

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JASON HAMMON,)
)
 Claimant,)
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 v.)
)
 CONTINENTAL STEEL, INC.,)
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 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2007-037893

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

Filed: March 3, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on June 26, 2009. Claimant, Jason Hammon, was present in person and represented by Michael McBride of Idaho Falls. Defendant Employer, Continental Steel, Inc., and Defendant Surety, Idaho State Insurance Fund, were represented by R. Todd Garbett of Preston. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on October 19, 2009.

ISSUES

The issues to be decided were narrowed at hearing and include:

1. Claimant’s entitlement to additional temporary disability benefits;
2. The extent of Claimant’s permanent partial impairment, if any;
3. Claimant’s entitlement to additional medical benefits;

4. The extent of Claimant's permanent disability, if any; and
5. Apportionment pursuant to Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant asserts that Defendants underpaid his temporary disability benefits from the time of his October 29, 2007, industrial accident through August 12, 2008, and that he is also entitled to total temporary disability benefits for the period from August 12, 2008, through September 16, 2008. He asserts that his increased lumbar and cervical symptoms are due to his industrial accident and seeks permanent impairment benefits of 5% of the whole person due to his lumbar spine injuries and 5% of the whole person due to his cervical spine injuries. Claimant requests \$3,731.51 for past medical expenses incurred and also requests further medical treatment including physical therapy, medications, and bilateral ulnar nerve decompression surgery. He claims substantial permanent disability due to his loss of wage-earning capacity.

Defendants acknowledge Claimant's industrial accident of October 29, 2007, but maintain that he has recovered therefrom. Defendants attribute Claimant's current cervical and lumbar symptoms to pre-existing conditions.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken June 4, 2009, and admitted as an exhibit at hearing;
3. Claimant's Exhibits 1 through 8, admitted at hearing;
4. Defendants' Exhibits 1 through 16, admitted at hearing;
5. Supplements to Defendants' Exhibits 12 and 17, admitted pursuant to the Commission's Order Granting Motion to Augment Record entered September 14, 2009;

6. The testimony of Claimant and Cynthia M. Robbins, taken at the June 26, 2009 hearing;
7. The post-hearing deposition of David C. Simon, M.D., taken by Defendants on July 15, 2009; and
8. The post-hearing deposition of Reed Ward, D.O., taken by Claimant on August 5, 2009.

All objections posed during the post-hearing depositions are overruled. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1968. He was 41 years old and had resided in Idaho Falls for three years at the time of the hearing. He is five feet eleven inches tall and weighed 321 pounds at the time of the hearing. Claimant graduated from Idaho Falls High School in 1987. After high school he worked for Pizza Hut, Wendy's, and Palisades Lodge Resort.

2. In 1988, Claimant moved to California and began working at an auto parts and tire center. In 1991, he returned to Idaho Falls where he worked for Checker Auto and Kirkham Auto Parts. Claimant subsequently moved back to California and worked at a Sears Automotive Center for two years. His duties generally involved counter sales. He also helped lift heavy auto parts, including engine blocks weighing up to 400 pounds. Claimant became a store manager and was responsible for training new employees, clearing tills, and making deposits. He worked at Sears from 1988 through 1993 and eventually earned \$13.00 per hour.

3. In approximately 1993, Claimant moved to Portland, Oregon where he became a car salesman. Claimant was a very successful salesman and earned \$40,000 to \$50,000 per year from 1993 through 1998. In 2000, Claimant became a Chevrolet service advisor. In 2001, he became a Ford service advisor, earning \$50,000 annually. He managed two auto service

departments. Claimant also worked part-time as a loan officer handling home mortgages. In 2002, he received his Automotive Service Excellence (ASE) certification.

4. Commencing in approximately 1994, Claimant began experiencing lumbar and thoracic back pain and muscle spasms. He has a family history of back problems and attributed his symptoms to family genetics. James Webb, M.D., treated Claimant with ibuprofen, physical therapy, and trigger point injections. Claimant's back pain gradually worsened over the next several years and Dr. Webb eventually prescribed Vicodin and hydrocodone. Diagnostic scans revealed degenerative disc disease. In addition to chronic back pain, Claimant also had episodes of viral congestive heart failure and hypoglycemia requiring medical treatment, including prescription medications.

5. In January 2006, Claimant moved back to Idaho Falls and began working as a Ford service manager and service advisor. The position required no heavy lifting, however he was on his feet for 10-12 hours per day, which aggravated his back pain. Claimant obtained a mat and also used a stool to ease the stress of prolonged standing. He earned approximately \$43,000 per year.

6. In March 2006, Claimant began treating with nurse practitioner Rosemary Brown. Nurse Brown recorded that Claimant had relocated and was seeking someone to manage his pain. She noted the location of his pain was in his lower back and recorded: "The patient has a history of a MRI 5 months ago, which confirmed 4 herniated discs. He complains of muscle spasms. He has bilateral leg nerve pain, back pain." Defendants' Exhibit 17, p. 391. She further noted that Claimant had experienced back pain for the prior seven years and that his pain at the time of the exam was nine on a scale of one to ten. Nurse Brown found numbness in Claimant's left lower extremity, positive straight leg raising bilaterally, and noted that the overall exam was positive for radicular pain.

