BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEREMY FEASEL, Claimant, v. COATINGS PLUS, LLC, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2007-013289** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED DECEMBER 16 2011**

INTRODUCTION

Pursuant to *Idaho Code § 72-506*, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on August 11, 2010. Clinton E. Miner represented Claimant. Kent W. Day represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were scheduled, then vacated. The parties were allowed multiple rescheduling of deadlines to submit briefs. The case came under advisement on May 16, 2011. It is now ready for decision.

ISSUES

The issues to be resolved according to the notice of hearing and by agreement of the parties at hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether apportionment of partial permanent disability for a preexisting condition under *Idaho Code § 72-406* is appropriate;

3. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause; and,

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

    a. Temporary partial and/or temporary total disability benefits (TPD/TTD);
    b. Permanent partial impairment (PPI);
    c. Disability in excess of impairment;
    d. Medical care, and
    e. Attorney fees.

Claimant declined to maintain the issue of attorney fees in his post-hearing briefs or to present a basis for a claim for attorney fees at hearing. That issue is deemed to be waived.

CONTENTIONS OF THE PARTIES

Claimant contends his low back condition was caused by a compensable work injury. He needs further medical treatment, including another surgery. Medical care received from Richard Radnovich, D.O, should be paid by Surety. Alternatively, if deemed stable, Claimant suffers significant permanent disability as a result of the accident.

Defendants contend Claimant's refusal to work with designated treating physicians and his unilateral decision to seek care from Dr. Radnovich preclude liability for Dr. Radnovich's medical bills. Claimant is stable. PPI of nine percent of the whole person has been paid. Clamant does not suffer disability in excess of PPI. His condition is more due to a preexisting condition or a subsequent accident or both, rather than the subject accident.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant;

2. Claimant's Exhibits 1 through 11; and

3. Defendants' Exhibits A through T.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

2007

1. On March 21, 2007, just shy of his 24th birthday, Claimant began working for Employer, sandblasting and powdercoating metals. Claimant testified that on April 16, 2007 he was with two co-employees lifting a very heavy column. (Claimant initially estimated it to his doctors as weighing 200 lbs.; at hearing, he estimated it at 500-600 lbs.) Claimant testified that one employee slipped, causing Claimant to suddenly bear more weight, and that Claimant felt immediate, sharp, severe, back pain with radiation down his legs.

2. At the end of his shift, Claimant went home where he self-treated with ice and heat. When Claimant returned to work the next day he was no better. Employer sent Claimant to Primary Health for treatment.

3. The Form 1, dated April 18, 2007, recorded that there were no witnesses.

4. On April 18, the Primary Health physician, Tim Loewenstein PA-C, examined Claimant. He noted low back pain without radiation into Claimant's legs. He recorded that Claimant expressly denied "lower extremity weakness, numbness or tingling." A straight-leg-raising test was negative for radicular symptoms. PA Loewenstein's handwritten note of Claimant's reported history suggests there was a lag time between lifting the column and the onset of pain. A typed note of this visit expressly records that Claimant reported the pain arose one hour after the lift. It does not indicate that Claimant reported any accident or slipping event was associated with the lift or the onset of low back pain. It states, "There was no obvious trauma, fall or injury at that time of the lift but it was a significantly heavy lifting episode." PA Loewenstein noted Claimant reported having a prior episode of back pain in 2005. He imposed lifting restrictions but did not release Claimant from all work. He diagnosed a lumbar back strain.

5. On April 25, Claimant was seen in follow-up by Francis Palmer, M.D., at Primary Health. Claimant reported his pain as being worse and that the medications were not helping. He reported no light-duty work was available. A low back X-ray was reported as "totally normal." Pain medication was prescribed. Dr. Palmer released Claimant from work and referred him to Scott Lossman, M.D.

