

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FLOYD BLAINE FIFE,)
)
 Claimant,)
)
 v.)
)
 HOME DEPOT, INC.,)
)
 Employer,)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY OF PITTSBURGH,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-008636

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

filed June 8, 2010

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Susan Veltman. Referee Susan Veltman conducted a hearing in Idaho Falls on November 5, 2009. Subsequently, Referee Veltman left the Commission and this case was reassigned to the Commissioners. James D. Holman represented Claimant. W. Scott Wigle represented Employer and Surety. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing briefs. The case came under advisement on March 29, 2010. It is now ready for decision.

ISSUES

After due notice and by agreement of the parties at hearing the issues were:

1. Whether Claimant suffered an injury caused by an accident rising out of and in the course of employment;

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

3. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, including spinal surgery;

4. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits;

5. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;

6. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of permanent impairment; and,

7. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant argues that his need for back surgery is related to his industrial accident. Claimant contends that he promptly notified Employer, but Employer refused to fill out a notice of injury or a claim for benefits. Claimant argues that his medical care was reasonable, and that Employer is responsible for the full invoiced amount of medical expenses under *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). Claimant argues for TTD benefits from March 11, 2008, the date of his back surgery, until June 9, 2008. Claimant argues that he is entitled to PPI and PPD benefits without apportionment to pre-existing conditions, because Claimant had never treated with a physician or chiropractor for back pain.

Defendants dispute the occurrence of the industrial accident and the reasonableness of the medical treatment. In the alternative, Defendants contend that the need for surgery is not related

to an accident caused injury. Defendants argue for apportionment of PPI and PPD to Claimant's pre-existing condition. Defendants argue that Claimant should not receive PPD, because Claimant has returned to work on a full-time basis for Employer, and earns more money than he did prior to the alleged accident. Defendants argue that the factual scenario of this case is distinct from *Neel v. Western Construction, Inc.*, 147 Idaho 146 (2009), and that the rationale of *Neel* does not apply here where the evidence establishes that Claimant has no obligation to pay the full invoiced amount of the bills he incurred outside the workers' compensation system, since provider is contractually bound to forego balance billing of the amount not paid by Claimant's non-occupational insurer.

EVIDENCE CONSIDERED

The record in this instant case consists of the following:

1. Oral Testimony at hearing from Blaine Fife, David Lowry, and Katie Hazelbush.
2. Claimant's Exhibits 1 through 25 admitted at hearing.
3. Defendants' Exhibits A through L admitted at hearing.
4. The Commission's legal file.

After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter. There were various objections raised during depositions by the parties. These objections are overruled.

FINDINGS OF FACTS

1. Claimant was 66 years old at the time of the hearing. Claimant was an appliance sales specialist for Home Depot. Claimant has worked for Home Depot for about 10 years. Prior to his employment with Home Depot, Claimant owned and operated his own business in

Idaho Falls and handled service and customer relations matters for Whirlpool Corporation and Frigidaire. On February 22, 2008, Claimant alleges that he was injured when moving a dryer at Home Depot. Claimant was 64 years old at the time of the alleged injury. Claimant felt a sharp pain in his lower back. Claimant finished his shift and retrieved other appliances for customers as needed. Claimant had February 23, 2008, off and took his family skiing. Hr.Tr., p. 71. Claimant did not ski because of his back discomfort. Hr.Tr., p. 73. Claimant returned to work on February 24, 2008, and completed a full shift. Hr.Tr., p. 74. On Monday, February 25, 2008, Claimant went to work in the morning, but left work early to seek treatment from Community Care for his back pain. *Id.*

2. Claimant met with Dr. Thompson at Community Care for treatment on February 25, 2008. Claimant's Exh. 12. Notes generated in connection with Claimant's initial medical visit with Community Care do not indicate that Claimant told his medical providers that he was injured at work. *Id.* Claimant's x-ray revealed severe degenerative changes in his thoracic and lumbar spine with disc space narrowing. *Id.* Dr. Thompson's notes indicate that Claimant complained of "right sided sciatica when lifting or standing on concrete . . . onset for years on/off." *Id.* Dr. Michael Biddulph reviewed images of Claimant's spine taken during Dr. Thompson's exam and reported the following:

There are degenerative change hypertrophic changes in the thoracic and lumbar spine. Severe degenerative disc disease is noted at L3-4, L4-5 and L5-S1. There is also degenerative arthritis in the lower lumbar fact joints. No fractures are seen.

