BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY MCCREA, Claimant, v. IDAHO YOUTH RANCH, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-026908** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED: 3 DECEMBER 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on August 15, 2013. Claimant was represented by Rick D. Kallas of Boise. Paul J. Augustine, of Boise, represented Idaho Youth Ranch, Inc. (Employer), and State Insurance Fund, (Surety), Defendants. Oral and documentary evidence was admitted. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on November 12, 2013, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

2. Whether Claimant is entitled to temporary total disability (TTD) benefits, and the extent thereof.

More specifically, the threshold issue for resolution is whether Claimant's October 13, 2012, industrial accident caused or contributed to his undisputed need for an L5-S1 decompression and fusion surgery, or was it solely the result of a previous industrial accident which occurred in September 2011 while Claimant was employed elsewhere. All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts he injured his lower back on October 13, 2012, while helping load a piano into a horse trailer as part of his work duties with Employer. As the result of this accident, he aggravated and rendered symptomatic a pre-existing degenerative spinal condition, and now needs a decompression and fusion surgery at L5-S1. While he admits he previously injured his back at the same level while working in Florida, he claims his symptoms from his earlier accident resolved by late spring 2012 with rest and conservative treatment. He acknowledges his treating doctor in Florida recommended he undergo the identical surgery he now seeks. He argues the accident in question aggravated or accelerated his pre-existing low back condition, thus obligating Employer to pay for the surgery he seeks, as well as TTD benefits for the time he has been unable to work.

Defendants assert that while Claimant is indeed a candidate for back surgery, his current condition is due entirely to a degenerative condition which was made symptomatic by his previous industrial accident, and has basically remained symptomatic ever since. Although Claimant's symptoms and pain have waxed and waned since the Florida accident,

the pain and symptoms he is now experiencing are the direct result of his previous injury, and in no part due to the events of October 13, 2012.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file in this case;

2. The testimony of Claimant, taken at hearing;

3. The testimony of Employer's witness, Lisa Woodruff, taken at hearing;

4. Claimant's Exhibits 1 through 14 (excluding Exhibits 7, 11, and 12 which were reserved), admitted at hearing;

5. Defendants' Exhibits A through I, admitted at hearing;

6. The pre-hearing deposition transcript of Claimant (Defendants' Exhibit E);

7. The post-hearing deposition of Timothy Doerr, M.D., dated August 29, 2013.

After having considered the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a 48-year-old, married but separated, high school-educated man, living in Glenns Ferry, Idaho with his aging mother.

2. Prior to moving to Idaho in August 2012 Claimant had most recently lived in Florida. While there, he was at one point employed at Universal Studios (Universal) theme park as a janitor.

3. On September 25, 2011, while working at Universal, Claimant injured his back as he was dumping garbage into a compactor from a large wagon known as a hopper.

He filed a workers' compensation claim and was sent, at Universal's direction, to Solantic of Orlando, a local medical clinic. He was initially diagnosed with a strain and placed on light duty work restrictions.

4. Claimant's condition did not initially improve with conservative treatment, so an MRI was obtained. It showed a grade 1 anterolisthesis at L5-S1 with bilateral pars defect, and a protruded/herniated disc at L5-S1, with left sided radiculitis. Claimant was subsequently referred to an orthopedic surgeon, G. Grady McBride, M.D., who broached the idea of surgery during Claimant's December 13, 2011, office visit. Claimant made no decision that day regarding surgery.

5. Claimant missed his next three scheduled appointments with Dr. McBride. He returned on December 28, 2011. Dr. McBride's office notes of that date state:

> PRESENT ILLNESS: The patient is seen for follow-up today. He is still having quite a bit of back pain on a constant basis with radiculitis down the left lower extremity. He is in today with his wife to discuss treatment options. He very strongly would like to have things fixed.

The notes further indicate Dr. McBride discussed with Claimant his recommendation for surgery, including all associated risks and complications. He explained to Claimant the nature of the surgery using x-rays, anatomic models and drawings. Claimant was informed he would have lifting restrictions post-surgery, and the operation may not provide 100% relief. Lastly, Dr. McBride made the notation, "Due to his increasing pain situation, I would recommend he stay out of work. We will contact him in the near future regarding scheduling." Claimant's Exhibit 8, p. 8.