6. On May 1, Claimant visited Dr. Lossman. By history, Dr. Lossman's note states that Claimant reported, "He was lifting a column with steel out of the back of his truck when it became unwieldy on him and started to turn. He tried to stop it from turning and he felt spasm in his low back." This note also records that Claimant reported a history of low back disc disease and a C-spine fracture after a motor vehicle accident. An examination revealed some mild tenderness in the bilateral lumbar paraspinous muscles, but no other objective findings. Dr. Lossman diagnosed a low back strain. He suggested a one-week temporary lifting restriction of 20 pounds. He mentioned the possibility of physical therapy.

7. When Claimant visited Dr. Lossman one week later, he was hurting more. Dr. Lossman further restricted Claimant from lifting more than 10 pounds and referred him to physical therapy.

8. Raj Issuree, P.T., evaluated Claimant for therapy on May 11. He began a nine-visit regimen over a three-week period. Claimant reported an initial increase in pain with therapy, but this quickly decreased with additional visits.

9. On May 14, ICRD consultant Ken Halcomb received the referral to assist Claimant vocationally. He contacted Employer who reported that Claimant would be welcome to return to work as soon as possible, but that no light-duty or modified work was available.

10. On May 22, Dr. Lossman noted that the tenderness was significantly decreased,

but Claimant was complaining more. Dr. Lossman changed his painkillers from Norco to Ultracet. Dr. Lossman restricted Claimant from lifting over 30 pounds occasionally.

11. An ER visit for a complaint of abdominal pain, nausea and vomiting on June 9 resulted in an X-ray which showed no abnormality.

12. On June 12, Dr. Lossman noted that Claimant had finished physical therapy. Claimant said it did not help; the physical therapist reported that all goals had been achieved and Claimant had told physical therapy providers that he had "0/10" pain. On examination, Dr. Lossman found no tenderness and no objective findings. Diagnoses included: low back pain, sciatica in the right gluteal muscle, and acute renal failure which had occurred four days prior. Relating to the kidney failure, Dr. Lossman cautioned against the use of all non-steroidal anti-inflammatory drugs. He released Claimant to work, no lifting over 50 pounds.

13. Ordered by Dr. Lossman, a lumbar MRI was taken on June 20. It showed a disc bulge at L4-5 which impinged the nerve root, was bigger than it was after a 2005 MRI, and was accompanied by mild degenerative disease at L4-5 and L5-S1.

14. On June 26, Dr. Lossman noted that Claimant complained of a lot of pain and that he was out of pain medications. He noted the MRI findings were consistent with Claimant's symptoms. He referred Claimant to Dr. Sant for additional treatment. Drs. Sant, Moore and Friedman work together. Dr. Lossman released Claimant to light-duty work, no lifting over 25 pounds and only occasional bending and twisting.

15. On July 18, Claimant returned to Dr. Lossman complaining of pain. Dr. Lossman prescribed Norco and Valium. He reaffirmed his light-duty restrictions.

16. On July 25, Robert Pollmann, PA-C, to Drs. Sant, Moore and Friedman, examined Claimant. Based upon the MRI, significant subjective symptoms and equivocal

objective testing, he recommended a steroid injection. He prescribed Oxycontin and Oxy IR in an attempt to limit Claimant's Norco usage. The acetaminophen in Norco raises other risks if taken too frequently over time. On August 3, Claimant complained about the medications. PA Pollmann substituted Vicoprofen for the Oxy IR.

17. On August 6, Monte Moore, M.D., performed a left L5-S1 epidural steroid injection.

18. On August 15, PA Pollmann ordered Claimant to remain off work.

19. On August 23, Joseph Verska, M.D., evaluated Claimant as a surgical candidate. Upon examination, Claimant demonstrated severely restricted range of motion. Dr. Verska did not report significant objective findings, although he noted 4+/5 strength in multiple, bilateral, lower extremity muscle groups. He reviewed the June 20 MRI and recommended surgery. Under a paragraph headed "indications for surgery" Dr. Verska included "pain, numbness or tingling in a radicular pattern, objective weakness on physical exam, severe incapacitating pain, axial imaging studies that correlate with the patient[']s symptoms and physical exam findings."

20. On August 31, Dr. Verska performed a laminectomy and microdiscectomy of L4-5 on the left. He reported finding and removing a free fragment of disc material.