7. In April 2006, Claimant began treating with David Bowman, D.O., for continuing back pain and muscle spasms. At that time, Claimant weighed 375 pounds. He noted intermittent tingling in his fingertips. He also experienced left lateral thigh numbness, but denied neck pain and lower extremity pain below his knees. Dr. Bowman assessed back pain, displaced lumbar disk, and radiculopathy. He prescribed Soma and Toradol trigger point injections which helped Claimant function. Nurse Brown managed Claimant's pain medications monthly. Claimant took Celebrex, Naproxen, Norco 10-325 (hydrocodone), Soma, and Xanax. He also used Fentanyl pain patches. With the pain control achieved through these medications, Claimant was able to be physically active. He fished, boated, played softball, and tolerated working on his feet for up to 12 hours a day. Nurse Brown reported in June 2006, that Claimant had radiculopathy from the lower lumbar nerve roots, specifically L4-5. She provided an L4-5 epidural steroid injection.

8. Claimant and the Ford store owner differed in their management philosophies and in July 2007, Claimant left the service advisor position.

9. On July 12, 2007, Claimant presented to nurse Brown who recorded Claimant's complaints of cervical, thoracic, and lumbar pain and pain radiating to his upper arms, buttocks, and thighs. Claimant characterized his pain as constant, severe, sharp, aching, and burning. Brown noted Claimant's pain was essentially chronic and was inflamed by moving his belongings from storage the prior week. She also recorded Claimant's reports of left lower extremity paresthesia. Brown prescribed a refill of ibuprofen, Soma, Xanax, 180 10-milligram hydrocodone capsules, and 15 100-milligram Fentanyl patches.

10. Claimant testified that in August 2007, he began working for Continental Steel. His official date of hire, according to Continental's records, was September 17, 2007. Claimant testified that at that time he had no specific injuries to his neck, mid back, or low back. He initially worked building a security fence in Salmon. His duties in the fence construction required repeated bending over and made his back sore.

11. On October 8, 2007, Claimant presented to nurse Brown reporting increased thoracic pain due to his duties as an ironworker. Claimant was lifting as much as 100 pounds during the course of his work duties. Brown prescribed additional medications, including 240 10-milligram hydrocodone capsules (Norco), 120 Soma tablets, and 90 Xanax tablets. At hearing Claimant could not recall the amount of prescription medications he took daily during this period, but testified he had to take two hydrocodone tablets every morning when he awoke because of his back pain.

12. On October 29, 2007, Claimant was at work helping install a 25-pound beam while standing on the fourth step of a ladder. While descending the ladder he missed the third step and fell, striking his head against a cinderblock wall and landing flat on his back on the concrete floor. The fall lacerated his scalp, knocked the wind out of him, and left him unconscious for several minutes. He was immobilized and taken to the hospital via ambulance. Claimant was earning \$22.69 per hour and working an average of 31 hours per week at the time of his accident. He also received a per diem of \$19.00 per day, an average of four days per week. Defendants' Exhibit D, p. 19.

13. Claimant was hospitalized for three days and treated by James Richards, M.D., for acute back injury with scalp laceration and persistent back pain. Claimant reported his past medical history to include: "Hypoglycemia. Congestive heart failure. Chronic back pain (no known injury to back – but with increased pain found to have 4 bulging discs.)" Defendants' Exhibit 5, p. 60. X-rays, CT, and MRI scans were taken. Claimant's cervical spine CT was negative. His thoracic spine CT showed multiple calcified discs. His thoracic spine MRI disclosed multi-level disc protrusions, including a central disc protrusion at T7-8 and a moderately large T8-9 protrusion to the left. His lumbar spine CT revealed degenerative changes with calcified central disc protrusions at L2-3, L3-4, and L4-5. His lumbar spine MRI revealed large central disc protrusions at L4-5 and L5-S1. Dr. Richards concluded that the diagnostic

scans confirmed longstanding chronic degenerative arthritis and degenerative disc disease, but no acute injury. Dr. Richards expressly noted that there was severe degenerative disc disease and degenerative arthritis of the spine considering Claimant's age, possibly aggravated by pre-existing morbid obesity.

14. Claimant was released from the hospital after three days and nurse Brown then referred him to Brady Wirick, D.C., who performed traction for Claimant's continuing low back pain. Dr. Wirick did not treat Claimant's cervical spine. Claimant received chiropractic treatment for low back pain on at least 15 occasions from November 5, 2007, through January 25, 2008, however his back pain persisted.

