BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL ELG, Claimant, v. IDAHO ABATEMENT & INSULATION SUPPLY, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-017581** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed September 18, 2012**

INTRODUCTION

Pursuant to *Idaho Code § 72-506*, the Industrial Commission assigned the above matter to Referee Douglas A. Donohue who conducted a hearing in Idaho Falls on November 29, 2011. Claimant was represented by Delwin Roberts. Defendants were represented by Russell Webb. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on June 28, 2012 and is now ready for decision. 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

The sole issue to be decided is:

1. Whether the surgery requested by the treating physician is causally related to the alleged industrial accident.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends the lumbar fusion surgery recommended by Dr. Robert L. Cach is a compensable consequence of an accepted work accident and surgery. The surgery was performed to ameliorate a left-sided disc herniation. Continued left-sided symptoms, a right-

sided herniation and instability resulting from the accident and effects of the first surgery, require the fusion.

Defendants contend that Claimant's spine shows significant degenerative disease beginning long before the industrial accident. Claimant's accident occurred on June 30, 2010. Left-sided symptoms arose immediately and were surgically treated on August 6, 2010. Right-sided symptoms did not begin to appear until October 15, 2010 according to a physical therapist's note. On January 5, 2011, Dr. Cach opined Claimant was fixed and stable. Claimant's right-sided symptoms are unrelated to the accident and the August surgery. Continuing degeneration, intervening events and complicating conditions are more likely the causes of Claimant's right-sided herniation and symptoms. Fusion is unreasonable because a compensable causal basis has not been established.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony of Claimant;
2. Claimant's Exhibits A1-A7 and B1, and C1(Exhibit C1 is Claimant's deposition);
3. Defendants' Exhibits A-R (Exhibit Q is Claimant's deposition and Exhibit R is Dr. Manos' deposition); and
4. Post-hearing depositions of Robert Cach, M.D. and Richard Manos, M.D.

FINDINGS OF FACT

(NOTE: These findings apply only to the issue addressed and are not to be read hypertechnically to dispose of, to prejudice, or to apply to any reserved issues.)

1. Claimant worked for Employer performing asbestos removal. On June 30, 2010, Claimant was removing ductwork at Portneuf Medical Center. The duct joints contained asbestos. As a heavy piece fell, Claimant twisted to avoid it. Claimant was pinned for about

10-20 seconds until a coworker lifted the section of duct. Claimant struck his hip against a heating unit. He felt immediate arm pain. He continued working.

2. The hip pain increased and Claimant noticed low back pain as well. By the time he got home from work that day, he had developed left leg symptoms into his calf and later into his foot.

3. He worked the next day with these symptoms. The work was lighter, but the symptoms increased.

4. Claimant reported his pain from the accident on the day following its occurrence. His supervisor said Claimant should report the accident to the owner. Claimant continued working. The job was completed about July 2, 2010.

5. On July 7, 2010, Claimant sought medical attention. Caren Smith, PA, at Community Care urgent care facility examined Claimant. X-rays showed disc degeneration and spondylitic disease. She diagnosed a disc herniation and low back pain with radiculopathy. She released Claimant from work and referred him to Dr. Cach's care.

6. Claimant reported the accident to the owner on July 12, 2010, by telephone. Claimant testified he waited to report it because he did not want a report of accident to hinder his opportunity to work a future job for owner. Claimant's testimony on this point is reasonable and credible. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

7. On July 13, 2010, a lumbar MRI showed an extruded disc fragment from L4-5 on the left. It showed a "moderate broad-based disc bulge endplate spur complex at L4-L5 as well as moderate facet spondylosis resulting in mild to moderate spinal canal stenosis and moderate bilateral neural foraminal stenosis." At L5-S1 it showed "moderate broad-based

disc bulge endplate spur complex and moderate facet spondylosis resulting in moderate spinal canal stenosis and moderate to severe neural foraminal stenosis on the right.

8. Dr. Cach first saw Claimant on July 26, 2010. Dr. Cach recommended immediate surgery without waiting for Surety approval. Claimant sought and obtained Surety approval for the surgery.

9. Surgery was performed August 6, 2010. Dr. Cach performed a left L4-5 laminectomy and discectomy with removal of a large free fragment of disc which had migrated downward nearly to S1. Claimant was discharged from Eastern Idaho Regional Medical Center the following day.