21. On follow-up on September 18, Claimant reported to Dr. Verska that his leg pain had resolved but he still had low back stiffness. Dr. Verska considered this consistent with normal postoperative healing. He recommended physical therapy and a return to modified work, four hours per shift, no lifting over 15 pounds, with position and motion restrictions.

22. Claimant began again with physical therapy on September 24. He attended 26 visits until January 14, 2008. The notes indicate Claimant was trying to become more

active in November. This increased activity resulted in additional temporary pain but does not appear to have significantly set back therapy.

23. On October 2, Dr. Verska increased the weight limit to 20 pounds. He noted Claimant should use over the counter medications for pain. The exam showed progressive healing. He referred Claimant to Beth Rogers, M.D., for further follow-up care.

24. With each visit, Dr. Rogers noted some complaints without objective findings, except for a one-time positive, right, straight-leg-raise test on December 31. At each visit, she noted she expected he would be at MMI in about three weeks.

25. On November 27, Claimant visited the ER with a complaint of increased back pain following a slip on a stairstep. Claimant stated, "I was in severe pain before the fall. I just need some painkillers." The ER physician prescribed 30 Norco and noted better coordination of drug prescriptions between the ER and Claimant's chronic pain physician was needed.

26. An MRI was performed on December 13. It showed postsurgical changes, a mild circumferential disc bulge at L4-5 with degeneration but which did not unequivocally suggest neural impingement. Other lumbar vertebrae and disc spaces were normal.

27. On December 27, Claimant had an episode of abdominal pain and nausea. An ER visit and examination appears unrelated to the industrial accident.

2008

28. On January 23, 2008, Beth Rogers, M.D., performed an L5 epidural steroid injection on the right.

29. Dr. Rogers continued with follow-up visits. She gradually increased the number and strength of prescription medications upon Claimant's requests or complaints of pain.

30. Claimant visited Primary Health on February 8, 2008, claiming he was out of

Norco and Valium. PA Jeffrey Flaker provided prescriptions.

31. Another lumbar MRI was taken February 14, 2008. As in December 2007, it showed significant pathology only at L4-5. The report stated, "There is potential for impingement of the traversing bilateral L5 nerve roots, the bilateral neural foramina are not impinged."

32. On March 13, 2008, Claimant visited Timothy Doerr, M.D. On examination, Dr. Doerr found lower extremity weakness in all muscle groups, worse on the right, with some paresthesias, also worse on the right. He considered surgical fusion or a revision of the prior surgery to be options vis-à-vis chronic pain management. He informed Claimant that he must stop smoking before additional surgery would be indicated. Claimant became angry, threatened Dr. Doerr and left.

33. Claimant visited Richard Radnovich, M.D., on his own initiative on March 18, 2008. As described under "Prior Medical Care" below, Dr. Radnovich had previously treated Claimant for one year for low back pain and other conditions following a motor vehicle accident. By history, Dr. Radnovich's note is the first recorded medical report, consistent with Claimant's testimony at hearing, which describes the April 2007 industrial accident as involving co-workers. Dr. Radnovich's medication history shows Claimant was taking a mix of eight prescriptions including muscle relaxers, narcotic opiates, mood elevators, and other drugs. On examination, Dr. Radnovich reported some muscle spasm and tenderness, equivocal findings on reflex testing and that Claimant demonstrated "severely restricted" range of motion. He diagnosed "postlaminectomy syndrome of lumbar region, failed spinal surgery syndrome" which was added to his former diagnoses of lumbalgia and myofascitis. The amount and number of prescribed medications increased. Claimant

returned for visits on 9 occasions in 2008. The number of prescriptions in the cocktail waxed and waned – as many as 10, never fewer than 6 – without apparent objective correlation to Claimant's condition as reported in Dr. Radnovich's examination notes.

34. After an April 3, 2008 follow-up visit, Dr. Doerr requested authorization for surgery. Claimant did not again visit Dr. Doerr until after Surety stopped benefits.

35. On July 14, 2008, Surety notified Claimant it was stopping benefits stating, "Your temporary total benefits have been terminated based on no authorization for disability from the doctor and non-compliance with medical recommendations."

