. There is diffuse mild facet arthropathy.

In my opinion, the present study is unchanged considering the report of April 26, 2002.

Conclusion: Diffuse degenerative change as described with multiple levels of facet degenerative change. There is slight narrowing to the neuroforamina bilaterally at L5-S1. There is a prominent central disc bulge at L2-L3. By description, these findings are unchanged from the prior study.

J.E. Ex. 13, p. 26.

10. Following his September 15, 2008 visit with Claimant, Dr. Haller ordered an MRI evaluation of Claimant's lumbar spine. That study was accomplished on

September 18, 2008 and was read in pertinent part as follows:

> L2-L3: Focal posterior central disc extrusion with mild caudal extension. This is superimposed on broad-based disc bulge endplate osteophyte complex. Mild bilateral facet joint hypertrophic degenerative changes. There is moderate central spine canal stenosis.
>
> L3-L4: there is a broad posterior disc bulge endplate osteophyte complex. Mild bilateral facet joint hypertrophic degenerative changes. There is mild central spinal canal stenosis.
>
> L4-L5: there is a broad posterior disc bulge endplate osteophyte complex. Mild to moderate bilateral facet joint hypertrophic degenerative changes. There is no significant central spinal canal stenosis.
>
> L5-S1: there is a broad posterior disc bulge endplate osteophyte complex. Mild bilateral facet joint hypertrophic degenerative changes. There is no significant central spinal canal stenosis. Moderate to severe left and moderate right neural foramen stenosis.
>
> The visualized spinal cord end nerve roots are within normal limits for signal.
>
> **Impression:**
>
> Spinal canal stenosis which is moderate L2-3 and mild L3-4. There is a disc extrusion noted posterior central at L2-3.
>
> Multilevel facet arthropathy.
>
> Bilateral neural formamen stenosis at L5-S1.
>
> J.E. 9, pp. 19-20.

11. Claimant returned to Dr. Haller in follow-up on September 24th. Dr. Haller noted:

> Lower back pain. Follow–up on low back pain. He had had a recent MRI scan. This does reveal spinal stenosis at L2-3 and L3-4. He has disk extrusion at L2-3. Patient does have bilateral lower extremity weakness and pain radiating down both legs. He apparently began to have pain on 9/2/2008. Occurred while at work and it has been reported. On two previous occasions seen for low back pain and was not reported as a work related incident but this now felt to be work related. Midline is worse with

> movement Which [sic] is excruciating. Radicular pain, posterior aspect of lower extremities. No leg muscle atrophy. Tingling of legs. No previous history of limb weakness.

J.E. 9, p. 21. Dr. Haller assigned work restrictions and referred Claimant to Jeffrey McDonald, M.D., Ph.D., a neurosurgeon practicing in Coeur d'Alene.

12. Claimant saw Dr. McDonald one time only, on October 2, 2009. Dr. McDonald acknowledged Claimant's history of low back pain and that he had received ESIs about every two years in Montana, which provided some relief. Dr. McDonald noted that Claimant was on his hands and knees at work ". . . when he could not get up in this position due to a new onset of low back pain." J.E. 10, p. 1. Physical therapy has not been helpful and Claimant had not had any recent ESIs or EMG/nerve conduction studies.

13. Dr. McDonald expressed his assessment and plan as follows:

> In summary, Mr. Davis is a 51-year-old man referred to the neurosurgical clinic for evaluation of low back pain and posterior leg pain. I have explained to Mr. Davis that I believe his degenerative changes and neuroforaminal narrowing at the L5-S1 level is likely his pain generator. For diagnostic and therapeutic purposes, I have asked him to undergo a series of left L5-S1 transforaminal epidural injections in conjunction with additional efforts at physical therapy. *Id*., p. 2.

14. The Referee found Claimant to be generally a credible witness. He admitted to being less than truthful regarding his past medical history on Employer's pre-employment physical questionnaire, but explained that he had already been hired in any event and had passed Employer's physical. Further, there is no evidence that Employer would have done anything different had Claimant disclosed all of his prior back problems. The Referee did not find that Claimant otherwise intentionally tried to hide his prior back problems, and Claimant readily admitted them in his testimony. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation

or credibility

DISCUSSION AND FURTHER FINDINGS

15. The crux of this matter is whether Claimant is entitled to the medical care (ESIs and physical therapy) recommended by Dr. McDonald. To answer this question, it is necessary to determine whether Claimant suffered an industrial accident on September 4, 2008, and, if so, whether said accident permanently aggravated his underlying degenerative disk disease or whether his clinical presentation represents nothing more than the natural progression of that pre-existing condition.