15. On February 11, 2008, Claimant presented to neurosurgeon Robert Cach, M.D., who reviewed Claimant's MRI scans and requested the Surety's approval to perform a left L4-5 discectomy and left L5-S1 discectomy. The Surety sought a second opinion and, in April 2008, neurosurgeon Timothy Johans, M.D., and neuropsychologist Craig Beaver, Ph.D., examined Claimant at Defendants' request. Claimant told Dr. Beaver that he had slight back problems before his industrial accident. Dr. Beaver noted that Claimant was being treated for depression, anxiety, and chronic back pain before his industrial accident. After extensive neuropsychological evaluation, Dr. Beaver concluded that Claimant showed a strong tendency towards somatization, was very prone to symptom magnification, and presented with a significant amount of functional overlay. Claimant told Dr. Johans that prior to his industrial accident he had never had any thoracic or low back pain except for a minimal low back strain in 1991. Dr. Johans found the copies of the October 2007, MRIs of such poor quality that he recommended a new MRI. After reviewing the new MRI from April 22, 2008, Dr. Johans recommended against surgical intervention for Claimant's back and neck pain and recommended Claimant be treated conservatively by a physiatrist.

16. In April 2008, Claimant began treating with board certified physiatrist David Simon, M.D. Dr. Simon concluded that Claimant suffered a lumbar sprain due to his industrial accident and prescribed physical therapy. He also began reducing Claimant's prescription narcotics. Claimant completed 20 physical therapy sessions with Nathan Hunsaker, P.T., and his condition improved. Claimant then transitioned to a home exercise program.

17. On August 12, 2008, Dr. Simon examined Claimant and reviewed Hunsaker's physical therapy notes. Dr. Simon concluded that Claimant needed no further physical therapy due to his industrial accident. Dr. Simon restricted Claimant to lifting no more than 15 pounds frequently and 35 pounds occasionally and recommended he avoid bending, stooping, and lifting. Dr. Simon attributed all of Claimant's restrictions to his pre-existing condition and none to his industrial accident. He referred Claimant back to nurse Brown for continued treatment of his pre-existing chronic back pain.

18. On September 16, 2008, Claimant sought a disability evaluation from Reed Ward, D.O., who found him medically stable. Claimant testified that he discontinued all narcotic medications for approximately two months and noted significant continuing pain. On November 11, 2008, Claimant returned to Dr. Ward, who then began treating Claimant monthly. Dr. Ward prescribed Xanax, Norco, and Soma and ultimately referred Claimant to Dr. Cach. Claimant testified that Dr. Cach again recommended a discectomy, but declined to perform surgery because of the status of Claimant's workers' compensation case. In February 2009, Claimant underwent new MRIs and continued treatment with Dr. Ward. Surgical intervention was further discussed, but Claimant sought conservative alternatives. He requested additional medications, however, Dr. Ward encouraged further physical therapy for long-term pain management.

19. Claimant worked with an Industrial Commission rehabilitation consultant to find employment after his accident. He contacted the following businesses while seeking employment: Continental Steel, Staples, Action Motor Sports, Smith's Food, Sage Creek Auto,

Taco John's, WinCo, Eastern Idaho Regional Medical Center, Johnson Brothers Cabinets, Center Apartments, Intelligent Employment Solutions, Common Cents, and B&D Finishing. He submitted online applications to Best Buy, Quest, State of Idaho, Idaho State University, AutoZone, Smith Group, Wackerli Buick, Ron Sawyer Dodge, Taylor Chevrolet, Pat Service, Kirkham Auto, Keyline Auto, CarQuest, NAPA Auto Parts, D&D Electric, Rush Auto, Karnes Park Ave., and Boozers Convenience Store.

20. On January 16, 2009, Claimant began working part-time at AutoZone. At the time of the hearing, he was employed at AutoZone making \$9.07 per hour, working five to eight hours per day and averaging 20 hours per week. His duties include assisting customers at the counter, looking up parts, and testing batteries, starters, and other automotive parts. He lifts brake drums weighing 30 to 60 pounds, even though he knows he should not. Co-workers help him lift batteries and heavier auto parts. He mops the floor every night, although this exacerbates his pain. Claimant lied about his back condition to obtain his present job at AutoZone. At every other business where he sought employment he had told the truth regarding his back condition and was not considered. He continues looking for additional employment.

21. Claimant testified in his deposition on June 4, 2009, that his back pain was three to four times worse now than before his accident. At hearing, Claimant testified that he has left leg pain from his back into his left hip, knee, and foot. He testified that an area on his left thigh regularly becomes hot and red when he stands at work for two or three hours. Claimant testified that his neck is also symptomatic, his fingers are numb, and his left shoulder stings. He testified that he cannot get into a boat to go fishing and cannot tolerate pitching a softball, throwing horseshoes, bowling, sweeping, mopping, vacuuming, bending over, fishing, hunting, camping, hiking, or playing with his 13 year-old son. Claimant and his girlfriend testified that he frequently drops glasses and other items because he cannot feel them.

22. Having observed Claimant at hearing, and compared his testimony to other evidence in the record, the Referee finds that Claimant is mostly credible, however, he has on occasion significantly misrepresented the extent of his pre-existing back pain.

DISCUSSION AND FURTHER FINDINGS

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

24. **Additional temporary disability benefits.** The first issue is whether Claimant is entitled to additional temporary disability benefits. The threshold element of this inquiry is the proper calculation of Claimant's average weekly wage.