36. Claimant returned to Dr. Doerr on July 17, 2008. Dr. Doerr noted:

> I discussed with Jeremy that I do believe that a discogram would be a reasonable next step in evaluating his low back pain, at which time the patient adamantly refused any further treatments involving needles. I also discussed with Jeremy that I believe it is important that he discontinue the use of all narcotics prior to surgery, at which time he became fairly agitated but did agree to try a course of Ultram. I am concerned with Jeremy's ability to participate psychologically in his recovery and I am also concerned with regard to his current social support network, prior to any surgery I think that a formal rehab evaluation would be warranted including psychological testing. I will refer him to Dr. Rod Cox for this evaluation.

37. On July 30, 2008, Claimant visited an ER for back pain. The ER physician found tenderness and muscle spasm on examination, administered a shot of Dilaudid and Phenergan and sent Claimant back to Dr. Radnovich.

38. On August 7, 2008, Dr. Cox refused to treat Claimant. He cited Dr. Radnovich's assumption of care and multiple prescriptions of medication as his reasons.

39. On September 15, 2008, Claimant visited an ER for back pain. The ER physician found tenderness and muscle spasm on examination and gave Dilaudid and Ativan on an IV drip.

40. Robert Friedman, M.D., first examined Claimant on September 18, 2008. Clamant emphasized that he wanted his back "fixed." A thorough examination revealed

no objective findings. Dr. Friedman diagnosed: "1. Low back injury status post L4-5 hemilaminectomy; 2. Nonphysiologic, neuroanatomic examination; 3. Psychological stressors; 4. Marked irritability and anger, possible depression; 5. Persistent tobacco use; 6. Opioid use." He recommended a psychological assessment by Robert Calhoun, M.D. He noted concern about Claimant's "anger outbursts" and "explosive behaviors." Dr. Friedman's next note is dated February 18, 2009.

41. Dr. Calhoun evaluated Claimant on September 26, 2008. Dr. Calhoun described Claimant's answers to diagnostic interview questions as vague. Claimant completed an MMPI-2 but refused to cooperate with any other tests. Dr. Calhoun opined that Claimant's psychological condition made the success of any future surgery unlikely. He recommended anger management. He noted Claimant was at risk for overmedication of opioids.

42. On October 8, 2008, Surety authorized Claimant to attend the LifeFit program. LifeFit would not accept Claimant until he completed the testing required by Dr. Calhoun. Claimant never completed that testing.

43. On December 16, 2008, Claimant again visited Dr. Radnovich. Upon no new examination findings, Dr. Radnovich diagnosed: "1. Postlaminectomy syndrome of lumbar region, failed spinal surgery syndrome; 2. Lumbalgia; 3. myofascitis, paraspinal mm; 4. cervicalgia, and 5. Panic disorder, probable PTSD." Dr. Radnovich considered a possible diagnosis of arachnoiditis. He referred follow-up care and the imposition of restrictions to Dr. Friedman.

2009

44. On January 13, 2009, Claimant again visited Dr. Radnovich. In 2009, Claimant visited Dr. Radnovich for examinations 11 times and Dr. Radnovich's staff for therapy 10 times. A March 11, 2009 visit noted Claimant fell out of a truck which affected his T12-L2

area and caused an exacerbation of the prior condition at L4-5.

45. On January 29, 2009, Dr. Doerr opined, from clinical notes and the report by Dr. Calhoun, that Claimant was stable as of September 26, 2008 and that he sustained a PPI of 9% whole person without apportionment. He did not consider Claimant a viable surgical candidate.

46. On February 18, 2009, Dr. Friedman examined Claimant and referred him to LifeFit.

47. On April 8, 2009, Claimant visited an ER for right pleuritic chest pain. A chest X-ray and CT scan showed no abnormality. His White count, blood pressure and heart rate were all elevated. Claimant was admitted overnight and given IV fluids. Claimant received 10 pills each of morphine sulfate, both short-acting and long-acting. No clear causation was identified in the diagnoses.

48. On April 15, 2009, Dr. Friedman examined Claimant. He prescribed some medications in anticipation of Claimant tapering when in the LifeFit program.