10. Dr. Cach released Claimant to light duty effective September 10, 2010.

11. On a September 16, 2010 visit, Dr. Cach noted Claimant still had some numbness, but his left foot weakness was "markedly improved."

12. On September 20, 2010, Claimant began physical therapy. After several visits, on October 15 he first reported to the therapist that he felt right leg pain. Right-sided symptoms of radiculopathy were less frequently mentioned than the left-sided symptoms in therapy notes. Nevertheless, the notes indicate that while the therapist focused on Claimant's left-sided symptoms, the right-sided ones were present as well. The initial 12-visit authorization was extended for an additional 16 visits. The therapist noted Claimant was compliant with home exercises as well as office visits. Claimant progressed well, with a few worse days, until released from physical therapy after his December 30, 2010 visit. The therapist sought an additional 24 visits, but this request does not appear to have been authorized.

13. On October 18, 2010, a lumbar MRI compared Claimant's condition to a July 13, 2010 MRI. It noted the surgical changes. It noted the broad-based L4-5 disc bulge on the right

with neurological involvement and more rightward stenosis at L5-S1.

14. Dr. Cach first recorded, "some disk present right L4-5" and right L5 pain, "mild intermittent," with lower back spasm, on October 26, 2010. Dr. Cach released Claimant to full duty. Claimant recalls an October 12, 2010 telephone call in which he told Dr. Cach about right back and leg symptoms. These symptoms had been arising intermittently until they were prominent enough for Claimant to feel the need to report them. Dr. Cach's limited notes do not mention the telephone conversation.

15. On October 29, 2010, Dr. Cach answered questions raised in correspondence by Claimant's attorney. He confirmed a causal relationship and the October 26 release to full duty. Paradoxically, he opined Claimant was not medically stable and needed more physical therapy, but provided a PPI rating of 15% whole person without preexisting impairment or condition. He provided a detailed FCE of Claimant's positional, environmental, and exertional limitations.

16. On November 23, 2010, Stephen Vincent, M.D., performed a neurological consultation upon referral from Dr. Cach. After a detailed examination, Dr. Vincent opined Claimant's continuing symptoms on the left constituted residual radiculopathy related to the work injury. Dr. Vincent opined, "The right foot symptoms are more complex. It is possible this is related to the surgery. As you may know, some anesthetics (nitrous oxide for example) can deplete vitamin B12 and may be part of his bilateral foot numbness (including the new foot numbness that only began after the surgery on the right side)." Dr. Vincent also considered the possibility of peripheral neuropathy, unrelated to the work injury, based in part upon Claimant's report of numbness in his fingers. He checked for insulin resistance and found no abnormality.

17. On January 5, 2011, Dr. Cach responded to some questions Surety raised

in correspondence. He opined Claimant reached MMI on that date. He declined to perform a PPI evaluation, but did opine that PPI from the injury was not apportionable to any preexisting condition.

18. On January 6, 2011, Dr. Cach referred Claimant to Dr. Vincent for an EMG and nerve conduction velocity (NCV) study. Dr. Vincent's report on this testing is absent, but other medical records summarize it as showing no abnormality.

19. On February 9, 2011, David Simon, M.D., performed an IME at Defendants' request. He examined Claimant and provided an EMG/NCV. The EMG/NCV showed no abnormalities. However, Dr. Simon noted, "Clinically, his right thigh numbness is in the distribution of the lateral femoral cutaneous nerve; however, with his obesity, this nerve is unable to be tested. He causally linked Claimant's ongoing left lower extremity symptoms to the industrial accident. He linked Claimant's ongoing right lower extremity symptoms to meralgia paresthetica from abdominal obesity. He opined Claimant was at MMI, but not about what date MMI was reached. Dr. Simon rated PPI at 7% whole person, related to the accident without apportionment. He recommended restrictions of 50 pounds occasionally, 25 pounds frequently, with some position and motion restrictions. He noted these restrictions were within Employer's description of Claimant's job, but not within Claimant's description of his job.