25. Average weekly wage. A claimant is ordinarily paid weekly income benefits equivalent to 67% of his average weekly wage during the first 52 weeks of disability, subject to the 90% maximum and 45% minimum of the applicable average state wage. Claimant herein contends he meets the 90% maximum for the first 52 weeks. Defendants do not directly address this issue in their briefing. According to Idaho Code § 72-102(32), wages include the reasonable market value of board, rent, housing, lodging, fuel, and other advantages which can be estimated in money that the employee receives as part of his remuneration. It does not include sums which the employer paid to the employee to cover any special expenses entailed on him by the nature of his employment.

26. Claimant alleges that Defendants paid him total temporary disability benefits at the rate of \$462.45 per week from October 29, 2007, through August 12, 2008. He asserts his average weekly wage was \$911.84 at the time of his October 29, 2007, industrial accident, but

that due to the state maximum he is entitled to a statutory temporary disability rate of \$525.60 per week for this period.

27. The record establishes that Claimant was earning \$22.69 per hour and working an average of 31 hours per week at the time of his accident. His average weekly wage was no less than \$703.39. He also received a per diem at the average rate of \$76.00 per week. A per diem may be considered part of an employee's average weekly wage rather than a special expense, pursuant to Idaho Code § 72-102(32), where the employer requires no receipts documenting how the per diem is spent and the employee may use the per diem as he or she chooses. Day v. Brown Brothers, 2001 IIC 0452. There is no evidence that Continental required Claimant to provide receipts documenting his expenditure of his per diem. Pursuant to Day, Claimant's per diem should be included in his average weekly wage. Thus, Claimant's average weekly wage at the time of his accident was \$779.39. He was entitled to temporary disability benefits at 67% of his average weekly wage, which equals \$522.19.

28. Defendants calculated Claimant's temporary disability benefits at the rate of \$522.19 per week commencing October 29, 2007. Defendants' Exhibit 14, p. 325. However, Defendants were required by a Child Support Garnishment Order issued pursuant to Idaho Code § 7-1203(5) to deduct \$119.52 from Claimant's bi-weekly benefits. Defendants' Exhibit 14, pp. 326, 347-349. Claimant has not acknowledged the garnishment in his briefing. Defendants' Exhibit 16 records the deduction of this garnishment during the entire period Claimant received temporary disability benefits. Thus, Defendants' payment to Claimant of \$426.45 weekly was appropriate rather than insufficient. Defendants processed the balance as required by the Child Support Garnishment Order. Claimant has not proven that he was entitled to temporary disability benefits at a higher weekly rate.

29. Additional period of temporary disability. Defendants paid Claimant total temporary disability benefits from October 29, 2007, through August 12, 2008. Defendants

assert Claimant's continued physical difficulties thereafter result from his pre-existing conditions. Claimant asserts entitlement to total temporary disability benefits from August 12, 2008, through September 16, 2008.

30. 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 medical 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). Thereafter:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

31. In the present case, Dr. Simon commenced treating Claimant on April 30, 2008. He opined that Claimant had recovered from his industrial injuries and was medically stable by August 12, 2008. Claimant asserts that Dr. Simon ignored or misread the August 11, 2008, physical therapy notes of Nathan Hunsaker and concluded that Claimant needed no more physical therapy. However, it appears Dr. Simon did not base his conclusion on the language of Hunsaker's August 11th note alone. Dr. Simon discussed Claimant's progress with Hunsaker on July 22, 2008, and concluded that Claimant was progressing sufficiently to transition to home exercises. Hunsaker's notes of June 30 and July 3, 2008, confirm that Claimant was indeed progressing well in therapy. Hunsaker's notes of August 5 and 7, 2008, further confirm

Claimant was doing well with his home exercise program. Thus, it does not appear that Dr. Simon ignored or misunderstood the intent of Hunsaker's August 11, 2008, note.

32. Dr. Ward first examined Claimant on September 16, 2008, and opined that Claimant was medically stable, with residual permanent impairments from his industrial accident. Dr. Ward's opinion is not necessarily in conflict with Dr. Simon's opinion on this point. On September 16, 2008, Dr. Ward noted that it had been "nearly 11 months since his injury and the patient has undergone extensive evaluation and multiple different therapies." Claimant's Exhibit 1A, p. 9. Dr. Ward found Claimant stable on the first day he examined Claimant. Dr. Ward did not opine that Claimant was not medically stable prior to September 16, 2008. Dr. Ward simply had no occasion to examine Claimant prior to that time. The only treatment Claimant received between August 12, 2008, and September 16, 2008, was a refill of prescription pain medications by nurse Brown. This was similar to the ongoing pain management treatment Claimant had consistently received for well over a year prior to his industrial accident and consistent with the maintenance level of medications Dr. Ward later prescribed. The Referee finds that Claimant first reached medical stability on August 12, 2008.

33. Claimant has not proven his entitlement to any additional temporary disability benefits from the time of his accident through the time of hearing.

