BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH E. GODFREY, Claimant, v. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, Self-Insured Employer, Defendant.	)	**IC 2005-012945** **2009-028453** **2007-020643** **2008-012881** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 20, 2011

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Rinda Just. On July 19, 2010, this case was reassigned to the Commissioners. Commissioners Maynard, Limbaugh, and Baskin conducted the October 13, 2010 hearing in Idaho Falls, Idaho. Robert Beck represented Claimant. Alan Gardner represented Employer. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing briefs. The case came under advisement on January 21, 2011. It is ready for decision.

ISSUES

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

1. Whether or not a timely claim under Idaho Code § 72-701 was filed for an injury allegedly occurring February 4, 2008.

2. Whether or not there are any actions that may have tolled the running of the statue of limitations of Idaho Code § 72-701 pertaining to the claim;

3. Whether or not an injury on April 2, 2008, "arose out of" Claimant's employment; and

4. Whether and to what extent Claimant is entitled to attorney fees.

CONTENTIONS OF THE PARTIES

At issue in this case are two alleged industrial accidents suffered by Claimant, one on February 4, 2008 while and the other on April 2, 2008.

Claimant argues that he filed his complaint prior to receiving notice of his claim being denied; thus, any reasonable argument for a statute of limitations defense is foreclosed. Claimant also requests attorney fees for the unreasonable denial of impairment benefits as awarded by Defendant's IME, Dr. Knoebel.

Defendant contends that Claimant did not timely notify Employer or make a claim regarding his February 4, 2008 accident and as such it is barred by Idaho Code § 72-701. Defendant also avers that the April 2, 2008 industrial injury did not arise out of Claimant's employment because his stenosis, disc bulge, and disc protrusion were present and symptomatic in the months prior to the April 2, 2008 accident. Finally, Defendant asserts that attorney fees are not warranted because it reasonably investigated Claimant's April 2, 2008 claim.

EVIDENCE CONSIDERED

The record in this instant case consists of the following:

1. Testimony at hearing on October 13, 2010, from Jeffrey Jardin, Claimant and Linda Godfrey.
2. Claimant's Exhibits A through K admitted at hearing.
3. Defendant's Exhibits 1 through 5, and 8 admitted at hearing.
4. The pre-hearing depositions of Lene O'Dell and Heather Foster taken April 19, 2010, admitted by stipulation filed October 28, 2010.
5. The Commission's legal file.

Claimant filed a Motion to Strike and Motion for Telephonic Hearing asking the Commission to strike significant portions of Defendant's response brief. The Commission does not find oral argument necessary and hereby denies Claimant's Motion to Strike. As addressed below the Commission agrees that the issue of notice was conceded by Defendant at hearing. Regarding any alleged misleading factual and legal discrepancies, the Commission will base its decision on the record and applicable law.

All deposition objections are overruled. After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACTS

1. Claimant was 56 years old at the time of hearing and resided in Ammon, Idaho. Claimant's past work experience includes employment as a mechanic and the manager of a rental center. In 1996 he began working for Employer as a building engineer. After approximately five years, Claimant was promoted to the building engineer senior. In this position, Claimant supervised other building engineers and the custodial department.

2. Claimant has had four prior back surgeries, including fusions at L4-5 and L5-S1. Claimant continued to work after each of these surgeries without significant problems. Claimant did not recall any restrictions given by his previous doctors.

3. Claimant's first accident at issue in this matter occurred on February 4, 2008, when he was working on a leaky boiler valve, hereinafter the "Boiler Accident." Claimant had to lie on top of the boiler to loosen some very tight bolts. When Claimant tried to get up his back was very sore. Claimant told his supervisor, Jeff Jardin, that Claimant's back was hurting. Claimant and Mr. Jardin decide to take a wait and see approach. Claimant wanted to take it easy for a few days to see if his back would get better. He did not miss any work.