Id.

Claimant was released with a 15-pound lifting restriction, medication and a referral to Dr. Eric Walker, a physical medicine and rehabilitation specialist. Claimant's Exh. 12, Hr.Tr., p. 21.

3. Claimant canceled his appointment with Dr. Eric Walker, because he did not wish to handle his pain symptoms with narcotic medication. Hr.Tr., p. 51. Claimant wanted to have a consultation with a surgeon. *Id.* Claimant had previous problems with narcotic pain medications and wanted to avoid them entirely. Hr.Tr., p. 82. On March 3, 2008, Claimant self-referred to Dr. Grant Walker, an orthopaedic surgeon. Claimant's Exh. 9. Claimant was not interested in pursuing conservative measures to treat his back pain. Hr.Tr., p.53. After Claimant's initial examination, Dr. Grant Walker recommended a four-level spinal fusion surgery from L3 to S1 to alleviate Claimant's back pain, and diagnosed Claimant with L4-S1 degenerative disc problem, stenosis, and greater trochanteric bursitis. Claimant's Exh. 9. Claimant decided to proceed with the lumbar fusion, and Claimant contacted his private medical insurer for authorization. Sometime after Claimant first visited with Dr. Walker, Claimant's son-in-law, a nurse anesthetist, traveled from out-of-state to dissuade Claimant from proceeding with the surgery.

4. On March 6, 2008, Claimant had a lumbar spine MRI, which Dr. Marc Cardinal evaluated. Claimant's Exh. 2. Dr. Cardinal found spinal stenosis at L3-4, moderate narrowing of the foramina on L3-4, L4-5 and L5-S1, moderate facet degenerative change and hypertrophy at L2-3, L3-4, L4-5, and L5-S1. Claimant's Exh. 2.

5. Claimant continued to work from the date of the alleged accident until his scheduled surgery. Claimant's Exh. 19. On March 11, 2008, Dr. Grant Walker noted that Claimant's primary diagnosis was "degenerative disk disease." Claimant's Exh. 2. Shortly before the surgery, Dr. Grant Walker discussed including the L2 level to remedy a large level of stenosis in that area. Claimant's Exh. 9. Claimant agreed and underwent a five-level, L2-S1 decompression and fusion, instead of a four-level, L3-S1 decompression and fusion. *Id.* Dr. Walker conceded that Claimant's surgery was not performed on an emergency basis. Dr. Walker

Depo., p. 45. Claimant's surgery was performed at Bingham Memorial Hospital. Claimant's Exh. 9. During surgery, Claimant's common iliac vein was compromised. Claimant's Exh. 10. Thereafter, Claimant experienced an unfortunate and life-threatening surgical complication of deep veinous thrombosis, which extended his hospital stay, and required months of additional medical treatment. *Id.*

6. The parties disputed when Employer had notice of Claimant's accident. Claimant maintains that he returned to Employer on February 25, 2008, and discussed filling out a claim with a human resources representative named Debbie in the presence of Steve Hanson, Claimant's assistant manager. Hr.Tr., pp. 46-48. Claimant could not recall Debbie's full name, but reports that she refused to allow Claimant to complete an accident report or notice of injury and indicated that Employer was not responsible for his preexisting condition. Hr.Tr., p. 46. Employer denies Claimant account. The Commission is not persuaded that Employer had notice of Claimant's accident on February 25, 2008. The contemporaneous medical records from Community Care, where Claimant first sought treatment for his back injury, do not indicate that Claimant injured his back at work. It appears that Claimant initially attempted to pursue benefits under a long-term disability coverage policy through his work, but that was unsuccessful. Hr.Tr., pp. 79-80. The timing of Claimant's claim for workers' compensation benefits suggests that Claimant may have not filed his claim until after he learned he had a surgical recommendation and would not receive long-term disability benefits. *Id.* The Commission finds that Employer had notice of Claimant's injury on March 4, 2008, when Claimant filed his notice of injury and claim for benefits.