The medical evidence:

Dr. McDonald

16. Jeffrey McDonald, M.D., is a board certified neurosurgeon practicing in Coeur d'Alene, Idaho. He saw Claimant for evaluation on one occasion on October 2, 2008. At that time, he took an "abbreviated" medical history from Claimant, in which Claimant related that he had suffered a job related low back injury in 1984. He told Dr. McDonald that he had done well with his injury until approximately ten years prior to his 2008 visit with Dr. McDonald. Claimant acknowledged having undergone low back injections prior to the subject accident. (McDonald Dep. 7/14-25). Claimant gave Dr. McDonald a history of the subject accident of September 4, 2008, and also described how this accident caused an increase in low back pain radiating into his lower extremities bilaterally. (*See*, J.E. 10, p. 1). At the time of his evaluation of Claimant, Dr. McDonald also had the opportunity to review the report from the September 17, 2008 MRI. As explained by Dr. McDonald, that study demonstrated multi-level degenerative disease of the lumbar spine, most severe at L5-S1, where Claimant was noted to have a broad based

posterior disk bulge, end-plate osteophytes complex and moderate to severe left and moderate right neuroforaminal stenosis. Dr. McDonald testified that he thought the findings at L5-S1 likely explained Claimant's low back and lower extremity symptoms. (McDonald Dep. 12/20-13/3; 34/22-35/2). Although Dr. McDonald did not initially have the opportunity to review Claimant's extensive pre-injury treatment records for low back difficulties, those records were later sent to him for review by the State Insurance Fund. (McDonald Dep. 16/1-21/7). Significantly, Dr. McDonald testified that his review of the pre-injury records suggested that Claimant's pre-injury complaints were, by and large, limited to low back pain, without extension into Claimant's lower extremities. However, following the subject accident, Claimant's complaints changed to include bilateral lower extremity symptomatology. (McDonald Dep. 34/1-21). Dr. McDonald acknowledged that the new symptoms with which Claimant presented following the subject accident represented a change from his pre-injury complaints.

17. At the time of deposition, Dr. McDonald was asked to comment on the 2002 MRI of Claimant's lumbar spine, and to compare it against the 2008 study. Dr. McDonald did not have the opportunity to review the actual films of either study, but testified that from his review of the reports, the 2008 study showed no new pathology as compared to the 2002 study. However, Dr. McDonald also acknowledged that when it comes to commenting on whether these studies reveal an interval change in Claimant's low back condition, it would be best to compare the actual films. (McDonald Dep. 47/11-48/7). Dr. McDonald clearly believed that the subject accident did cause an injury to Claimant's lumbar spine, although he characterized it as a "temporary exacerbation." (McDonald Dep. 22/10-18; 35/17-2).

18. As noted, Dr. McDonald saw Claimant on only one occasion, October 2, 2008. However, in response to Surety's letter of October 28, 2008, Dr. McDonald stated, in his response of November 3, 2008, that Claimant's change in symptomatology represented a temporary exacerbation of his underlying condition. In follow-up, Surety asked Dr. McDonald to confirm that Claimant's "temporary exacerbation" had resolved:

> In reviewing your response, the State Insurance Fund is interpreting you to indicate that as of the date of your letter [11/3/08], Mr. Davis' temporary work aggravation had resolved and his current problems were related to his pre-existing medical condition. If this information is correct, please sign, date and return this letter at your earliest convenience. . .

19. In response to Surety's invitation to elaborate, Dr. McDonald responded, "yes." (*See*, J.E. 10, p. 5). Accordingly, as of March 17, 2009, Dr. McDonald had advised Surety that the injury suffered by Claimant on September 4, 2008 was temporary, and that the temporary injury had resolved, returning Claimant to his baseline level.

20. On cross-examination, however, Dr. McDonald candidly acknowledged that in view of the fact that he saw Claimant on only one occasion, he has no idea whether Claimant's exacerbation has, in fact, resolved as anticipated. In short, he has no idea whether the injury, which he acknowledges Claimant did suffer, has turned out to be a temporary injury only:

> Q. (by Mr. Kelso) Now, in the October 28, correspondence, with your handwritten notes dated 11/-13, you indicate in your handwritten notes that you believe his current difficulties began while he was at work. That's your opinion. Correct? Based upon history and records that you received?
>
> A. Yes.
>
> Q. Okay. Representing a temporary exacerbation of his underlying degenerative changes in his lumbar spine.
>
> A. Yes. Those are my words. Yes.