6. Dr. McBride's next office note is dated March 15, 2012, and states:

> PRESENT ILLNESS: The patient returns to the office today with regard to his back and left leg. He is still complaining of quite a bit of debilitating pain as well as some numbness, tingling, and weakness down

> the left lower extremity. When we last saw this patient back in December, the recommendation at that time was made for surgical intervention which would include TLIF fusion and posterolateral fusion at L5-S1. We are still awaiting the authorization from his insurance carrier with regard to the recommended procedure. The patient had been taking Mobic, Soma, and tramadol [sic] at that time, but he is all out of the medications and also requesting refills on the meds as well.

The records of that March visit also provide physical examination findings which include "severe tenderness to palpation" in Claimant's lower back, "positive straight leg raises and limited range of motion with forward flexion." According to the notes, Dr. McBride again reviewed the previous MRI findings and apparently again discussed with Claimant his recommendation for surgery, including all risks associated with the procedure, and the nature of the surgery "using x-rays, and/or anatomic models and drawings." Dr. McBride noted that Claimant "remains on a light duty, no lifting greater than 15 pounds[1]" and "is not at MMI at this time." Dr. McBride refilled Claimant's prescriptions with a two month supply of Mobic, Soma and Tramadol. The last entry in the notes reiterated the doctor was still awaiting authorization from the insurance carrier to proceed with surgery. Claimant's Exhibit 8, p. 10.

7. In contrast to Dr. McBride's medical notes, Claimant contends his condition was improving throughout December 2011 and into the new year. By March 2012, his visit to Dr. McBride was simply to refill prescriptions. Claimant testified he had been prescribed physical therapy in November 2011 which he continued into December. He had been laid off work, so he was able to rest. According to Claimant, the therapy and rest resulted in him feeling much better by April 2012. Hearing Transcript, pp. 58-60.

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[1] At Claimant's last recorded visit with Dr. McBride in December 2011, he was taken off work completely.

8. Claimant most strongly disputes the substance of Dr. McBride's March 15, 2012, medical records. He testified there was no discussion of the MRI on that date, no physical examination, and no discussion of physical limitations. He further testified he was not in "debilitating pain" nor was he suffering "numbness, tingling, and weakness on the left lower extremity" as noted by Dr. McBride. Claimant recalls Dr. McBride mentioned he was still waiting for surety authorization for surgery during the March 15 visit, but Claimant supposedly told the doctor he was feeling much better and did not want surgery at that time. Claimant insists the only reason he went to Dr. McBride on March 15 was for a "med check," during which the doctor refilled prescriptions. Claimant wanted the medications, not due to his then-current pain level, but "in case I would have had a problem I wanted to have some on hand just in case." Hearing Transcript, p. 82.

9. Regardless of what was or was not discussed or examined during the March 15, 2012, office visit, it is undisputed Claimant did not return to Dr. McBride thereafter, nor do the records indicate he saw any other medical provider in Florida for the remainder of the time he resided there.

10. Claimant, with the help of his Florida attorney, settled his pending workers' compensation claim on April 5, 2012, for the lump sum of $17,750. Claimant received $15,000 from the settlement. Of that $15,000, the settlement designated $10,000 for future medical expenses.

11. Claimant stated the settlement was arranged due to the fact he was feeling better. His back and radiating leg pain had subsided. He testified he would not have settled his claim for $15,000 had he not been "feeling good." He also pointed out the $10,000 allocated for future medical expenses would not even come close to paying for

back surgery, and he would not have accepted the settlement if surgery was still a possibility. Hearing Transcript, p. 66. Throughout the hearing, Claimant consistently maintained he was essentially pain free by sometime in April 2012.

12. In July 2012, Claimant sold his house in Florida and in late August moved to Glenns Ferry, Idaho at the request of his mother, whose husband (Claimant's father) had recently passed away. He soon found employment at Idaho Youth Ranch in Mountain Home as a truck driver/warehouseman. The job routinely required heavy lifting of such items as couches, kitchen appliances, tables, etc. Claimant performed his duties without issue from September 14, 2012, the date of his hire, until the date of his industrial accident.

13. On Saturday, October 13, 2012, at about 4:30 p.m., Claimant was helping to lift a heavy piano into a horse trailer when he felt a pain in his lower back which shot like an electrical shock down his left leg. He was able to complete his shift, and worked the following day as well. On Monday or Tuesday he filed a written accident report.

14. On Tuesday, October 16, 2012, Claimant presented at the Glenns Ferry Health Center for his continuing back pain, where he was seen by Brian Bizik, PA-C, who prescribed Hydrocodone, Naprosyn, and Flexeril, as well as a work restriction note. Eventually, Claimant was also prescribed physical therapy, and an MRI was ordered.