7. Claimant filed a notice of injury and claim for benefits on March 4, 2008. Employer's adjusting company, Sedgwick, received Claimant's claim the following day, on

March 5, 2008. Lene O'Dell, Sedgwick claims adjuster, was assigned to Claimant's claim and initiated "three-point contact." O'Dell Depo. As part of the three-point contact, Ms. O'Dell attempted to speak with Employer, Claimant and Claimant's medical provider. *Id.* Ms. O'Dell testified that she contacted Employer's representative, Ron Smith, on March 5, 2008. *Id.* Ms. O'Dell also attempted to contact Claimant and left a message on March 5, 2008. *Id.* Ms. O'Dell contacted Tiffany at Community Care, who indicated that she would send medical records to Surety. *Id.* At that point, Ms. O'Dell was aware that Claimant might have some pre-existing issues, but had not spoken to Claimant or reviewed any medical records. *Id.* Ms. O'Dell made two more attempts to speak with Claimant, on March 6 and March 10, 2008. *Id.* Each time, Ms. O'Dell left messages with her contact information. *Id.* Claimant argues that he attempted to contact Surety, but was given evasive responses. Hr.Tr., p. 90. First, Claimant maintains that Surety told him that there was no file, then his claim was under investigation, and then the claim was denied. Hr. Tr., p. 90. When questioned, Claimant acknowledged that he could not recall when he exactly spoke with Surety. Hr. Tr., pp. 90-93. Ms. O'Dell does not have any notes indicating that Claimant called her back prior to his scheduled surgery, although it is standard procedure to note when a claimant calls. O'Dell Depo. On March 25, 2008, Surety received Dr. Walker's diagnosis of degenerative disc disease, stenosis and scoliosis with a recommendation for surgery. *Id.* Prior to that point, Surety was unaware that Claimant had already had his lumbar surgery on March 11, 2008. *Id.*

8. Surety received the first medical records in this case on March 25, 2008. *Id.* On March 26, 2008, Claimant and Surety finally spoke on the telephone. *Id.* Surety learned that Claimant had already undergone a major lumbar surgery and requested additional medical records. *Id.* Surety spoke with Ron Smith and confirmed that Claimant had not worked since

the March 11, 2008 surgery. *Id.* On April 4, 2008, Surety requested wage information from Wanda Porter. *Id.* On April 11, 2008, Surety received wage information from Employer. *Id.* Ms. O'Dell left Surety for another position and was replaced by Ms. Roxanne Hathaway Stevens. Ms. Stevens received authorization for an independent medical exam. *Id.* On May 5, 2008, Surety arranged for Dr. Knoebel to perform an IME. *Id.* Claimant and Surety spoke on May 9, 2008, and Claimant expressed his concerns about the status of his claim. *Id.* Surety informed him that an independent medical exam was scheduled for June 19, 2008. *Id.* Subsequently, Surety attempted to place Claimant on Dr. Knoebel's cancellation list for independent medical exam at an earlier date. *Id.* Surety's notes indicated that Dr. Knoebel would not be in his Idaho Falls office before June 19, 2008. *Id.*

9. On June 2, 2008, Dr. Grant Walker issued the following restrictions for Claimant of lifting maximum of 10-15 pounds, no repetitive lifting greater than 8 pounds, and no repetitive pushing, pulling, bending, stooping, crawling, kneeling, climbing or use of ladders, stairs, roofs. Claimant's Exh. 2.