Q. When did the temporary exacerbation resolve?

A. I don't know. I never had follow-up with him after that initial visit. I guess that would reflect my expectations, but not having followed with him, I don't know how that matches his reality.

McDonald Dep. 35/17-36/8

* *

Q. So as of March 31, 2009, from a medical perspective, you did not have an opinion as to whether or not Mr. Davis' aggravation that he suffered at work had resolved. Is that correct?

A. That is correct, yes. I'll say that's correct. But that, you understand, is not the basis of my answer here.

McDonald Dep. 39/11-17

21. To the extent that his response to Surety's letter of October 28, 2008 conflicts with his deposition testimony, Dr. McDonald explained that the judgment expressed by him in that response was "medical/legal" in nature, and reflected his recognition that his words have legal ramifications that will impact Surety's handling of the claim. (McDonald Dep. 36/9-38/7). Dr. McDonald's explanation of why the legal component of this case led him to offer an opinion that may have been informed by something other than his pure medical judgment is somewhat difficult to understand. However, from his deposition testimony, it clearly appears that Dr. McDonald is of the view that the subject accident did cause a change in Claimant's condition, but he has no means of knowing whether that change was temporary or permanent in nature. This testimony must be reconciled with his equally unambiguous testimony that his review of the 2002 and 2008 MRI reports showed no interval change in Claimant's low back pathology.

Dr. McNulty

22. Claimant saw John M. McNulty, M.D., one time only on May 27, 2009 for a second opinion. Dr. McNulty is a board certified orthopedic surgeon, although he has not performed spine surgery since 1994.

23. At the time of his evaluation of Claimant, Dr. McNulty took a history from Claimant that his principal complaints involved mid and low back pain and pain going down both legs posteriorly to the thighs and knees. Dr. McNulty had no pre-injury medical records to review, and took only a brief history from Claimant concerning his pre-injury low back problems. Claimant told Dr. McNulty that although he had low back problems in the past, he was able to get around pretty well until the subject accident. (McNulty Dep. 9/18-10/15). Dr. McNulty did have the opportunity to review the report, but not the films from the September 17, 2008 MRI. Correlating Claimant's clinical presentation with the MRI led Dr. McNulty to conclude that Claimant suffered a work related injury on September 4, 2008. (McNulty Dep. 14/4-8).

24. On cross-examination, Dr. McNulty acknowledged that he had not had the opportunity to review either the reports or the films from the 2002 and 2005 studies. He also acknowledged that he had not had the opportunity to review any of Claimant's other pre-injury medical records, and had taken only a fragmentary history from Claimant concerning the nature and extent of his pre-injury complaints. Finally, Dr. McNulty acknowledged that in opining that the subject accident did cause injury to Claimant's lumbar spine, he assumed that Claimant was lifting or moving a heavy weight at the time of the accident, such as to "get some force on his back." (McNulty Dep. 15/3-17).

25. On cross-examination, Dr. McNulty acknowledged that these potential

deficiencies in the foundation of his opinion might be important enough to undermine his ultimate opinion on causation:

> Q. (by Mr. Hull) Doctor, in order to determine whether or not his present condition as you saw it was a proximate result of an incident t the U.S. Silver mine on 9-4-08 or just a natural progression of his pre-existing degenerative condition in his lower spine, you'd have to know and review all the medical records in this case, would you not?
>
> A. I would – I guess I would like to know more of his pre-existing. See MRIs or other findings that show, yeah, he has this back problem and the MRI is very similar and, you know, he was receiving treatment in reasonable proximity of the accident. And maybe I don't have quite an understanding of the mechanism of injury.

McNulty Dep. 15/18-16/5.

26. In summary, although Dr. McNulty opined that the subject accident did cause some additional injury to Claimant's lumbar spine, this opinion is called into question by the foundational deficiencies illustrated by Dr. McNulty's deposition testimony. As well, Dr. McNulty simply failed to explain what structures in Claimant's low back were injured by the subject accident, and how the activities in which Claimant was engaged could have caused those injuries.