34. **Permanent impairment.** The next issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 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 Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

35. Claimant seeks permanent impairment benefits of 5% of the whole person due to his cervical condition and 5% of the whole person due to his lumbar condition. The parties dispute the cause of these permanent impairments.

36. Causation. A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). 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 plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). Claimant herein asserts that his dramatically increased cervical and lumbar symptoms are due to his industrial accident.

37. Cervical spine. Dr. Ward testified that Claimant’s accident caused chronic cervical strain amounting to a permanent impairment to his cervical spine of 5% of the whole person. Diagnostic scans subsequent to Claimant’s accident disclosed a C6-7 disc herniation. Dr. Johans reported that Claimant’s C6-7 disc herniation, although not requiring surgical treatment, was potentially new at the time of his examination, rather than longstanding, and thus likely attributable to the industrial accident. Dr. Cach also noted a moderate size C6-7 disc

herniation which he opined contributed to Claimant's upper extremity symptoms. Dr. Simon readily acknowledged that he did not treat or factor in Claimant's cervical spine complaints. Simon Deposition, p. 58, Ll. 5-13. Dr. Ward's opinion that Claimant suffers a 5% whole person cervical impairment due to his industrial accident is well corroborated and persuasive. Claimant has proven that he suffers a permanent impairment of 5% of the whole person due to cervical injuries caused by his industrial accident.

38. Lumbar spine. Claimant alleges dramatically increased low back symptoms due to his accident. He emphasizes that he was very functional prior to his industrial accident, but is now very limited. He testified to working 12 hours a day on his feet, lifting substantial amounts, and engaging in recreational pursuits such as biking, softball, and hiking—none of which he can now tolerate. However, the record is clear that he relied upon multiple prescription narcotic medications to sustain this level of pre-accident activity. Prior to his industrial accident, Claimant had a four-year history of prescription narcotic medications and a one-year history of monthly appointments with nurse Brown or Dr. Bowman to manage his chronic low back pain. Dr. Simon opined that, given Claimant's pre-existing degenerative disk disease, he should not have been doing the heavy lifting of an ironworker prior to his accident.

39. At the time of hearing, Claimant received a monthly prescription for 90 hydrocodone (Norco) tablets. He testified that instead of taking three Norco per day, he "banks" his medication for the days he works and the day after, and does not take Norco on other days. Claimant's Norco prescription prior to his industrial accident was 240 per month and he took eight per day. Although Claimant now describes a reduced tolerance for many activities, it is unknown whether he might yet tolerate his pre-accident level of activity if a physician were currently willing to prescribe equally high doses of medication as Claimant routinely took prior to the accident.

40. Dr. Simon is a board certified physiatrist who treated Claimant from April through August 12, 2008. He opined that Claimant suffered merely a temporary aggravation of

his pre-existing chronic low back pain and no permanent impairment due to the industrial accident. Dr. Simon testified that when he first examined Claimant he believed Claimant was on an excessive amount of medications. At that time Claimant was taking two narcotics, a muscle relaxer, an anti-anxiety drug, and an anti-inflammatory. Dr. Simon noted that Claimant had used prescription narcotics—including oral narcotics and/or a narcotic patch—almost continuously for several years before his accident. He testified that Claimant’s low back recovered to its pre-injury state by August 12, 2008, and that Claimant’s residual low back complaints are due to his pre-existing condition. Dr. Simon opined that Claimant was actually better after his accident and physical therapy than before his accident. Dr. Simon recognized that Claimant needed ongoing management of his pre-existing chronic back pain. He opined that Claimant could not return to his pre-injury occupation as an ironworker and restricted him to lifting 15 pounds frequently and 35 pounds occasionally. Dr. Simon expressly reported that these restrictions were not due to Claimant’s industrial accident and that, given Claimant’s pre-existing back condition, he should not have performed the heavy duties of an ironworker before his accident.

41. Dr. Ward is a family practitioner and treated Claimant from October 2008 through the time of the hearing. Dr. Ward opined that Claimant’s industrial accident caused a lumbar strain amounting to a permanent impairment to his lumbar spine of 5% of the whole person. He testified that Claimant told him that he had some back pain and took some medications from time to time prior to his industrial injury, but it was never debilitating and had never limited his work activities. Dr. Ward testified that Claimant described his symptoms after the industrial accident as different than before the accident. Dr. Ward testified that he was not aware of any lumbar MRI or CT scan being taken prior to the accident. He concluded: “evidently, lumbar disk disease or significant disk disease had not been a concern or an issue in the past.” Ward Deposition, p. 15, Ll. 14-16. Dr. Ward believed Claimant’s report that his pain was different from and worse as a result of his industrial accident than anything he had prior to the accident.

Dr. Ward did not believe Claimant had any radiculopathy prior to his accident. The record documents otherwise.