20. On June 6, 2011, a lumbar MRI showed a mild disc bulge at L3-4, likely asymptomatic; a disc bulge, significant degeneration with osteophytes, and the prior surgical changes at L4-5, likely causing neurological symptoms; and a disc protrusion at L5-S1, likely symptomatic. The radiologist opined there was no significant change since the MRI one year earlier. Lumbar X-rays showed degenerative changes and "minimal retrolisthesis"

of L2, L3, and L4.

21. On June 24, 2011, Claimant visited EIRMC ER complaining of right foot pain. A lumbar MRI found no significant interval change since the MRI of June 6. The ER physician treated Claimant for some cellulitis around his right foot. Dr. Cach performed follow up. He also noted "right and left L5, S1 radiculopathy."

22. On July 19, 2011, Dr. Cach recommended a two level lumbar fusion, L4-5-S1.

23. On August 4, 2011, Richard Manos, M.D., performed an IME at Defendants' request. At that examination, Claimant stood 5' 10" and weighed 255 pounds. Dr. Manos reviewed the MRIs. He diagnosed preexisting lumbar spondylosis; degenerative disc disease at L5-S1 left greater than right, and the likely cause of Claimant's symptoms; and an industrially-related left L4-5 disc herniation and surgery, without recurrent disc herniation. He opined the endplate changes and spondylosis predated the injury. He opined that "fusion surgery is not medically necessary for Mr. Elg based upon his industrial injury of June 30, 2010." Upon Dr. Manos' recommendation, Claimant was sent for steroid injections.

24. On August 16, 2011, Claimant was evaluated by Mark Greenfield, M.D., for pain management. On examination, Claimant showed more objective weakness in his right lower extremity than in his left. Treatment included conservative measures and steroid injections at L5-S1. Claimant reported 100% relief immediately following the interlaminar ESI on September 1, and 90% immediate relief following the right transforaminal ESI on September 12.

25. An August 23, 2011 note authored by the Surety adjustor referred to Claimant's attorney as "Catty." Surety notes at this time reveal a delay in receiving from Dr. Manos his report.

26. On September 25, 2011, Dr. Manos responded to correspondence from Surety. He criticized Dr. Cach's use of the term "recurrent" when describing disc conditions at L4-5 and L5-S1. He used this criticism as a springboard to "doubt" that Claimant's right-sided symptoms and documented condition was work related. He expressed consternation with Claimant's attorney having used the phrase "smoke and mirrors" with regard to Dr. Manos' IME report.

27. On November 14, 2011, Dr. Cach answered "yes" and "no" and "unknown" to questions posed in correspondence by Claimant's attorney. Dr. Cach unequivocally opined that Claimant's right-sided L4-5 condition was caused by the industrial accident and surgery, and that it was not preexisting. He called it "unknown" whether Claimant's L5-S1 disc bulge was so caused.

28. On November 15, 2011, Dr. Cach answered additional such questions. This time, he added commentary to his "yes" and "no" and "unknown" answers.

29. At hearing, Claimant described his pain and numbness, how it increases with activity, and how it limits his ability to function.

DISCUSSION AND FURTHER FINDINGS OF FACT

30. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Causation

31. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho

734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973), overruled on other grounds by Jones v. Emmett Manor, 134 Idaho 160, 997 P. 2d 621 (2000).

32. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

33. In his medical records, Dr. Cach was terse. In deposition, he was equally so. Nevertheless, he persuasively expressed the clinical bases for his opinions. As the treating surgeon, he is in the best position to evaluate Claimant's conditions and recovery process. Dr. Manos' opinions are somewhat weakened in persuasiveness because he saw Claimant only once and did not view the post-injury/presurgical MRI.

34. Dr. Manos was more expansive in deposition testimony. His testimony and opinions well supported his written report. He well described the bases for his reasonable opinions.

35. Dr. Manos opined that Claimant fusion surgery was not "medically necessary from a workers' comp standpoint." He does not dispute the reasonableness of the fusion. However, Dr. Manos testified that because the postsurgical left L4-5 residual radiculopathy did not come from an additional disc fragment leaking through the same annulus tear, Claimant's disc condition cannot be described as "recurrent." He opined it must be classified

as a "new" injury. Therefore Dr. Manos opined, the right-sided symptoms and condition as well as the residual left radiculopathy are unrelated to the accident.