49. On May 5, 2009, Claimant was again referred to the LifeFit program. This time he was accepted without prerequisites. On May 27, 2009, Claimant was instructed to begin tapering his medication use. Dr. Friedman prescribed Seroquel to help Claimant with withdrawal and to sleep. On May 28, 2009, Claimant tested positive for benzodiazepines, opiates, oxycodone, and marijuana. Three of these were not under a current prescription. On June 3, 2009 Claimant was belligerent, loud, and verbally abusive to LifeFit Staff. Other patients complained. When confronted with the drug test report on June 3, 2009 by Dr. Friedman, Claimant became angry. He left with his mother. The mother stated, "We'll see you in court." Claimant did not complete the LifeFit program. Claimant's assertion

that it was LifeFit staff, not him, yelling and cursing is inherently improbable in the experience of the Commission's myriad of prior claims in which LifeFit has provided service.

50. On May 31, 2009, Claimant underwent a brain MRI after possible stroke symptoms. The report showed no abnormality.

51. On a June 1, 2009 visit, Claimant reported a loss of consciousness while at a stop light and the resulting ER visit the day before. Dr. Radnovich considered it an acute stress reaction and wondered at the possibility that the work comp claim caused it. Generally, throughout 2009, Claimant reported to Dr. Radnovich a waxing and waning of symptoms without overall improvement.

52. On the June 3, 2009 LifeFit meeting, Drs. Friedman and McClay diagnosed the alleged stroke as dystonia, a side effect of the Seroquel.

53. On June 5, 2009, James Whiteside, M.D., evaluated Claimant about the May 31, 2009 impaired consciousness event. Dr. Whiteside ruled out a stroke, but could not state a definitive diagnosis for the event.

54. On June 22, 2009, Dr. Friedman opined Claimant's PPI at 7% whole person with permanent restrictions to medium work, lifting 50 pounds occasionally, 25 pounds frequently, and no twisting.

2010

55. On January 8, 2010, Claimant again visited Dr. Radnovich. In multiple visits before and including April 26, 2010, Claimant's symptoms wax and wane without permanent improvement. Claimant continued on the medication regimen under Dr. Radnovich's care.

56. On March 22, 2010, Dr. Friedman opined Claimant suffered a 5% PPI related to the industrial accident. He imposed restrictions of no lifting over 50 pounds occasionally, and 25 pounds repetitively.

57. On June 16, 2010, Dr. Doerr confirmed his opinion that Claimant was stable as of September 26, 2008 and that all medical treatment after that date was related to Claimant's underlying preexisting degenerative condition and not to the industrial accident of April 16, 2007.

Vocational/Disability

58. Claimant earned a high school diploma from Eagle Academy in 2002.

59. Claimant worked in construction, roofing, framing, siding and some drywall, as well as finish carpentry for about five years. He also worked through a temporary employment agency building clean rooms for Micron.

60. ICRD consultant Ken Halcomb assisted Claimant from August 25, 2007 through July 8, 2009. He noted some post-closure contacts January through March 2010. In July 2010, he provided labor market information to Surety. Based upon restrictions provided by Dr. Friedman, Mr. Halcomb identified several types of jobs Claimant could perform. These ranged from $7.00 per hour to $14.00 per hour.

Prior Medical Care

61. Claimant suffered from minor low back pain while he was still in high school. He received medical treatment, mostly physical therapy and chiropractic treatment for about one year before this pain resolved.

62. He was involved in car accidents, one in May 1999, one in December 2001, in which his girlfriend was killed, and one in September 2004 when he hit a cow. Although he testified they required no medical care, medical records from May 1999 show X-rays were taken. The lumbar X-ray showed no obvious traumatic lesion. It does not describe degenerative disease. Claimant complained of low back pain and right leg weakness. A somatosensory evoked potentials test showed normal nerve function. Upon a complaint of

bilateral hip pain, right and left hip X-rays showed entirely normal hips.