15. When physical therapy failed and the MRI showed degenerative findings and a grade 1 anterolisthesis of L5-S1 with bilateral chronic pars defects at L5, Claimant was referred to Paul Montalbano, M.D. for surgical consultation. On December 7, 2012, Dr. Montalbano examined Claimant, took a history, reviewed the recent MRI findings and ordered x-rays. His notes reflect that Claimant gave a history of the florida injury, but reported that by June of 2012, he was doing fine. He also took Claimant off work as of that

date. In a letter to the State Insurance Fund dated December 12, 2012, Dr. Montalbano concluded that Claimant had "mechanical low back pain related to instability as well as bilateral lumbar radiculopathies related to severe foraminal stenosis and subsequently nerve root compression," and recommended an L5-S1 decompression, fusion and instrumentation surgery. Claimant's Exhibit 4, p. 5.

16. Claimant's employment was terminated as of December 11, 2012. He has not worked since.

17. Surety did not authorize the requested surgery, but instead scheduled Claimant for an Independent Medical Examination (IME) with Timothy Doerr, M.D. On January 31, 2013, Dr. Doerr examined Claimant, reviewed medical records and MRI films from 2011 and 2012, and took a history from Claimant. His post-examination conclusion was that Claimant was a back surgery candidate, but his need for surgery was entirely the result of his industrial accident of September 25, 2011. After receiving Dr. Doerr's report, Surety terminated all medical and disability benefits.

DISCUSSION AND FURTHER FINDINGS

18. The parties do not dispute that on October 13, 2012, while in the course and scope of his employment, Claimant suffered an accident as defined in I.C.§ 72-102(18)(b), or that he needs surgery on his low back at L5-S1. The dispute centers on whether there is a causal connection between the accident and Claimant's need for surgery. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability.

No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *See, e.g. Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997). Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

19. In order for Claimant to have a compensable claim, he must establish there was an accident-caused injury "which result[ed] in violence to the physical structure of the body". I.C. § 72-102(18)(c). In the present case, Claimant seeks compensation for the aggravation or acceleration of his pre-existing degenerative low back condition. A pre-existing disease or infirmity of the employee does not disqualify a workers' compensation claim. As noted in *Wynn v. J.R. Simplot Co.,* 105 Idaho 102, 104, 666 P.2d 629, 631 (1983), "our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him."

20. Claimant relies solely upon Dr. Montalbano to provide the needed medical opinion establishing the causal connection between the October 13, 2012, accident and his current condition. The doctor was not deposed; only his written analysis and opinions were introduced into the record.

21. Dr. Montalbano's analysis and opinions are best summed up in a letter he provided to Claimant's counsel on May 17, 2013. Therein he states:

> I have reviewed the medical records regarding Gary McCrea. I have also reviewed [sic] (the) MRI scan of his lumbar spine without contrast dated October 21, 2011. I have also reviewed the MRI scan of his lumbar spine dated November 16, 2012. In addition, I have reviewed the medical records from treatment rendered to Gary McCrea while he lived in Florida.

> It is quite clear that Mr. McCrea experienced a work-related low back injury in the state of Florida in September 2011. It was also recommended that he undergo a surgical intervention at the level of L5-S1 in March 2012. It is clear in my interview with Mr. McCrea that his symptomatology in March 2012 does not warrant surgical intervention. He did well with treatment and conservative measures up until his work-related injury in October 2012 after he lifted a 2000-pound panel [sic] (piano).
>
> It is my medical opinion, and I respectfully disagree with Dr. Doerr, that the etiology of Mr. McCrea's symptomatology is related to his October 13, 2012 injury. My opinion is based on the fact that Mr. McCrea was asymptomatic for months prior to the work-related injury of October 2012. In addition, after reviewing the above MRI scan from October 21, 2011 and November 16, 2012, there is a change in the appearance of the disk at the level of L5-S1. There is a rostrally migrated disk fragment as evidenced on a T2 sagittal MRI scan of November 16, 2012 that was not present on the MRI scan of October 21, 2012 [sic] (2011). … [T]here is no argument that there is a new disk herniation on this followup MRI scan of November 16, 2012.
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> The mechanism of injury certainly would account for the above new disk herniation of November 16, 2012.
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> In conclusion, Mr. McCrea did have a preexisting condition; however, that preexisting condition was asymptomatic prior to his work-related injury of October 13, 2012. In addition, Mr. McCrea did not seek out any medical treatment for the above preexisting condition prior to his most recent work-related injury of October 13, 2012. Furthermore, there are new findings on the above imagine study, as I delineated above, which would be consistent with his work-related injury of October 13, 2012. Therefore it is my opinion that Mr. McCrea did experience a new work-related injury on October 13, 2012. His symptomatology has not returned to baseline and therefore, it is my opinion that Mr. McCrea should undergo surgical intervention at level L5-S1…