10. On June 19, 2008, Dr. Richard Knoebel performed an IME. Dr. Knoebel reviewed Claimant's medical history, including Claimant's February 25, 2008 lumbar and thoracic spine x-rays, and March 6, 2008 lumbar MRI scan. Claimant's Exh. 24. Dr. Knoebel noted that Claimant's lumbar and thoracic spine x-rays indicated multilevel degenerative changes without any evidence of fracture, dislocation, spondylolisthesis or soft tissue swelling. *Id.* Claimant's lumbar MRI scan showed multilevel degenerative disc signal changes and disc collapse with significant disc bulging, also without any evidence of acute injury, fracture or dislocation consistent with an industrial accident or injury. *Id.* Dr. Knoebel found that

Claimant's need for the surgery was not related to the industrial accident. *Id.* On July 3, 2008, Surety denied Claimant's claim for workers' compensation based on Dr. Knoebel's report. *Id.*

11. On January 1, 2009, Dr. Grant Walker issued a causation opinion. Claimant's Exh. 13. Dr. Grant Walker acknowledges that Claimant had preexisting degenerative changes, which, according to Claimant, required him to take ibuprofen and stretch his back once or twice a year. *Id.* Dr. Grant Walker opined that Claimant's industrial accident was related to his injury, because the February 22, 2008 incident exacerbated his condition, and Claimant felt an increase in symptoms which did not subside. *Id.*

12. Claimant's counsel arranged for Dr. Gary Walker to evaluate Claimant for the purposes of a permanent impairment rating. Claimant's Exh. 22. Claimant reported to Dr. Gary Walker that he was very comfortable lifting 40 lbs, and continues to take ibuprofen and Tramadol to manage his ongoing pain. *Id.* Dr. Gary Walker concluded that Claimant's condition warranted a 15% whole person impairment rating, with 5% apportioned to pre-existing degenerative conditions. *Id.* Defendants do not dispute the total impairment assessment calculated by Dr. Gary Walker. However, Defendants dispute whether any of the impairment should be attributed to the industrial accident, given that Claimant's claimed accident was an acute event, and the impairment assessment is based on pre-existing pathology.

13. Claimant argues that PPD of 30%-40% whole man, inclusive of impairment is appropriate. Claimant's post-injury employment is with Employer in the home appliances department, where Claimant earns more than he did at the time of his injury. Claimant argues that his back condition affects his ability to stand for an extended period of time, and he is unable to take breaks. Claimant argues that he now has a 15-pound lifting restriction from Dr. Grant Walker, although Claimant reported being able to lift up to 40 pounds without any problems.

Claimant's testified that his back pain has not resolved, and he misses about four days of work each month, due to his condition.

14. Claimant's surgical and post-surgical treatment resulted in medical bills totaling over \$400,000.00. Defendants' Exh. L. Claimant requests \$339,961.39, representing the amount invoiced for his hospital stay. Claimant's Exh. 16. Claimant's surgery was billed under his private health carrier, Blue Cross, and Claimant paid the appropriate deductibles and co-payments to Blue Cross. Ms. Hazelbush, Bingham Memorial Hospital's billing director, and Mr. James Lowry, Director of Surgical Services, who handles the pricing of inpatient services, testified about hospital billing practices. The testimony established that Bingham Memorial Hospital's invoice is not a reflection of its expectation of payment for the services involved, and that acceptance of the Blue Cross contract forbids the hospital from balance billing a patient for contractual reductions taken by Blue Cross. Hr.Tr., pp. 131-132, 139, 152. Against invoiced hospital bills in the amount of \$339,961.39, Blue Cross has paid an estimated \$29,674.75, to settle these bills. Hr.Tr., p.143. In all, Blue Cross has paid approximately \$90,000.00 to settle Claimant's medical bills. Hr.Tr., p. 144.