4. A few weeks later, Claimant testified that he noted the onset of pain while getting out of bed.[1] He went to Allied Health Care on February 28, 2008. The medical record states Claimant's chief complaint as "yesterday walking" with pain in his left hip, knee and leg. Cl. Ex. F. 152. The note also lists shoveling snow four weeks ago as an aggravating factor. Claimant was given an electromyographic scan (EMG), a paraspinal thermal scan, and a lumbar spine x-ray. The x-ray read by Steven Larsen, M.D., found 1) postsurgical changes of the lumbar spine with laminectomy and previous fusion at L5-S1 with a laminectomy defect at L4, 2) mild curvature of the lumbar spine with associated degenerative changes, 3) wedge compression deformity of L1 with approximately 20% loss of vertebral body height which appears new compared to the 2004 MRI, and 4) previous cholecystectomy (surgical removal of the gallbladder).

5. Claimant received manual therapy on February 29, as well as March 3, 5, 10, 13, 14, 17, 19, 21, 24, and 26. Claimant testified that he was not getting better nor was he getting any worse. Claimant did not inform his Employer that he was receiving any medical treatment, nor did Employer have any independent knowledge that Claimant was receiving medical treatment prior to the April 2, 2008 accident. None of the medical records note an accident while working on a boiler, but Claimant testified that he did inform his providers about the Boiler Accident.

6. Claimant had an MRI on March 28, 2008. The MRI displayed 1) Claimant's previous fusion surgeries at L4-5 and L5-S1, 2) a large, left lateralized posterior disc protrusion

[1]There is disagreement about when this occurred. Claimant insists that this incident occurred between the accidents of February 4, 2008 and April 2, 2008. However, in her summary of Claimant's April 16, 2008 recorded statement, Lene O'Dell reported that Claimant described the incident as occurring before the February 4, 2008 accident. A similar history was recorded by Dr. Marano on April 15, 2008, and by Dr. Knoebel in his report.

(almost an extrusion) at L3-4, 3) a diffuse, posterior disc bulge at L2-3 along with disc space narrowing, 4) a small, right lateralized posterior disc protrusion superimposed on the diffuse posterior disc bulge at T12-L1, and 5) an anterior compression deformity of the L1 vertebral body.

7. On April 2, 2008, Claimant bent over to repair a leaky sink and felt a sharp pain in his back and down his left leg – the Sink Accident. He fell to the floor in pain. A patron found Claimant, helped him off the floor and down the stairs. Claimant reported the incident to Mr. Jardin and then went home for the day. Claimant continued doing light duty work for Employer.

8. Claimant attended another chiropractic session at Allied Healthcare on April 2, 2008. The medical record for that session states that Claimant bent over to fix a sink and suffered from pain and spasms.

9. Claimant was referred to Stephen Marano, M.D., and a consultation was done on April 15, 2008. The medical report from that appointment states that Claimant began having pain about six weeks ago and that he could not associate any injury or trauma with the onset of this pain. Claimant testified that he talked with Dr. Marano about the Boiler Accident and the Sink Accident. Claimant received an L3-4 epidural steroid injection on April 21, 2008 which gave Claimant some short term relief but ultimately Claimant opted for surgery.

10. On May 14, 2008, Dr. Marano performed left L2-3 and L3-4 laminectomies with disc excision and neural decompression. Claimant did not return to work after the surgery. Claimant participated in physical therapy and his back recovered well, but he had on-going left leg weakness which resulted in falling, left quadriceps atrophy, and left knee complaints.

11. On October 9, 2008, Claimant had another MRI which showed post-surgery improvement at the L3-4 disc herniation but Claimant had continuing left leg pain and weakness.

12. On December 16, 2008, Lynn Stromberg, M.D., evaluated Claimant and recommended an epidural injection. The injection helped for a short time. Dr. Stromberg could not assist with any treatments to help Claimant's leg weakness. Dr. Stromberg referred Claimant to Shane Mangrum, M.D.

13. Claimant treated with Dr. Mangrum during April 2009, and on May 4, 2009, Dr. Mangrum found Claimant at MMI regarding his May 2008 surgery.