63. An ER record for the December 2001 car accident shows he complained of significant left buttock pain. He suffered a scalp wound. By history, significant chronic back pain was noted. Bilateral hip X-rays were again taken and again showed no abnormalities.

64. In February 2005, a C-spine MRI showed disc protrusions at C5-6 and C6-7. These were considered unchanged compared to a September 2000 MRI. A February 2005 L-spine MRI showed, when compared to a September 2000 MRI, a new, "very mild" disc protrusion at L4-5.

65. On March 18, 2005, Claimant saw Richard Radnovich, M.D., for the first time. He was not improving after the September 2004 car accident. The examination was compromised by Claimant's overreactions to testing. Dr. Radnovich diagnosed cervicalgia, lumbalgia, and myofascitis. He considered a possible disc bulge and PTSD as contributors. Claimant visited Dr. Radnovich regularly, about twice per month into March 2006. Shortly after the episode described in the immediately following paragraph, Dr. Radnovich included panic disorder and/or PTSD as the primary diagnosis at each visit, superseding the pain diagnoses which continued to be listed. Dr. Radnovich treated Claimant with physical therapy and/or chiropractic, and with prescriptions for various muscle relaxers, opiate narcotics, barbiturates, mood elevators, and other drugs – up to nine different prescriptions simultaneously – for the year March 2005 to March 2006. A June 23, 2005 letter shows Dr. Radnovich corresponded with an attorney representing Claimant on some matter, possibly the September 2004 car/cow accident.

66. As part of an ER visit, an April 2005 head CT following an episode of "altered level of consciousness" revealed no abnormality. Claimant reported three episodes

which he characterized as "anxiety or panic attack" but with which characterization the ER physician did not agree. These attacks were described as involving a loss of awareness, possibly loss of consciousness. Claimant also complained of back pain, and a muscle relaxer was prescribed. His lab data was positive for Valium and marijuana. He was released without a definitive diagnosis.

67. Claimant suffered a mild ankle injury in April 2006 while at Micron. He missed no more than a few days' work. An X-ray showed some swelling, no fracture. This accident left no long-term effects.

DISCUSSION AND FURTHER FINDINGS OF FACT

68. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *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, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

69. Claimant is a poor historian. He has provided inconsistent information to medical providers and others throughout the course of this claim. Where contemporaneous medical records are inconsistent with his testimony, the medical records are given more weight. At hearing, Claimant's mother was present. With gestures, nods or shakes of her head, expressions and occasional spoken words, she attempted to assist Claimant's testimony. During a break, off the record, she was cautioned against such behavior.

Causation

70. The claimant in a worker's compensation case has the burden of proving an

injury caused by an accident arising out of and in the course of employment. The proof must establish a probable, not merely a possible, connection between cause and effect to support the contention that the claimant suffered a compensable injury. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982); *Vernon v. Omark Industries*, 115 Idaho 486, 767 P.2d 1261 (1989). Moreover, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. *Dean v. Dravo Corp.*, 95 Idaho 558, 511 P.2d 1334 (1973); *Bowman v. Twin Falls Construction Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). "Magic words" are not required. *Jensen v. City of Pocatello,* 135 Idaho 406, 18 P.3d 211 (2000). A claimant is required to prove by a preponderance of the evidence that a claimed injury was caused by a compensable accident. *Henderson v. McCain Foods, Inc.,* 142 Idaho 559 at 563, 130 P.2d 1097 (2006).

71. Although Claimant's recollection of the details of the April 16, 2007 lifting incident has changed over time, he has consistently tied the onset of back pain to lifting a steel column at work. An MRI in February 2005 showed a very mild disc bulge at L4-5. The June 20, 2007 MRI showed a larger disc bulge which was newly impinging the nerve root.

72. Claimant's early treating physicians accepted Claimant's report of the accident as the cause of his back pain. Later physicians opined his PPI was related to this accident. Claimant established it likely that the accident caused the increased disc bulge.

73. Defendants argue that preexisting conditions or subsequent accidents were causes for Claimant's condition. However, when Dr. Doerr rated Claimant he expressly stated there was no apportionment for preexisting conditions. The subsequent events identified in the record, the November 2007 activities and the March 2009 accident, appear to have caused no more than temporary exacerbations of low back pain without lasting injury.