Pre-existing Condition

15. As to Claimant's previous medical history, Claimant remembers visiting a chiropractor in the early 1970s, but denied that a physician has ever treated him for low back pain prior to his accident. The lack of medical treatment does not mean that Claimant was problem-free prior to the appliance moving incident. Claimant reported that he experienced occasional low back pain, which he managed through stretching, ibuprofen and rest. The record also reflects that at the time he was evaluated by Dr. Knoebel, Claimant acknowledged that prior to the subject accident he had some difficulty with heavy lifting. Dr. Knoebel Depo., p. 12. The

medical record supports that Claimant had extensive degenerative disc problems in his back. Claimant filed a workers' compensation claim in 2004 for a left shoulder injury. Claimant's Exh. 1. Dr. David R. Warden III diagnosed Claimant with degenerative joint disease at the left acromioclavicular joint. *Id.* Claimant underwent physical therapy for his shoulder and was given a full work release on November 20, 2004. *Id.*

DISCUSSION

Claimant's industrial accident/injury

16. Idaho Code § 72-102(17)(b) defines accident 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." An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(17)(a).

17. As stated above, Claimant alleges that he was injured when moving a dryer at work on February 22, 2008. Claimant reportedly felt a sharp pain contemporaneous with moving the appliance. Claimant finished his shift, and retrieved other appliances for customers as needed. Claimant had February 23, 2008 off from work and took his family skiing. Claimant testified that he did not ski because of his back discomfort. Claimant returned to work on February 24, 2008 and completed a full shift. On Monday, February 25, 2008, Claimant went to work in the morning, but left early to seek treatment from Community Care for his back pain. Employer argues that Claimant's statements about how he gave notice to Employer cast doubt on whether an industrial accident actually occurred, because Claimant did not give notice until he received a surgical recommendation. Claimant argues that he gave Employer notice on February 25, 2008, prior to receiving Dr. Grant Walker's surgical recommendation. Employer disputes

that Claimant gave notice at that time and argues that it only became unaware of Claimant's industrial accident on March 4, 2008, when Claimant filed out his notice of injury and claim for benefits. The medical record from Claimant's February 25, 2008 visit does not mention that Claimant injured his back at work.

18. Claimant's testimony on giving notice to Employer prior to the filing of his notice of injury and claim for benefits is not persuasive. However, Claimant's testimony that he felt increased back pain after moving an appliance at work has been consistent and is persuasive on the matter. Claimant has shown that he suffered an industrial accident.

Causation and Medical care

19. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only his or her plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

20. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Idaho Code § 72-432(1) further permits an injured employee to

obtain treatment on their own, at the expense of the employer, if the employer fails to provide reasonable medical treatment for the industrial injury.

21. The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

22. In this case, Claimant sought treatment from Dr. Thompson at Community Care on February 25, 2008. Dr. Thompson referred Claimant to Dr. Eric Walker. Claimant's Exh. 12. Claimant canceled his appointment with Dr. Eric Walker, because Claimant had already made up his mind that he wanted surgical intervention. Hr.Tr., pp. 50-51. After some internet research and consultation with friends, Claimant made an appointment with Dr. Grant Walker. Hr.Tr., p. 52. Claimant had his first appointment with Dr. Walker on March 3, 2008, and a spine MRI on March 6, 2011. Claimant had a five-level fusion operation with Dr. Grant Walker on March 11, 2008. Claimant's Exh. 9. The crux of this case is whether Claimant is entitled to the five-level fusion he had on March 11, 2008, as a result of his industrial accident.

23. Dr. Grant Walker opined that Claimant's need for surgery was work-related on January 26, 2009. During Dr. Grant Walker's initial examination, Claimant was able to perform several objective tests without any difficulty or evidence of problems with lower extremity strength and reflexes. Dr. Walker Depo., pp. 37-40. However, Claimant was having muscle spasms in his lower back and reported increased pain. Dr. Walker Depo., p. 10. Claimant rated his pain on a scale of one to ten as a four on the day of Dr. Grant Walker's examination, and that

it had recently been as high as six. Dr. Walker Depo., p. 10. Claimant denied previous medical treatment for his low back condition, although he acknowledged using rest and ibuprofen to alleviate his symptoms. Hr.Tr., pp. 28-30. Claimant's medical exam demonstrated lumbar spine degenerative changes that were pre-existing, and not caused by an acute event, such as the industrial accident described by Claimant. Dr. Walker Depo., pp. 9-10. Dr. Walker acknowledged that Claimant's degenerative changes in his lumbar spine are not the result of Claimant's industrial accident. Dr. Walker Depo., pp. 10-11, 47. In fact, Dr. Walker was unable to identify any anatomic findings that were likely related to the subject accident. In the final analysis, the basis for Dr. Walker's opinion that Claimant suffered some additional injury as a result of the work accident is found only in the fact that Claimant suffered a significant and unrelenting (at least through the day of surgery) increase in his pain following the accident:

Q. You also note in this office visit note of Exhibit 013 of January 26, 2009, you offer an opinion as to whether or not his injury and the resultant surgery was related to the incident at work on February 22, 2008. Do you see that?