14. Claimant filed a complaint on September 4, 2009 for the April 2, 2008 Sink Accident. Claimant filed a complaint on November 5, 2009 for the February 4, 2008 Boiler Accident.

Dr. Knoebel IME – June 18, 2009

15. Dr. Knoebel was hired by Defendant to perform an IME of Claimant and assess an impairment rating. The report states that it cannot be opined, with a reasonable degree of medical probability that Claimant's low back pain complaints were caused simply by bending over. Claimant's L3-4 left disc extrusion was noted on the MRI prior to the April 2, 2008 accident and Claimant was noted to have stenosis secondary to degenerative changes at that level, not consistent with an acute accident or injury. Dr. Knoebel did find that Claimant incurred 14% whole person impairment due to his L3-4 condition.

16. The report states the sequence of pain causing events in the following order: pain getting out of bed, then Boiler Accident, finally Sink Accident. Claimant testified that while he told Dr. Knoebel about all three events, Claimant did not have this kind of problem with his lower back prior to the February 4, 2008 the Boiler Accident.

Dr. Ward IME – December 14, 2009

17. Robert Ward, D.C., M.D., was hired by Claimant to perform an IME of Claimant. Dr. Ward said that he would consider the Boiler Accident and the Sink Accident to be one significant accident or one injury. He opined that the March 28, 2008 MRI noted a disc herniation which is related to the Boiler Accident and then when Claimant stood up from working on the faucet it caused an increase in the injury causing the additional symptoms. Dr. Ward reports that damage was done by the Boiler Accident and if Claimant had not straightened up from fixing the sink he would have done something else to cause the additional damage. But the totality of his report finds that both accidents caused the need for the surgery.

Defendant's actions

18. During all relevant times, Jeffrey Jardin was Claimant's supervisor at Employer's Idaho Falls LDS temple. Mr. Jardin was aware that Claimant had had prior back surgeries and back problems. Mr. Jardin testified that Employer's policy was to report any injury. Mr. Jardin testified that in February 2008, Claimant mentioned that he wrenched his back or twisted it while working on the boiler. Mr. Jardin and Claimant agreed to wait and see how Claimant felt before they reported the incident as a workers' compensation claim. Mr. Jardin did report the Sink Accident as a workers' compensation injury. Between the February 4, 2008 Boiler Accident and the April 2, 2008 Sink Accident, Mr. Jardin does not remember Claimant reporting that he was receiving medical treatment or missing work because of his back.

19. Lene O'Dell was the first claims adjuster to handle Claimant's case. Ms. O'Dell started her initial process on April 10, 2008. Ms. O'Dell investigated the claim by speaking with Claimant on April 16, 2008. The recorded statement is not in evidence. However, Ms. O'Dell's contemporaneous summary of Claimant's statement reflects the following:

> Claimant states about 8 weeks ago he was getting out of bed and felt an immediate pain in his back. He stated it got better and he didn't seek any treatment. About 3-4 weeks ago he was at work working on the boiler and as he was doing that he felt pain in his back, like a muscle was pulled. Again thought it would get better, his pain leveled out. On 04/02/08 he was bent over working on a faucet that was not working and as he was doing this he felt immediate pain in the back and down the leg and actually caused him to fall to the ground.
> Claimant's Ex. E., p. 135.

Claimant testified that he reported the sequence of events differently to Ms. O'Dell. Claimant maintains that the Boiler Accident came first, then the pain getting out of bed, and finally the Sink Accident.

20. Ms. O'Dell accepted Claimant's claim on April 18, 2008, noting that the injury was confirmed to have occurred within the course and scope of employment. No payments were made by Defendant for any bills that predated the April 2, 2008 accident. Ms. O'Dell stopped working on Claimant's case after April 18, 2008, and Heather Foster became the adjuster on the claim.