Claimant's Exhibit 4, pp. 12-13. In a letter to Ms. Linda Wilson of State Insurance Fund on February 15, 2013, Dr. Montalbano explained his reasoning for his opinions on causation between Claimant's then-current condition and the accident of October 2012 *vis-à-vis* Claimant's September 2011 accident thusly:

> It is very clear Mr. McCrea was symptomatic in terms of low back pain as this relates to his L5-S1 instability prior to this work related injury.

> However, after his work related injury of October 13, 2012, Mr. McCrea's symptomatology did not return to baseline. Due to the fact that his symptomatology did not return to baseline and Mr. McCrea has failed conservative measures, I have recommended surgical intervention which would include an L5-S1 decompression, fusion, and instrumentation.

Claimant's Exhibit 4, p. 2. Dr. Montalbano connected the October 13, 2012, accident to Claimant's current need for surgery with both MRI findings of a new injury and evidence of an aggravation of a pre-existing condition.

22. Defendants strongly disagree with Dr. Montalbano's conclusion on causation. They believe Claimant's present need for surgery is simply a continuing manifestation of his symptomatic condition first occasioned by the industrial accident of September 25, 2011. They support their position with a three-pronged argument. First, Defendants take the position Claimant never recovered from his 2011 industrial accident, and has needed surgery ever since. They rely on the analysis and opinions of Dr. Doerr to support this proposition. Next they point to Dr. Doerr's MRI interpretation, which is that the 2011 and 2012 MRIs are nearly identical. They bolster this opinion with the report of neuroradiologist Vicken Garabedian, M.D., who interpreted Claimant's MRI films from both industrial accidents. Dr. Garabedian's findings are more closely aligned with Dr. Doerr's MRI opinions than with Dr. Montalbano's. The MRI interpretations support Defendant's position that there was no new injury occasioned in Claimant's October 2012 accident. Finally, Defendants argue Claimant is not credible, so his testimony must be rejected.

23. Dr. Doerr opined the September 2011 accident is solely responsible for Claimant's current need for surgery. During his deposition, he summarized his opinion as follows:

> If someone has been asymptomatic for 46 years and they injure their back and their pre-existing spondylolisthesis becomes symptomatic and then they have surgery recommended, with a very brief window when the symptoms subsided and then came back, I think it's – I think it is much more probable than not that it relates back to this original injury of September.
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> So between September of 2011 and October of 2012, there was only a three-month interval where the symptoms had subsided, per the patient's report; and there is nothing in the medical records to document that in Florida the symptoms ever went away.
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> In fact, the last record I have from Florida was that they had him on light duty and he was awaiting surgery. So is it possible that lifting the piano could have caused the pre-existing condition to become symptomatic?
>
> It's possible. If he had never had the first injury and the second injury caused this pre-existing condition to become symptomatic, then it would be, more probable than not, related to the lifting of the piano.
>
> But that's not the case. I mean, this is a case where there is – like I mentioned before, there are 46 years of a complete absence of symptoms, an injury that is severe enough that it failed conservative treatment, surgery was recommended, and then there is some question in the medical – you know, there's a gap in the records, as far as what can actually be documented.
>
> Per the patient's report, they continued from when he was last seen in March until July of 2012 with a very short window, a symptom-free interval; and then the symptoms came back.

Doerr depo. p. 24, l. l5 through p. 26, l. 2.

Later in that deposition, he stated, "If people's symptoms go away, we don't recommend that they proceed with surgery." Doerr depo. p. 27, ll.6-7.