Medical Care

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

75. Defendants provided initial treatment as required by statute. They paid for care including surgery and follow-up treatment. To be clear, Defendants are liable for related medical care provided by physicians within the chain of referral from the date of accident through September 26, 2008, and for any medical treatment provided by physicians within the chain of referral afterward to the date of hearing.

76. Claimant was noncooperative with his treating physicians. He sought care outside the chain of referral with Dr. Radnovich, starting with his visit to Dr. Radnovich of March 18, 2008. This altered the treatment provided. Designated treating physicians were unable to treat Claimant because he would not visit. One potential treating physician, Dr. Cox, refused to see Claimant because Claimant had gone outside the chain of referral to be treated by Dr. Radnovich.

77. Claimant requests that Dr. Radnovich be recognized as his treating physician. The question of whether Claimant is entitled to a change of physician is subsumed in the noticed issues of medical benefits, and is argued by Claimant in his post-hearing brief. In pursuing a change of physician, the parties are not limited to the expedited procedure described at J.R.P. 20. *See*, J.R.P. 20 (I).

78. *Idaho Code § 72-432(4)* provides a mechanism by which an injured worker may petition the Industrial Commission to change physicians. That section, last amended in 1997, provides:

> (a) The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a

> change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer. Upon receiving such written notice, the employer shall render its written decision on the claimant's request within fourteen (14) days. If any dispute arises over the issue of a request for change of physician, the industrial commission shall conduct an expedited hearing to determine whether or not the request for change of physician should be granted, and shall render a decision within fourteen (14) days after the filing of the response by the employer.
> (b) The industrial commission shall, no later than December 31, 1997, promulgate a rule for the expeditious handling of a petition for change of physician pursuant to this section. Nothing herein shall prevent the commission from making periodic amendments, as may become necessary, to any rule for a petition for change of physician.

79. For purposes of the instant matter, it is important to note that unless written notice is given, the employer is not obligated to pay for the services at issue. Appropriate written notice is a prerequisite to the injured worker's ability to petition the Commission for an order authorizing a change of physician, and requiring employer to pay for such care. *See*, *Quintero v. Pillsbury Company*, 119 Idaho 918, 811 P.2d 843 (1991); *Seward v. Pacific Hide & Fur Depot.*, 138 Idaho 509, 65 P.3d 531 (2003).

80. Here, the record reflects that Claimant first treated with Richard Radnovich, D.O., on March 18, 2008. However, the record fails to reveal the date on which employer could be said to have received written notice of Claimant's request for authorization to treat with Dr. Radnovich. This makes it difficult to know what part of the care provided by Dr. Radnovich is altogether barred by reason of Claimant's failure to give written notice, and what part is potentially compensable following appropriate written notification by Claimant. The Referee finds that identification of the precise date of notification is not critical here since, as developed below, the Referee finds that Claimant has failed to establish "reasonable grounds" for a change of physician.

81. First, this case is not like *Reese v. V-1 Oil Company*, 141 Idaho 630, 115 P.3d 721 (2005). There, one of claimant's treating physicians had recommended a trial of a dorsal column stimulator. Surety denied authorization for treatment, and the Court found that surety's action represented a failure by surety to provide the care required by employee's physician, thus freeing claimant to obtain the same at employer's expenses. (See, I.C. § 72-432(1)). Therefore, although claimant did not notify surety of the fact that he obtained surgery out of state, this failure did not run afoul of the provisions of I.C. § 72-432(4) since surety had declined to provide the care required by claimant's physician under I.C. § 72-432(1). In contrast, Employer in the instant matter did not decline to provide any of the care recommended by Claimant's recognized treating physicians during the time of Dr. Radnovich's involvement in this case.

82. The medical records show that the medical care provided by Dr. Radnovich was substantially similar to that which he provided Claimant in 2005-2006 for chronic back pain. It is difficult to discern how or why the care he began providing Claimant 11 months after this industrial accident was related to the accident and not to Claimant's longstanding chronic back pain issues. Claimant's symptoms waxed and waned without evidence of gradual improvement under Dr. Radnovich's care. Dr. Radnovich's treatment appears to involve a condition more like chronic back pain than like an injured worker healing from an accident. The Referee concludes that Claimant has failed to show reasonable grounds supporting the requested change of physician.