21. After her deposition, Ms. Foster explained that because she knew Claimant had prior back problems, she attempted to gather Claimant's prior medical records. Foster Depo., pp. 15-16. None of the medical records that she subsequently received referencing treatment provided prior to April 2, 2008, made any reference whatsoever to a boiler accident of February 4, 2008. On July 10, 2008, Ms. Foster received a billing statement for the MRI of March 28, 2008. Defendant did not pay this bill, just as it did not pay any other bills for services rendered prior to April 2, 2008. Again, nothing in any of the medical records generated prior to April 2, 2008 could be said to create in Ms. Foster an obligation to make additional inquiries into whether or not Claimant had suffered a compensable accident on February 4, 2008. Simply, the medical records generated during this time frame make no reference whatsoever to the occurrence of the Boiler Accident.

22. Defendant sent Claimant to Dr. Knoebel for an IME to obtain a PPI rating. Ms. Foster received Dr. Knoebel's report of June 18, 2009 finding Claimant stable and rating his impairment at 14% of the whole person. Ms. Foster initiated the payment of impairment benefits to Claimant on July 1, 2009. Dr. Knoebel's report did not prompt Ms. Foster to do additional investigation into the claim.

23. Claimant was deposed on October 28, 2009. Following Claimant's deposition Defendants stopped paying Claimant's impairment benefits as rated by Dr. Knoebel. The denial letter, dated December 15, 2009, states "[f]ollowing your deposition we continued our investigation, in particular regarding conditions existing prior to the 4/2/08 incident. Our investigation has now been completed and shows that your problem arose prior to 4/2/08 and under circumstances questionable to the workplace." Claimant's Ex. C. Ms. Foster testified that prior to Claimant's deposition she had not received any information about a claim made by Claimant for an accident in February of 2008.

24. In a December 15, 2009 letter, Defendant denied Claimant's claim and stopped paying benefits.

25. The Commission finds that Claimant's testimony was very credible. His recollections and explanations of the accidents and medical treatment were consistent and reliable. Claimant was forthright with his medical providers about his past surgeries and low back problems. Dr. Knoebel noted that Claimant's presentation was credible, and Dr. Ward commented that Claimant was extremely sincere in his efforts. Claimant was not evasive and cooperated with all parties at hearing.

DISCUSSION

Idaho Code § 72-701

26. The first issue to be addressed is whether or not a timely claim under Idaho Code § 72-701 was filed for an injury allegedly occurring February 4, 2008.

27. Idaho Code § 72-701 provides that "[n]o proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident." Idaho Code § 72-702 further provides that "[s]uch notice and such claim shall be in writing." Additionally, Idaho Code § 72-704 provides that lack of notice shall not be a bar to proceeding if the employer had knowledge of the injury.

28. Mr. Jardin and Claimant testified that they discussed the Boiler Accident and decided to wait and see how Claimant felt before taking any action. This conversation established that Employer had actual knowledge of the Boiler Accident on February 4, 2008, thus excusing the requirement of written notice under I.C. § 72-701.[2]

29. Although I.C. § 72-704 provides a mechanism by which an injured worker's failure to give written notice may be excused under appropriate circumstances, the provisions of I.C. § 72-704 do not pertain to the injured worker's obligation to make a written claim within one year following the occurrence of the subject accident. It is undisputed the Claimant failed to make the written claim required by I.C. § 72-702 within one year subsequent to the occurrence to the February 4, 2008 accident. Nor, is the Commission persuaded that the final sentence of I.C. § 72-701 excuses the Claimant's obligation to make a timely written claim.

[2] Counsel for Defendant conceded that notice of the February 4, 2008 accident was given to Employer. Hr. Tr., p. 22.

30. The last sentence of Idaho Code § 72-701 provides: "[i]f payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required." The Supreme Court has held that the final sentence of Idaho Code § 72-701 was intended to apply only in situations where the employer acknowledges liability, not in situations where the employer ceases payment of benefits to contest liability. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 606, 944 P.2d 1365, 1369 (1997). This provision is inapplicable in this case because Defendants paid benefits for Claimant's medical problems stemming from his April Sink Accident. Once Defendants learned that medical treatment might be related to the Boiler Accident, they discontinued compensation to Claimant. The medical records do not clearly describe the accident which created the need for the treatment. It was not until Claimant's deposition that Defendant viewed Claimant's injury as having two distinct accidents. Further, Claimant did not file an application requesting a hearing regarding the February 4, 2008 accident until November 5, 2009, well beyond the one-year period.