Dr. Friedman

27. Of all the physicians who have hazarded an opinion as to whether Claimant suffered additional injury to his lumbar spine as a consequence of the subject accident, Dr. Friedman had access to the most complete set of pre and post injury medical records. Even so, he did not have access to the actual films for the 2002, 2005 and 2008 MRIs. He did have the opportunity to review and compare the radiologist's reports of those studies. His gestalt was that a comparison of the three MRI reports demonstrates progressive worsening of Claimant's multi-level degenerative spine disease over a period of years.

This worsening, he opined, is consistent with the normal history of the disease process. (Friedman Dep. 44/2-12). In his review of the MRI reports, Dr. Friedman detected nothing that spoke to the occurrence of an acute injury. (Friedman Dep. 44/13-17). Per Dr. Friedman, Claimant's current complaints, i.e. the complaints with which he presented following the subject accident, are a direct result of his preexisting condition. He continued to abide by this opinion even under the assumption of the occurrence of the subject accident as described by Claimant at hearing.

28. After defense counsel supplied him with a description of the rail event as testified to by Claimant at hearing, Dr Friedman summarized his opinion regarding causation this way:

> Q. And why didn't his scenario [Claimant's rendition of the rail incident] change your opinion at all?
>
> A. Because there's no evidence of direct trauma. There's no new injury ongoing. He can't say, I did this, and it caused that. We know he has - - or medically speaking, he's been in with multiple complaints of low back and leg pain.
>
> I think that there's nothing that would indicate he had a new injury; that this was an ongoing problem. I can't find any new findings that would indicate he had a new injury.

Id., p. 51.

29. However, Dr. Friedman also acknowledged that Claimant's complaints following the subject accident were different from those with which he presented prior the subject accident. (Friedman Dep. 53/22-54/2). He also acknowledged that Claimant's most significant finding, i.e. L5-S1 facet arthropathy, can result from arthritic degeneration, as well as direct injury to the joints. (Friedman Dep. 31/18-24).

30. Dr. Friedman is clearly of the view that the MRI studies of Claimant's

lumbar spine taken in 2002, 2005 and 2008 demonstrate worsening of Claimant's low back condition over time. Dr. Friedman proposed that these three films further support the conclusion that the changes in Claimant's spine have been progressive and gradual over the years. However, standing alone, the three studies in question are merely "snapshots" taken at three distinct moments in time over a span of seven years. Dr. Friedman has proposed that the films support his conclusion of gradual and progressive deterioration, but it might also be said that the films are not inconsistent with a worsening of Claimant's condition related to discrete events, particularly in view of Dr. Friedman's statement that facet arthropathy can be caused by direct injury to the facet joints. However, it appears that Dr. Friedman is of the view that the accident, as described by Claimant, does not amount to the type of "direct trauma" that he could reasonably associate with the development or aggravation of facet arthropathy.

Accident

31. 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). To constitute an accident it is not necessary that a worker slip or fall, or that machinery fails. It is sufficient to demonstrate that the worker was performing his usual and ordinary labor when the stress of that work overcame the resistance of his body to injury, even though he may have been predisposed to such injury. *See*, *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983); *Spivey v. Novartis Seed, Inc*., 137 Idaho 29, 43 P.3d 788 (2002).

32. The Commission finds that Claimant suffered a compensable industrial

accident on or about September 4, 2008. The evidence establishes that on that date, Claimant was engaged in doing repair work to a track on his hands and knees. As he stood up from this task, his back "locked up," leaving him almost unable to move. The activities associated with the onset of Claimant's symptoms are not dissimilar in character from those which led the Idaho Supreme Court to find that accidents occurred in the cases of *Spivey v. Novartis Seed, Inc*., *supra*, and *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005). We find that Claimant has credibly testified to the activities in which he was engaged on or about September 4, 2008, and conclude that on these facts Claimant has met his burden of establishing the occurrence of an "accident".

Injury

33. In addition to proving the occurrence of an accident, Claimant must demonstrate that the accident caused an injury. 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 accident which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). The occurrence of pain alone, without evidence of damage to the physical structure of a Claimant's body, is not sufficient to constitute an "injury". *See*, *Perez v. J. R. Simplot Company*, 120 Idaho 435, 816 P.2d 992 (1991). Therefore, the question which we must answer in the affirmative in order to award benefits in this case is not whether Claimant experienced a sudden and severe worsening of his pain contemporaneous with his work activities of September 4, 2008. Rather, in order to conclude that Claimant is entitled to workers' compensation benefits, we must be satisfied that the accident described by Claimant is responsible for causing physical injury to the structure of his body. If this question is answered in the affirmative,

then we must make some determination as to whether Claimant's injury was temporary and self-limiting in nature, or instead, whether Claimant continues to suffer to this day from the effects of a permanent worsening of his underlying condition.