42. As previously noted, nurse Brown recorded in her first examination of Claimant, more than a year prior to the accident, that he suffered from radiculopathy and had undergone an MRI five months earlier which documented four herniated discs. Claimant reported to Dr. Richards, upon being admitted to the hospital immediately after his accident, a past medical history of chronic low back pain and four bulging discs. Defendants' Exhibit 5, p. 60. Dr. Ward acknowledged that he had reviewed only part of nurse Brown's notes before arriving at his opinion regarding Claimant's lumbar impairment. The foundation of Dr. Ward's opinion as to the cause of Claimant's low back condition is thus materially eroded.

43. Dr. Simon expressly disagreed with Dr. Ward's opinion of the cause of Claimant's lumbar impairment, based principally on Dr. Simon's understanding of Claimant's history of chronic low back pain for several years prior to his industrial accident. Dr. Simon believed Claimant suffered only a temporary aggravation of his chronic low back pain because Claimant was using less prescription medication after he became medically stable than he was prior to his accident and because the CT and other diagnostic scans taken shortly after the accident showed degenerative conditions, but no acute injuries. Dr. Simon also observed that Claimant falsely told Dr. Johans and Dr. Beaver that he had virtually no low back problems before his industrial accident. This persuaded Dr. Simon to give little weight to Claimant's statements about increased low back pain post-accident.

44. Critical elements of Dr. Simon's opinion are well supported by the record. Claimant received regular medical treatment for chronic low back pain for several years before the accident. Claimant's diagnostic scans taken shortly after his accident revealed calcified disc protrusions at L2-3, L3-4, and L4-5 and a disc protrusion at L5-S1, all of which clearly support a diagnosis of longstanding chronic degenerative arthritis and degenerative disc disease. Claimant reported, when

admitted to the hospital immediately after his accident, a history of chronic low back pain, four bulging discs, and right and left leg weakness. Defendants' Exhibit 5, p. 60. Claimant's misrepresentations to Drs. Johans and Beaver about the extent of his pre-existing back pain cast doubt on the credibility of his present representations of dramatically increased low back pain.

45. The significance of Claimant's current low back complaints is further confounded by lateral femoral cutaneous neuropathy in his left thigh. Claimant alleges significant lower extremity symptoms, particularly left lower extremity symptoms which he attributes to low back injuries sustained in his accident. However, Dr. Johans noted that when a morbidly obese man suffers this condition, it is generally due to his pannus causing pressure on the lateral femoral nerve. Dr. Johans did not attribute Claimant's left lateral femoral cutaneous neuropathy to his accident. Dr. Simon similarly opined that Claimant's condition resulting in left lateral thigh numbness and burning is meralgia paresthetica, arising from an impingement of the lateral femoral cutaneous nerve at the pelvis and not in the spine. Dr. Ward testified that obesity is frequently the cause of this condition. No physician has attributed this condition to Claimant's industrial accident.

46. Dr. Simon's opinion of the cause of Claimant's continuing low back complaints is more persuasive than Dr. Ward's opinion. Claimant has not proven that he suffered any permanent lumbar impairment due to his industrial accident.

47. **Medical benefits.** The next issue is whether Claimant is entitled to additional medical benefits. Idaho Code § 72-432(1) requires that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course, the employer is only obligated to provide

medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

48. Past medical expenses. Claimant requests \$3,731.51 for past medical expenses incurred. These include bills from Dr. Ward in the amount of \$475.00; Rehab Authority in the amount of \$175.00; Rosemary Brown in the amount of \$1,293.00; Dr. Wirick in the amount of \$375.00; and medications prescribed by Dr. Ward and Rosemary Brown in the amount of \$1,413.51. Defendants generally assert Claimant is entitled to no further benefits because his ongoing symptoms are due to his pre-existing conditions. After Dr. Simon found Claimant medically stable on August 12, 2008, Defendants paid Claimant no further medical benefits.

49. Claimant incurred a charge of \$95.00 per treatment by Dr. Ward on each of the following dates: November 11 and December 4, 2008, and January 7, February 5, March 3, April 3, May 21, and June 23, 2009. Claimant testified that \$475.00 of these bills remains unpaid. Dr. Ward provided this treatment after Claimant became medically stable. However, Dr. Ward affirmed that Claimant needed chronic maintenance therapy for the injuries resulting from his industrial accident. Specifically, Dr. Ward recommended treatment of Claimant's chronic cervical strain and chronic lumbar strain in the same fashion: with anti-inflammatories, muscle relaxers, and pain control medication, as well as physical therapy. Ward Deposition, p. 22. The chronic maintenance therapy is similar to the long-standing treatment for his pre-existing lumbar condition. Claimant has proven that his chronic cervical strain is related to his industrial accident; thus, he is entitled to reasonable medical treatment therefor, including chronic maintenance therapy. This creates the unusual circumstance where Claimant is entitled to chronic maintenance treatment for his work-related cervical condition which simultaneously benefits his non-work related pre-existing lumbar condition. However, this does not preclude his entitlement to chronic maintenance therapy. Claimant is entitled to maintenance therapy for his chronic cervical strain, including

prescription medications and physical therapy as recommended by Dr. Ward. Claimant is entitled to medical benefits from Defendants in the amount of \$475.00 for payment of Dr. Ward's bills.