31. Although Claimant has failed to demonstrate that he satisfies any of the means by which his failure to make a written claim within the required may be excused, there exists a separate mechanism by which the one year limitation may be tolled. I.C. § 72-602 requires an employer to file an employer's first report no later than ten days following the occurrence of any accident which (a) requires treatment by a physician, or (b) results in the absence from work for one day or more. Where an employer is aware of the occurrence of such an accident, yet "willfully fails" to file the required employer's first report, I.C. § 72-604, specifies that the limitation of I.C. § 72-701 shall not run against the claimant until such a report has been filed.

32. The Idaho Supreme Court has repeatedly stated that "willful implies a conscious wrong." Smith v. Idaho Dept. of Employment, 107 Idaho 625, 628, 691, P2.d 1240, 1243 (1984). The Court has held that misunderstanding or otherwise negligent omission to report required information will not support a finding that such an omission or failure to report is willful. Bainbridge v. Boise Cascade Plywood Mill, 111 Idaho 79, 82, 721 P.2d 179, 182 (1986).

33. Here, before the question of whether or not employer "willfully failed" to file an employer's first report is even reached, it must be determined whether employer was aware that the February 4, 2008 accident was one which obligated it to file the I.C. § 72-602 report. Again, the obligation to file an I.C. § 72-602 employer's first report does not arise until claimant suffers an accident which (a) results the need for medical treatment, or (b) results in the loss of at least one day of work. It follows that employer must have knowledge that one of these two events has occurred before it has an obligation to take the action required by I.C. § 72-602. Here, it is manifest that although employer, in the person of Mr. Jardin, had knowledge that the accident occurred, he did not ever have knowledge that the February 4, 2008 accident caused Claimant to require medical treatment, or required Claimant to miss at least one day of work. Similarly, nothing that Claimant said to Ms. O'Dell at the time of the April 16, 2008 recorded statement was sufficient to apprise her of the fact that Claimant had suffered an accident on February 4, 2008 which caused him to require medical treatment, or which caused him to miss time from work. Assuredly, Ms. O'Dell did hear Claimant say something about an incident with a boiler. However, the Commission concludes that Claimant did not say enough to put Ms. O'Dell on notice that sufficient to trigger her obligations under I.C. § 72-602.

34. Of course, Employer's obligation under I.C. § 72-602 did not end with the taking of the recorded statement on April 16, 2008. Rather, Employer had an ongoing obligation to file

an employer's first report at such time as it did learn of facts sufficient to implicate the I.C. § 72-602 filing requirement. However, as set forth in the testimony of Heather Foster, never did Employer's subsequent investigation reveal any facts sufficient to put Employer on notice that Claimant had ever required medical treatment as a consequence of the February 4, 2008 accident, or had ever missed work as a consequence of that accident. Indeed, it was not until the Claimant was evaluated by Dr. Knoebel on June 18, 2009 that Employer was arguably put on notice of facts suggesting that Claimant had suffered a low back injury on February 4, 2008 sufficient to cause him to require medical treatment.

35. The report states that Claimant had a low back injury while working on a boiler as well as sharp back pain while getting out of bed 6 weeks prior to the Sink Accident. The report goes on to say that Claimant's back pain was significantly increased when bending over to fix a sink. Dr. Knoebel's IME report comes the closest to giving the claims adjuster enough information to trigger the requirement of filing a First Report of Injury. However, by the time of Dr. Knoebel's report the one year period within which Claimant had to file a written claim for the accident of February 4, 2008 had long expired. That Dr. Knoebel's report arguably put Employer on notice that Claimant had required medical treatment for the accident of February 4, 2008, sufficient to implicate Idaho Code § 72-602 obligations, does not resurrect the claim where that information was received after the running of the Idaho Code § 72-701 limitation period.