A. Yes. I said it is my opinion that was a symptomatic event that occurred on February 22nd, 2008, during his employment at Home Depot and that this symptomatic exacerbation was uncovered, which is to say that there may have been—well, not may. There was most certainly those degenerative changes at that location in the spine preexisted before Mr. Fife entered my clinic.

However, he had the symptoms associated with it that were small and that injury was kind of like the straw that broke the camel's back. There was a specific event that occurred, and that event, regardless of what the x-rays showed, was the point that led to these significant pain levels that the patient sought my help for.

. . . .

Q. Are we in agreement, Doctor, that the surgery that you performed was to address pathology which would have preexisted his industrial accident of February 22nd, 2008?

A. In part. The other part

Q. Well, explain to me precisely what pathology in his back you relate to the accident of February 22nd, 2008.

A. The symptomatology.

Q. No. What pathology in his back do you relate to . . .

A. Pain.

Q. I understand that symptomatology—I understand that angle.

A. There is no answer to your question. You know, you're basically saying, you know, point to the airplane in the sky with a bent finger. You can't point to an x-ray, an MRI, and say, you know, what was the reason based on this MRI or this x-ray that the patient had surgery.

Q. Well, sure, you can. I don't want to be argumentative. For example, Doctor, if we take the MRI findings of spinal stenosis, you would agree, would you not, that that's a condition that is degenerative in nature and developed over the course of time and not as a result of the accident of February 22, 2008?

A. Absolutely, I agree with you.

Q. Okay. And I understand your point. He was getting along okay with these preexisting problems until February 22, 2008, and something happened to increase his symptomatology. I'm following that.

A. Yes.

Q. Can you point to any objective pathological findings in any of the diagnostic studies that were done that specifically relate to a recent trauma as opposed to something degenerative?

A. No.

Dr. Walker Depo., pp. 20/14-21/9, 46/11-48/1.

24. From the foregoing, it seems that Dr. Walker believes that since Claimant experienced an increase in pain following the accident, it follows that this pain is the result of some physical injury too subtle to be imaged on any of the radiological studies. For this reason, Dr. Walker related the need for the five-level surgery to the subject accident. Granting, for the sake of discussion, that Dr. Walker is correct in concluding that Claimant suffered an unspecified

subtle injury as a result of the accident, which injury is responsible for increasing Claimant's pre-injury pain, does it necessarily follow that the need for surgery, and Claimant's post-surgical treatment is causally related to the subject accident? To answer this question it would be helpful to better understand the nature of the physical injury causing Claimant's pain. Dr. Walker's testimony is unclear, to the point of opacity, as to the actual nature of the injury which he claims is responsible for the need for surgery. Dr. Knoebel, however, has testified convincingly to the probable nature of the suspected injury. Dr. Knoebel accepted Claimant's testimony that Claimant's pain following the accident was much worse than the pain he experienced on a pre-injury basis. However, Dr. Knoebel also noted that there was neither radiological nor surgical evidence of an accident produced injury. As explained by Dr. Knoebel, the cause of low back pain in the absence of objective evidence of anatomic injury is somewhat mysterious. Dr. Knoebel Depo., p. 25, ll. 5-17. In this case, Dr. Knoebel proposed that in the absence of any objective evidence of injury, it is more likely than not that Claimant's increase in pain is a result of a nonspecific low back strain suffered as a result of the lifting incident of February 22, 2008. In other words, Dr. Knoebel believes that Claimant suffered a muscle strain as a consequence of the accident. *Id.* at p. 25, ll. 24 – p. 26, l. 9. We find this testimony persuasive.