50. Claimant also requests payment of a bill for \$175.00 for physical therapy Claimant received from Nathan Hunsaker at Rehab Authority on August 11, 2008, the day before Dr. Simon released Claimant from further care. Defendants do not dispute this request. Dr. Simon expressly prescribed the physical therapy and considered Hunsaker's August 11, 2008, physical therapy note in determining Claimant's progress and medical stability. Defendant's Exhibit 16, setting forth a breakdown of benefits paid, does not reflect payment of this item. Claimant is entitled to medical benefits from Defendants in the amount of \$175.00 for payment of the bill by Rehab Authority for treatment on August 11, 2008.

51. Claimant requests payment of medical bills from Brady Wirick, D.C., in the amount of \$375.00. These charges arise from treatment Dr. Wirick provided to Claimant on the following dates: January 4, 18, 21, 23, and 25, 2008. Defendants' Exhibit 16 documents Defendants' payment for treatment Claimant received from Dr. Wirick on November 11, 2007, and January 2, 4, and 7, 2008. The January 4, 2008, bill Defendants paid totaled \$124.29; the January 4, 2008, bill Defendants have not paid amounted to \$75.00. All of Dr. Wirick's treatments occurred before Claimant became medically stable. During this time Dr. Wirick provided treatment only for his industrial accident. Claimant was referred to Dr. Wirick by nurse Brown, who resumed Claimant's care after he was discharged from the hospital following his accident. Claimant is entitled to medical benefits from Defendants in the amount of \$375.00 for payment of treatment by Dr. Wirick from January 4 through 25, 2008.

52. Claimant treated with nurse Brown monthly for his pre-existing chronic low back pain for over a year prior to his industrial accident. Claimant requests payment of medical bills from nurse Brown in the amount of \$1,216.00 (\$1,293.00 less \$77.00 that Claimant acknowledges are not accident-related bills). Of that amount, Claimant's Exhibit 2C shows a

balance forward on May 31, 2008, of \$784.00 and charges for additional visits on June 12, July 8, and August 14, 2008. Claimant expressly acknowledged at hearing that he did not know what the \$784.00 was. Defendants provided Claimant medical treatment through Dr. Simon from April through August 12, 2008. Claimant's Exhibit 2E documents prescriptions by Dr. Simon of hydrocodone, carisoprodol, and ibuprofen on May 14 and 27, June 17, July 1 and 22, and August 12, 2008. It does not appear that Dr. Simon referred Claimant to nurse Brown at any time before August 12, 2008. Thus Claimant is not entitled to benefits for treatment by nurse Brown on June 12 or July 8, 2008. After finding Claimant medically stable, Dr. Simon referred him back to nurse Brown for continuing treatment of his pre-existing chronic back pain. As noted previously, Dr. Simon did not address Claimant's cervical condition. Pursuant to Dr. Ward's recommendation, Claimant is entitled to maintenance therapy in the form of prescription medications for his chronic cervical strain. Nurse Brown prescribed such medications on August 14, 2008. Claimant is entitled to medical benefits from Defendants in the amount of \$145.00 for payment of treatment by nurse Brown on August 14, 2008.

53. Claimant relies upon Claimant's Exhibit 2E and alleges entitlement to benefits for medications prescribed by Dr. Ward and Rosemary Brown in the total amount of \$1,413.51. Claimant testified that the highlighted portions of his Exhibit 2E are charges related to his industrial accident and that non-highlighted entries are not accident-related. Pages 000026 and 000027 document charges from January 8, February 5, and March 3, 2009, for prescriptions by Dr. Ward for hydrocodone, alprazolam, and carisoprodol totaling \$216.38. Dr. Ward treated Claimant on each occasion and later affirmed that the treatment he provided was related to the industrial accident. As noted, Dr. Ward recommended treatment of Claimant's chronic cervical strain and chronic lumbar strain in the same fashion: with anti-inflammatories, muscle relaxers, and pain control medication. Claimant is entitled to medical benefits from Defendants in the amount of \$216.38 for medications prescribed by Dr. Ward on January 8, February 5, and March 3, 2009.

54. The balance of Claimant's Exhibit 2E, pages 000028-000030, contains approximately 125 entries listing dates of service and prescription medications—some highlighted as allegedly related to Claimant's accident, others not; some showing the price of the prescription, others showing no price—collectively totaling \$1,203.53. It is impossible to determine from the record the portion of the total attributable to Claimant's industrial accident. However Exhibit 2E does establish that Claimant received the following prescription medications from nurse Brown: on August 14, 2008, alprazolam (\$34.30) and naproxen (\$4.00); August 15, 2008, hydrocodone (\$81.39); September 11, 2008, hydrocodone (\$81.39), carisoprodol (\$37.38), and alprazolam (\$34.30), all totaling \$272.76. These prescriptions are consistent with the chronic maintenance regime to which Dr. Ward testified and which he later prescribed. They were provided after Defendants ceased providing medical care through Dr. Simon. Claimant is entitled to medical benefits from Defendants in the amount of \$272.76 for medications prescribed by nurse Brown on August 14, 15, and September 11, 2008, as described above.