36. At no point, prior to the end of the one-year statute of limitations, was the Surety aware of the occurrence of the triggering events of Idaho Code § 72-602(1). Surety had no obligations to file without knowing that Claimant suffered an industrial injury requiring treatment by a physician or resulting in an absence from work. As set forth above, there was no

understanding that Claimant sought medical treatment or missed any work due to the Boiler Accident. The Boiler Accident, as it was known to the adjusters working Claimant's case, was not the type of accident requiring the filing of a First Report of Injury.

37. Even were we to assume that the information available to Defendant prior to the June 18, 2009 IME was of a type that might have caused a hypothetical "reasonable adjuster" to pose additional questions to Claimant concerning the February 4, 2008 accident sufficient to cause him to reveal his current contentions about the significance of the February 4, 2008 accident, we cannot say that the adjuster's failure to undertake further investigation could be construed as a "willful failure" to file an employer's first report or conduct the type of investigation that might reasonably apprise the adjuster of facts sufficient to require the filing of an employer's first report. Simply, on the basis of the information that was received by Lene O'Dell and Heather Foster within the relevant time frame, they committed no conscious wrong by failing to do more than they did in investigating the February 4, 2008 accident.

38. Claimant failed to prove he made a timely claim for compensation regarding his February 4, 2008 accident, and his claim is barred pursuant to Idaho Code § 72-701. Claimant failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by Idaho Code § 72-604.

Arising out of the employment

39. In order to qualify for workers' compensation benefits, a claimant must establish that he or she was injured in the course of employment.

> " 'It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be

> performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment.' " Kiger v. Idaho Corp., 85 Idaho 424, 430, 380 P.2d 208, 210 (1963), quoting Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736; accord, Comish v. Simplot Fertilizer Co., 86 Idaho 79, 86, 383 P.2d 333, 338 (1963).

Although the law is to be liberally construed in favor of claimants, the burden is on claimants to prove by a preponderance of evidence that the accident arose out of and in the course of employment. Reinstein v. McGregor Land & Livestock, 126 Idaho 156, 158, 879 P.2d 1089, 1091 (1994) citing Basin Land Irr. Co. v. Hat Butte Canal Co., 114 Idaho 121, 124, 754 P.2d 434, 437 (1988).

40. A claimant is not required to establish a specific time and place of injury. Hazen v. Gen. Store, 111 Idaho 972, 729 P.2d 1035 (1986). Rather, an accident need only be reasonably located as to the time when and the place where it occurred. Spivey v. Novartis Seed, *Inc.*, 137 Idaho 29, 43 P.3d 788 (2002). To prevail on a worker's compensation claim, a claimant must establish that an accident happened by a preponderance of the evidence. Stevens-McAtee v. Potlatch Corp., 145 Idaho 325, 179 P.3d 288 (2008) (citing Painter v. Potlatch Corp., 138 Idaho 309, 63 P.3d 435 (2003)). The claimant must prove to a reasonable degree of medical probability that the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. *Id*. (citing Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211 (2000)). Probable is defined as "having more evidence for than against." *Id*. (citing Soto v. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994)). A preexisting

disease or infirmity does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as it finds him. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

41. Accordingly, we are focused on if Claimant's low back injury can be seen to have followed as a natural incident of his work in light of the whole situation. Defendant argues that Claimant's April 2, 2008 injury did not arise out of his employment because he had low back symptoms prior to that time, he had been receiving treatment for back pain, he was functionally limited by his back pain, and he had objective findings of a disc bulge, degenerative stenosis, and a large disc protrusion five days prior to his April 2, 2008 accident.

42. Claimant's treating doctor, Dr. Marano, was not deposed or asked to opine on the issue of causation. Accordingly, we are left with the contemporaneous medical records and the reports of Drs. Ward and Knoebel.