34. On this central question, the evidence is in substantial dispute. As developed above, the opinions of each of the three experts who have weighed in on this issue can be criticized for different reasons. We assign the least weight to the opinion of Dr. McNulty, who provided very little elaboration supporting his conclusion that the subject accident did cause injury to Claimant's lumbar spine, while acknowledging that an opinion on this important question deserves consideration of a complete medical record. Dr. Friedman reviewed the complete record and found that it supported his conclusion that Claimant's facet arthropathy is a condition which gradually progresses over time. Though it can be accelerated by direct trauma to the facet joints, Dr. Friedman did not identify any such trauma in this case. However, Dr. Friedman did not reconcile this opinion with what we have found to be the facts of this case; Claimant experienced a dramatic worsening of his symptoms immediately following the subject accident. Dr. Friedman did not explain how this sudden change can be squared with his belief that Claimant's condition worsened gradually over time.

35. Dr. McDonald believed that Claimant suffered an injury to his low back as a consequence of the described accident. Though he initially described that injury as "temporary," his deposition testimony makes it clear that all he really knows is that Claimant suffered an injury and that he has no knowledge whether it is temporary or permanent. On the other hand, Dr. McDonald also testified that his review of the 2002 and 2008 MRI studies does not demonstrate any interval change in Claimant's low back pathology.

36. The radiology reports on the 2002, 2005, and 2008 MRI studies are important to

understanding whether there has been an interval change in Claimant's low back condition between 2002 and 2008, and if so, whether such interval change is the product of an acute event versus the normal progression of Claimant's facet arthropathy. Dr. McDonald was unable to identify an interval change. Dr. Friedman, though apparently able to discern a gradual worsening of Claimant's low back condition over the span of time covered by the MRI studies, saw nothing on those reports that spoke to an acute change consistent with a specific mishap/event. Had the actual films been available for review, different conclusions might have emerged. However, from the objective medical evidence at hand, all we are able to conclude is that there may be an interval worsening of Claimant's condition between 2002 and 2008, but there is no evidence that this subtle worsening is consistent with the occurrence of a specific mishap/event.

37. The Commission is aware that the MRI is not a perfect diagnostic tool; false negative studies occur from time to time. Here we have accepted, as true, Claimant's testimony that he experienced a sudden and significant worsening of his pain following the subject accident. Under facts similar to those at bar, the Commission has, in the past, found that a compensable injury has occurred, even in light of pre- and post-injury radiology studies which show no interval change in an injured worker's condition. However, in such cases, we have been persuaded by medical testimony tending to establish that an injury has occurred not withstanding negative radiology studies. No such medical testimony is before the Commission in this matter. In other words, except for Dr. McNulty, whose opinion we have found unpersuasive, no physician has opined that Claimant's history of a sudden worsening of his discomfort effectively establishes that an accident-caused physical injury did occur, notwithstanding that radiology studies fail to demonstrate an interval change which can fairly be associated with the occurrence of a discrete mishap/event. Although Dr. McDonald believes that Claimant suffered an injury,

his testimony is not sufficient to establish that the injury was permanent in nature. Dr. McDonald acknowledged the possibility that Claimant's accident produced injuries are not temporary, but this testimony is not sufficient to meet Claimant's burden of proving the occurrence of a permanent aggravation of Claimant's condition

38. Again, it is Claimant who bears the burden of proving the occurrence of an accident-caused injury to the physical structure of his body. The proof that is required is medical proof. Although this case is a close one, we cannot say, on these facts, that Claimant has carried his burden of proof.

39. Having found that Claimant has failed to establish the occurrence of an injury, all other issues are moot.

CONCLUSIONS OF LAW

1. Although Claimant suffered an accident as defined at I.C. 72-102(18), he has failed to prove the occurrence of a compensable injury, as that term is used at Idaho Code § 72-102(18).

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

DATED this 20TH day of DECEMBER, 2012.

INDUSTRIAL COMMISSION

/S/_____
Thomas E. Limbaugh, Chairman

/S/_____
Thomas P. Baskin, Commissioner

PARTICIPATED BUT DID NOT SIGN.

_____
R. D. Maynard, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20TH day of DECEMBER, 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:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

cs-m /s/_____