55. Future medical treatment. Claimant also requests future medical treatment, including bilateral ulnar nerve decompression surgery, physical therapy, and prescription medications. Defendants deny that the need for such treatment is caused by Claimant's industrial accident.

56. Dr. Ward testified that Claimant's bilateral ulnar neuropathy is due to his industrial accident. Dr. Johans reported that Claimant's bilateral ulnar neuropathy was prominent and industrially related as either a direct result of Claimant's fall or a result of the posture in which Claimant had to sleep as a consequence of his fall. Dr. Simon acknowledged that he did not examine or treat Claimant for bilateral ulnar neuropathy. Simon Deposition, p. 58, Ll. 14-19. Dr. Johans opined that if Claimant's upper extremity symptoms persisted or worsened, he would need bilateral ulnar nerve decompression surgery. Claimant and his girlfriend testified that his upper extremity symptoms have persisted and that his fingers are numb and he drops items. Dr. Ward's

notes of July 22, 2009, record Claimant's report of worsening tingling and numbness in his bilateral upper extremities, resulting in dropping items such as cups and glasses. Claimant has proven that his bilateral ulnar neuropathy was caused by his industrial accident. He is entitled to treatment of his ulnar neuropathy, including probable surgery.

57. As noted, Dr. Ward recommended treatment of Claimant's cervical strain and lumbar strain in the same fashion: with anti-inflammatories, muscle relaxers, and pain control medication, as well as physical therapy. Claimant has proven that his chronic cervical strain is related to his industrial accident, thus he is entitled to reasonable treatment therefor. Dr. Ward noted that Claimant is now on chronic maintenance therapy necessitated by his industrial accident. Thus Claimant is entitled to reasonable chronic maintenance therapy for his cervical strain, including prescription medications and physical therapy as may be recommended by Dr. Ward. Claimant has not proven his entitlement to additional medical treatment for his lumbar or thoracic conditions.

58. **Permanent disability.** The next issue is the extent of Claimant's permanent disability. Claimant alleges substantial permanent disability due to his loss of wage-earning capacity. Permanent disability is generally evaluated after all injuries from an industrial accident are medically stable and ratable. Claimant's lumbar and cervical impairments have been ascertained. However, no physician has rated Claimant's impairment due to his bilateral ulnar neuropathy and Claimant has requested treatment, including possible surgery, therefor. The finding that Claimant is entitled to treatment of his bilateral ulnar neuropathy and the probability of decompression surgery establish that Claimant's condition is not medically stable. The extent of Claimant's permanent impairment from his bilateral ulnar neuropathy is not presently known. Thus a determination of the extent of his permanent disability would be premature.

59. **Idaho Code §72-406 apportionment.** The issue of apportionment of Claimant's permanent disability pursuant to Idaho § 72-406 is not presently ripe for determination.

CONCLUSIONS OF LAW

1. Claimant is not entitled to additional temporary disability benefits from the time of his accident through the time of hearing.
2. Claimant has proven he suffers permanent partial impairment of 5% of the whole person due to his chronic cervical strain resulting from his industrial accident. He is not entitled to any permanent partial impairment due to his lumbar or thoracic conditions.
3. Claimant is entitled to additional medical benefits, including \$1,659.14 for medical treatment already received. He is entitled to reasonable future medical treatment, including probable surgery for his bilateral ulnar neuropathy as well as prescription medications as maintenance therapy for his chronic cervical strain.
4. The extent of Claimant's permanent partial disability is not presently ripe for determination.
5. Whether Claimant's permanent partial disability should be apportioned pursuant to Idaho Code § 72-406 is not presently ripe for determination.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 26th day of February, 2010.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS ID 83404-6236

LYLE J FULLER
PO BOX 191
PRESTON ID 83263-0191

sc

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JASON HAMMON,)
)
 Claimant,)
)
 v.)
)
 CONTINENTAL STEEL, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2007-037893

ORDER

Filed: March 3, 2010

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 is not entitled to additional temporary disability benefits from the time of his accident through the time of hearing.
2. Claimant has proven he suffers permanent partial impairment of 5% of the whole person due to his chronic cervical strain resulting from his industrial accident. He is not entitled to any permanent partial impairment due to his lumbar or thoracic conditions.

3. Claimant is entitled to additional medical benefits, including \$1,659.14 for medical treatment already received. He is entitled to reasonable future medical treatment, including probable surgery for his bilateral ulnar neuropathy as well as prescription medications as maintenance therapy for his chronic cervical strain.
4. The extent of Claimant's permanent partial disability is not presently ripe for determination.
5. Whether Claimant's permanent partial disability should be apportioned pursuant to Idaho Code § 72-406 is not presently ripe for determination.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 3rd day of March, 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 3rd day of March 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS ID 83404-6236

LYLE J FULLER
PO BOX 191
PRESTON ID 83263-0191

sc

_____/s/_____