43. Claimant was seen at Allied Healthcare on April 2, 2008. The corresponding medical record states that Claimant bent over to fix a sink and suffered instant pain and spasms. The record from Claimant's first appointment with Dr. Marano does not note an accident. In fact it states that Claimant began having pain about six weeks ago and that he could not associate any injury or trauma with the onset of this pain. But Claimant testified that he talked with Dr. Marano about the Boiler Accident and the Sink Accident. Additionally, Dr. Knoebel's report notes that Claimant disagreed with Dr. Marano's note and its lack of detail about the accidents. Claimant told Dr. Knoebel that Claimant had severe back pain develop when he bent over the sink at work.

44. As discussed prior, Claimant is generally credible. While some medical records are not complete with descriptions of the Sink Accident, where Claimant testified that he discussed the accident with the medical provider, the Commission finds that the Claimant did in fact report the accident. This conclusion is supported by the very first medical appointment that Claimant attended, post Sink Accident, which states that Claimant was in severe pain from an accident with a sink.

45. Dr. Ward's report establishes that Claimant's injury was the creation of both the Boiler Accident and the Sink Accident.

Dr. Ward states:

> Much of the difference of opinion that was found between the report of Dr Knoebel and the one I did was what was the date of the original injury. He listed a pre-existing impairment due to the injury of 2/2008 and did not ascribe any of it to the incident of 4/2008. However, they were more of less 1 in the same incident in that they both led to and caused the surgery. If the examinee had not straightened up from putting in the faucet and had the excruciating pain, he would have done something else that caused it. The damage was already done.
> Claimant's Ex. K.

46. While the Commission takes issue with Dr. Ward's opinion that the Boiler Accident and the Sink Accident are really one accident, the relevant opinion is that Claimant's Sink Accident pushed the need for surgery. The Sink Accident increased Claimant's pain symptoms and he reported the accident with associated pain and spasms the same day.

47. Dr. Knoebel performed an IME report on June 18, 2009 for the purpose of establishing an impairment rating. The report's causation section stated:

> It cannot be stated with a reasonable degree of medical probability that the patient's low back pain complaints when seen by Dr. Marano on 4/08 were caused, contributed to or permanently aggravated by his work. The patient simply bent over at work. This is an activity of daily living. It was not an extraordinary event, accident or injury.
> Claimant's Ex. J.

48. In rendering their opinions, both Dr. Ward and Dr. Knoebel have wandered somewhat afield from their particular area of expertise, and into the realm of the legal. For his part, Dr. Ward has concluded, possibly due to their close proximity in time, that the accidents of February 4, 2008 and April 2, 2008 constitute one "incident." However, as explained above, it is clear that under the workers' compensation laws of this state, both accidents must treated as separate legal accidents. The help which the Commission hopes to obtain from medical experts lies in sorting out the medical consequences of each mishap. Dr. Ward does the Commission no service by taking it upon himself to simplify the analysis by employing the artifice of a single incident.

49. Dr. Knoebel, too, made a legal conclusion when he stated that the April 2, 2008 accident, as described by Claimant, did not constitute an "extraordinary event, accident or injury."

50. Contrary to Dr. Knoebel's statement that Claimant could not have suffered an accident by simply bending over, the Supreme Court has held that some specific event or sudden onset of pain such as the act of rising from a chair or the act of reaching a hand out over a conveyor belt is sufficient to establish an accident. Page v. McCain Foods, Inc., 141 Idaho 342, 109 P.2d 1084 (2005); Spivey v. Norvatis Seed, Inc., 137 Idaho 29, 43 P.3d 788 (2002). Further, the parties do not dispute that Claimant suffered an accident in the course of his employment.

51. Dr. Knoebel went on to state:

> The patient's pain complaints were noted to be significant and his functional disability noted to be significant prior to this reported 4/2/08 industrial event as noted in the patient's functional inventory of 2/28/08. The patient also was being seen at Allied Healthcare for low back pain. He was being treated with manipulation. He had a prior MRI scan ordered and done, with referral to Dr. Marano, all prior to the subject 4/2/08 incident.
> In keeping with these being prior symptoms, Dr. Marano also noted that the MRI scan of the lumbar spine had been done on 3/28/08, 4 days prior to the industrial

> incident reported. Already at that time a large left disc extrusion at L3/4 was noted. This was the reason for the left sided discectomy at L3/4 that was done. This was a pre-existing, symptomatic problem present prior to the 4/2/08 incident. The patient's decompression at L2/3 also was not reasonably secondary to the subject industrial incident. The patient was noted to have stenosis secondary to degenerative changes at that level, not consistent with an acute accident or injury. Claimant's Ex. J.