24. Dr. Doerr's opinion relies in part on his belief that Claimant was symptomatic for the entire time he remained in Florida, and only when he left the state and moved to Idaho did he enjoy a brief respite from his symptoms.[2] Dr. Doerr speculates this hiatus from pain could be

[2] Dr. Doerr's written assessment states in part, "Gary has had 16 months of symptoms of low back pain with left leg pain with the exception of a symptom free interval from July 2012 to October 2012….Given that he only had a three month symptom free interval between July and October 2012, I do believe that it is medically more probable than not that the current symptoms

due to the notion that perhaps Claimant may have been less active after leaving Florida, at least until he took the Idaho Youth Ranch job. When he started to work, his activity level increased and his pain returned. Dr. Doerr sees this as a likely scenario due to the fact symptoms can "wax and wane" in people with back problems such as Claimant's. Doerr depo. p. 29, l. 18. Dr. Doerr suggests Claimant's pain simply "came back" around the time he was lifting the piano. In response to a question regarding causation from the surety, he treats the 2012 accident as if it was a "non-event." Instead he states:

> I believe on a medically more probable than not basis that Mr. McCrea's symptoms and need for surgery are a result of an exacerbation [in 2011] of his underlying pre-existing L5-S1 spondylolisthesis with bilateral foraminal stenosis. Given that he had only a three month symptom free interval prior to the recurrence of his symptoms on 10/13/12, I believe that the current symptoms and the need for surgery are the result of his 09/25/11 industrial injury rather than his 10/13/12 industrial injury.

Defendants' Exhibit D, p. 3. Dr. Doerr does not attempt to explain what caused the "recurrence" of Claimant's symptoms beyond the notion that pain waxes and wanes in people with Claimant's condition. Nor does he explain what constituted Claimant's "10/13/12 industrial injury."

25. Defendants' next point is that the MRIs from 2011 and 2012 are either identical, or actually show an improvement in the reduction of Claimant's disc herniation from 2011 to 2012.[3] Defendants argue there is no MRI evidence of a new injury, and if there is

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and need for future surgery are a result of his original injury on 09/25/11 rather than the injury on 10/13/12." Defendant's Exhibit D, p. 3.

[3] Three different doctors looked at the same MRIs and came up with three different conclusions. Dr. Montalbano saw what he felt was a new disc herniation on the 2012 MRI compared to the 2011 image. Dr. Doerr called the two MRIs essentially identical, or perhaps the 2012 MRI showed a slightly smaller disc herniation. Dr. Garabedian opined that the 2012 MRI showed "marked improvements, with near complete resolution of the herniated disc." Defendants' Exhibit I. Based solely on MRI analysis of the three doctors, Claimant's back might be worse, the same, or much better in 2012 compared to 2011.

no new injury, there is no basis for compensation under the workers' compensation statutes. As stated by Dr. Doerr, "I was not able to diagnose a specific injury based on his new MRI, compared to his previous MRI." Doerr depo. p. 23, ll.11-13.

26. Dr. Doerr dismisses Dr. Montalbano's MRI findings on the issue of a new disc herniation. He testified the finding Dr. Montalbano suggested is a new herniation is in fact present on both the 2011 and the 2012 MRI films, and is of such insignificance it was not reported by either of the reviewing radiologists. According to Dr. Doerr, since this "disc fragment" was present prior to 2012, it can not be evidence of a new injury. Furthermore, it is not a clinically significant finding, as evidenced by the fact it was not reported by either reviewing radiologist.

27. The 2012 MRI finding discussed by Dr. Montalbano was not listed in the reading radiologist's conclusions. In his reports to Rachelle Jaramillo, PA-C, dated December 7, 2012, and March 13, 2012, and letters to Linda Wilson of the State Insurance Fund, dated December 12, 2012, and February 15, 2013, Dr. Montalbano does not mention this MRI finding when supporting his recommendation for surgery. The radiologists' findings from the 2011 MRI and the 2012 MRI appear similar with regard to what they found as clinically significant findings. The Referee finds the testimony and records of Drs. Doerr and Garabedian to persuasively establish that there is no evidence of a new clinically significant interval change between the 2011 and 2012 MRI studies evidencing a new acute injury.

28. Defendants' third argument against liability is that Claimant is not credible and his testimony should be discarded when rendering a decision in this matter. They cite several examples in an attempt to bolster their argument. Defendants' credibility attack begins with Claimant's statement to Dr. Montalbano that his 2011 injury "resolved with physical

therapy." Defendants claim this statement shows Claimant is not credible, since his therapy ended in December 2011, yet he testified repeatedly he was not symptom free until at least sometime in April 2012. Defendants' argument on this point is not well taken. Claimant did not tell Dr. Montalbano he was asymptomatic "as soon as" or "by the time" physical therapy ended in December. Dr. Montalbano's statement can reasonably be read to mean Claimant's injury resolved through the use of physical therapy, as opposed to other modalities, such as surgery. It implies a vehicle for resolution, not a time frame. Next, Defendants note Claimant told Dr. Doerr he was pain free by July 2012[4] and told Dr. Montalbano he was pain free by June 2011. He testified at hearing he was pain free by the end of April 2012. These inconsistencies are not hugely significant, and the Referee notes it is not always easy to know, or remember, exactly when a gradually resolving condition is finally gone for good. By the time of hearing, Claimant had the chance to refresh his memory by reviewing his workers' compensation settlement and the time frames contained therein. It is not surprising he had a better idea of when he was essentially pain free after reviewing the date of that document, since he relates his recovery with the time frame for settling his claim.