83. Finally, Claimant suggests he needs and is entitled to additional medical care. The consensus of treating physicians within the chain of referral considers Claimant medically stable as of September 26, 2008. Claimant's personality, his smoking and other noncompliance issues preclude him from being a viable surgical candidate. Moreover, at this late date, surgery

would likely be related to his chronic back pain and not to the disc injury caused by the accident. Claimant failed to show it likely that he is entitled to future medical care.

84. The evidence fails to establish reasonable grounds for the requested change of physician. Also, considered as a whole, the record fails to establish that Claimant is entitled to future medical care of any type.

Temporary Disability

85. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. *Idaho Code § 72-408*, *et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

86. Defendants provided an exhibit summarizing its payments of temporary total disability. This amount was not contested at hearing. The issue was not addressed in posthearing briefing. It is considered waived.

Permanent Impairment

87. Permanent impairment is defined and evaluated by statute. *Idaho Code § 72-422* and *72-424*. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

88. Various physicians have rated Claimant's PPI at 5%, 7%, and 9%. Surety has paid 9%. The Commission agrees that Dr. Doerr's rating of 9% is appropriate.

Permanent Disability

89. Permanent disability is defined and evaluated by statute. *Idaho Code § 72-423* and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission

considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v, Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). Wage loss is a factor, but not the only factor, to be considered in establishing permanent disability. *Baldner v. Bennet's, Inc.*, 103 Idaho 458, 649 P.2d 1214, (1982).

90. Here, Claimant is able to perform up to medium work under the restrictions provided by Dr. Friedman. His time-of-injury wage of $9.00 per hour is easily replaced by numerous jobs, including those identified by the ICRD consultant. Considering all medical and non-medical factors, Claimant failed to show his permanent disability exceeds the 9% PPI rating established herein.

90. There being no permanent partial disability above impairment, and upon Dr. Doerr's opinion, *Idaho Code § 72-406* does not apply.

CONCLUSIONS OF LAW

1. Claimant suffered an injury caused by a compensable accident;

2. He is entitled to medical care benefits within the chain of referral while in recovery to September 26, 2008, and to the date of hearing for palliative care, but no future medical care;

3. Claimant's unilateral decision to seek care outside the chain of referral does not require Defendants to be liable for that care. Claimant has failed to show reasonable grounds supporting a change of physician to Dr. Radnovich;

4. As a result of the compensable accident, Claimant suffered PPI rated at 9% of the whole person;

5. Claimant failed to show it likely he suffered permanent partial disability in excess of PPI;

6. Other issues were waived by the parties, or Claimant failed to establish a *prima facie* basis for their consideration.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 18TH day of November, 2011.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary db

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEREMY FEASEL, Claimant, v. COATINGS PLUS, LLC, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2007-013289** **ORDER** **FILED DECEMBER 16 2011**

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 recommendations 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 suffered an injury caused by a compensable accident.

2. He is entitled to medical care benefits within the chain of referral while in recovery to September 26, 2008, and to the date of hearing for palliative care, but no future medical care.

3. Claimant's unilateral decision to seek care outside the chain of referral does not require Defendants to be liable for that care, Claimant has failed to show reasonable grounds

supporting a change of physician to Dr. Radnovich;. As a result of the compensable accident, Claimant suffered PPI rated at 9% of the whole person.

4. Claimant failed to show it likely he suffered permanent partial disability in excess of PPI.

5. Other issues were waived by the parties, or Claimant failed to establish a *prima facie* basis for their consideration.

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

DATED this 16TH day of DECEMBER, 2011.

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 16TH day of DECEMBER, 2011, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

CLINTON E. MINER
4850 N. ROSEPOINT WAY, STE. 104
BOISE, ID 83713

KENT W. DAY
P.O. BOX 6358
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db

/S/_____