52. Of course "[a]n employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002); Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

53. The MRI clearly shows that Claimant had a disc protrusion at L3-4 and a disc bulge at L2-3. But the evidence establishes that Claimant's later Sink Accident caused an immediate and severe increase in symptoms which left Claimant on the floor and requiring help to get up and walk. When Claimant received medical treatment on the day of the Sink Accident a new symptom of spasms was recorded, as well as increased pain.

54. Additionally, the Commission finds the opinion of Dr. Ward more persuasive than that of Dr. Knoebel. Even though Dr. Ward impermissibly concluded that the accidents of February 4, 2008 and April 2, 2008 constituted a single incident, his report clearly reflects his belief that the accident of April 2, 2008 did cause additional injury to Claimant's lumbar spine. As developed above, the Commission has found Claimant's testimony concerning the abrupt change in his symptomatology following the April 2, 2008 accident to be credible. This testimony, coupled with Dr. Ward's opinion, leads the Commission to conclude that Claimant did suffer additional injury to his lumbar spine as a consequence of the April 2, 2008 accident. Dr. Knoebel's opinion that the simple act of bending over at a sink could not have been an

accident calls into serious question his conclusion that Claimant's April 2, 2008, work injury did not accelerate his need for surgery. Medical experts are not expected to be legal experts. However, here a medical expert's testimony clearly reveals a personal belief contrary to Idaho workers' compensation law on an issue highly material to his opinion. The Commission finds Dr. Knoebel's opinion unpersuasive.

55. The Commission, when considering the Drs. Knoebel and Ward opinions as well as all the medical records and relevant testimony, finds that Claimant's low back condition was permanently aggravated by the April 2, 2008 accident.

56. The Commission finds that Claimant has shown that his April 2, 2008 injury "arose out of" his employment. Claimant has proven to a reasonable degree of medical probability that his low back injury was permanently aggravated by his April 2, 2008 industrial accident.

Attorney fees

57. The next issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant seeks attorney fees for the unreasonable denial of impairment benefits as awarded by Defendant's IME, Dr. Knoebel.

58. Attorney's fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> *Attorney's fees -- Punitive costs in certain cases.* -- If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing

> to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

59. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

60. Claimant is not entitled to an award of attorney fees for Defendant's denial of impairment benefits. Medical records created before Claimant's April 2, 2008 accident show that Claimant suffered from low back pain similar to what he experienced after the April 2, 2008 accident. Claimant's deposition clarified the existence of two distinct accidents. Once Defendant's fully investigated the two accidents they made a decision to terminate impairment benefits because Claimant had not filed a claim on the February 4, 2008 accident. While ultimately the Commission found that Claimant's April 2, 2008 accident did arise out of his employment, Defendant's position was not unreasonable.

ORDER

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

1. Claimant failed to prove he made a timely claim for compensation regarding his February 4, 2008 accident, and his claim is barred pursuant to Idaho Code § 72-701. Further, Claimant failed to prove that the bar to his claim posed by Idaho Code § 72-701 is averted by Idaho Code § 72-604.

2. Claimant has proven that his April 2, 2008 injury "arose out of" his employment. Claimant has proven to a reasonable degree of medical probability that his low back injury was permanently aggravated by his April 2, 2008 industrial accident.

3. Claimant has not proven his entitlement to an award of attorney fees.

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

IT IS SO ORDERED.

DATED this __20th_____ day of ___April_____, 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 ___20th_____ day of _____April_____, 2011 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon:

ROBERT K BECK
3456 EAST 17TH STREET STE 215
IDAHO FALLS ID 83406

ALAN GARDNER
PO BOX 2528
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amw __/s/_____