36. Whether Dr. Manos' more precise use or Dr. Cach's more general use of the term "recurrent" matters to someone, it does not change the clinical picture. The evidence fails to establish that Claimant suffered from symptomatic low back complaints in the years immediately prior to the date of the subject accident. Following the subject accident, he had evidence for both left and right L4-5 disc abnormalities, but there is no evidence that these abnormalities pre-dated the subject accident. In the absence of evidence establishing preinjury symptomatology, it is reasonable to conclude that these L4-5 abnormalities were, at the very least, aggravated by the subject accident. There is a divergence of medical opinion on whether Claimant's right-sided L4-5 disc abnormality progressed subsequent to the accident; the radiologists who read the various MRI studies at issue appear to believe that there has been no interval change to the right-sided L4-5 lesion since the subject accident. Dr. Cach has testified that the size and extent of that lesion has progressed since the original MRI study. It is not critical to resolve this difference of opinion in order to ascertain whether Surety is responsible for the surgery proposed by Dr. Cach. The right-sided L4-5 lesion was patent as of the date of the first MRI, and there is no radiological evidence that would allow the Commission to conclude that this lesion predated the subject accident. However, correlating the radiology studies with the development of Claimant's right-sided symptoms supports the conclusion that the right L4-5 lesion was either caused or aggravated by the accident. Following the August 6, 2010 surgery, Claimant first reported right-sided lower extremity discomfort on October 15, 2010, a complaint that has consistently appeared in medical records since that date. It is to be conceded that over 100 days passed between the date of accident and Claimant's first report of

right lower extremity symptoms. However, it will be recalled that Claimant's left-sided disc herniation was thought to be significant enough to warrant surgery on an almost emergent basis, and it may simply be the case that Claimant did not become aware of right-sided complaints until he began to recover following the August 6, 2010 surgery. Therefore, even if Dr. Cach is incorrect in supposing that there has been an interval change in the right-sided L4-5 disc abnormality since the surgery, the evidence is nevertheless sufficient to establish that the right side of Claimant's L4-5 disc was among the structures injured as a consequence of the subject accident, and that Claimant is entitled to medical treatment therefor, the apparent late development of his right-sided symptoms notwithstanding.

37. Having said this, the Commission also finds Dr. Cach's testimony concerning his review of the radiological studies to be persuasive. Dr. Cach testified that he did review the original films, and did note a slight progression of the right-sided L4-5 disc abnormality following the surgery. He has proposed that the left-sided disc herniation, as well as the surgical treatment of the same, necessarily causes the entire disc to "remodel" and that the change as seen in the right-sided abnormality is likely attributable to Claimant's expected post-surgical course. Thus, the right-sided L4-5 abnormality is either directly caused/aggravated by the subject accident, or is a natural and probable consequence of the surgery performed by Dr. Cach in August 2010.

38. Comments expressed by Dr. Manos about the potential effects of subsequent events such as the December fall at home were clearly speculative, acknowledging the possibility but not opining whether such events caused specific injury.

39. Similarly, the preponderance of the evidence shows the aggravation and acceleration of Claimants L5-S1 disc bulge was also likely so caused. It advanced from a

disc bulge to a true herniation. Secondarily, although the causation of the L5-S1 condition is a closer case, the L4-5 condition for which the fusion is recommended would be required regardless of how the L5-S1 condition arose. The evidence shows it unlikely that a fusion of L4 on L5 would hold up given the nature and extent of the condition at L5-S1. So a two-level fusion would be proximately caused by the compensable L4-5 condition.

Medical Care Benefits

40. An employer is required to provide reasonable medical care for a reasonable time. *Idaho Code § 72-432(1*).

41. Claimant established that the proposed fusion surgery was reasonable based upon the clinical picture. Claimant established that his right-sided condition and symptoms arising at and from L4-5 is related to the accident as described above. Defendants' perceived lack of proof of causation having been overcome by a preponderance of evidence, Claimant should be entitled the compensable medical benefit.

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

CONCLUSIONS AND ORDER

1. Claimant is entitled to a two-level fusion surgery as a compensable medical benefit arising as a result of his industrial accident; and

2. All other issues are reserved; and

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

DATED this _18th____ day of __September_____, 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 __18th_____ day of __September_____, 2012, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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