25. With this understanding of the nature of Claimant's injury in place, we must next consider the question of whether or not Claimant's surgical treatment was necessitated because of his injury. In this regard, it is worth repeating that although Dr. Walker testified that surgery was recommended for Claimant only after he had failed conservative therapy, only seventeen days elapsed between the date of injury and Claimant's surgery. Moreover, there is nothing in Dr. Walker's testimony to support the proposition that surgery was performed on an emergency basis due to unbearable pain or to an acute radiculopathy. Although Dr. Knoebel does not

necessarily quarrel with the proposition that Claimant required multi-level surgery, his point is that the surgery that was performed is wholly related to Claimant's well documented pre-existing condition, and not to the low back strain which was caused by the subject accident. The surgery did not address, nor would it be expected to address, a non-specific low back strain, a condition better treated with conservative modalities. Dr. Knoebel's testimony that Claimant was not given a meaningful trial of conservative therapy is persuasive. Dr. Knoebel would have expected Claimant to improve with conservative therapy, and eventually return to his baseline level of discomfort. As Dr. Knoebel has recognized, the condition for which surgery was performed is distinct from the condition that is Claimant's true pain generator. Said another way, the evidence fails to establish that the work accident contributed to the condition for which Claimant required multi-level back surgery. Claimant may have needed back surgery, but not for a work related injury. For his work injury, Claimant required conservative treatment which was denied him in the rush to surgery. That Claimant may have experienced improvement following surgery does nothing to prove his case, since the normal course of a low back sprain/strain is that it resolves over time. Claimant's pain likely resolved quite apart from the surgery.

26. Claimant has not shown that the surgery or any of its residual effects is related to the industrial accident, or that the industrial accident aggravated his underlying condition. Claimant has not shown that his five-level fusion was reasonable medical care for his industrial accident. Claimant has not shown that his industrial accident permanently aggravated his underlying degenerative back condition. Claimant has shown that he was entitled to the February 25, 2008 medical visit with Dr. Thompson at Community Care.

TPD/TTDs

27. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Generally, a claimant’s period of recovery ends when he or she is medically stable. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

28. Claimant missed part of a work day on February 25, 2008, when he sought medical care with Dr. Thompson at Community Care. Thereafter, Claimant continued to work until his March 11, 2008 surgery, which the Commission finds is unrelated to Claimant industrial accident, and unreasonable care for Claimant’s work injury. Therefore, Claimant is not eligible for TTD benefits.

PPI/PPD

29. Claimant received a 15% impairment rating from Dr. Gary Walker, with 5% attributed to pre-existing conditions. Dr. Gary Walker’s analysis was based on the consequences of Claimant’s multi-level fusion, which the Commission finds is non-compensable, and unrelated to Claimant’s industrial accident. Certainly, Claimant’s multi-level fusion surgery did not go as expected, and Claimant had major complications and residual pain from his degenerative back condition. However, Claimant has not demonstrated any entitlement to PPI/PPD as a result of the industrial accident.

30. Because we have not found that the Claimant’s surgical treatment is causally related to the subject accident, we do not reach the interesting question of whether this case is one to which the rule of *Neel, supra*, would apply.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has shown that he is entitled to the medical care of the February 25, 2008 visit with Dr. Thompson at Community Care. Claimant has not met his burden of showing that the medical care connected with his five-level fusion was causally related to the industrial accident or that his industrial accident aggravated his preexisting degenerative condition.
2. Claimant has not shown his entitlement to PPI/PPD as a result of his industrial accident.
3. All other issues are moot.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

IT IS SO ORDERED.

DATED this __8th__ day of June, 2010.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2010 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon:

JAMES D HOLMAN
2635 CHANNING WAY
IDAHO FALLS ID 83404

W SCOTT WIGLE
JEFFERSON PLACE, SUITE 200
350 NORTH 9TH ST
PO BOX 1007
BOISE ID 83701

cs-m/cjh

_____/s/_____