29. Defendants' best argument for impugning Claimant's credibility involves Dr. McBride's medical notes, which Claimant directly and repeatedly repudiates. Dr. McBride's notes from March 15, 2012, paint a far different picture of Claimant's condition than Claimant testified to under oath. As previously noted, the doctor's records state Claimant was in significant pain, severely tender over his lumbar spine, and not at MMI in

[4] Claimant's statement may not be as straight forward as it seems at first glance. This issue will be discussed in greater detail below.

mid-March 2012. Dr. McBride was awaiting authority for surgery and nothing in his notes of that date suggests Claimant rejected the suggestion for surgery. Claimant's testimony both in his deposition and at hearing disputes almost all of Dr. McBride's notes of that visit, as discussed earlier herein.

30. The Referee must consider the weight to give these two contrasting versions of Claimant's state of recovery. While Dr. McBride's records are admissible, and were admitted without further foundation, they carry no special status of being infallible, necessarily accurate, or peculiarly trustworthy. In this case, they stand in direct opposition to sworn testimony, and must be scrutinized the same as the live testimony. The Referee has no knowledge of Dr. McBride - how, when, or even if, he personally transcribes his office notes, the type of notes he takes during an examination, to what extent he relies upon earlier records when compiling current summaries, or his reputation in general. One could even ponder for whom the March 15, 2012, office note was written. At the time of the examination, Dr. McBride was trying to obtain surgical authority from the surety. A note of continuing pain and limitations would certainly be more persuasive than a note indicating the Claimant was feeling much better. The Referee is not suggesting this is what happened, but simply illustrating the type of issues which can arise when reviewing office notes without further information.

31. The Referee had a chance to observe and question Claimant at the hearing, and found him to be basically honest. It appeared he tried to answer questions candidly, although at times it was apparent he was a bit confused by the questioning. The Referee finds him to be credible, and places more weight upon Claimant's sworn testimony than upon the written office notes of his treating surgeon.

32. Importantly, the weight assigned to Claimant's testimony relies heavily upon hindsight, as opposed to simply relying upon Claimant's credibility during the hearing. The adage "actions speak louder than words" (or office notes) applies here. Shortly after his March 15, 2012, office visit with Dr. McBride, Claimant authorized his attorney to settle his case for an amount of money which does not appear to contemplate a surgical condition. He apparently did not seek any further treatment for back issues thereafter. He did refill his medications after March 15, and instead testified he threw out his pills when he moved from Florida in July 2012. Once in Idaho, he applied for and obtained work which required heavy lifting. He was able to do the heavy lifting on a daily basis without issue for approximately one month until the accident in question. This fact pattern is not consistent with a person who is experiencing the debilitating pain and limitations suggested by Dr. McBride's medical notes. Claimant's actions are consistent with his testimony. Defendants' claimed "inconsistencies" in Claimant's testimony are either a matter of interpretation, or do not appear to be deliberate falsehoods as much as memory issues regarding dates and times.

33. On the other hand, some of Dr. Doerr's assertions are questionable. For example, he testified that Claimant was never pain-free until he left Florida. In his deposition, Dr. Doerr stated, "[o]ne of the questions I asked him…was whether there was any period of time *between when he left Florida and when he came to Idaho that he was symptom-free.* He reported to me that about July of 2012 his symptoms did subside." Doerr depo. p. 12, ll. 14-19. (Emphasis added). Since Claimant left Florida in July 2012, it is reasonable to understand why he mentioned being pain-free as of July. After all, it was the doctor who set the time frame for discussion – from July forward. Next, Dr. Doerr's

statement that "there is nothing in the medical records to document that in Florida the symptoms ever went away" is a bit disingenuous. After all, there is nothing in the medical records to document the pain still was ongoing after April 2011. Of course, this is because there are *no* Florida medical records at all after March 15, 2012. However, Claimant's *actions* certainly support his testimony that he was pain free in April 2011. It is not reasonable to attempt to prove Claimant was in pain by citing to a lack of medical records. The Referee finds the Claimant was symptom free from at least April until October 13, 2012.

34. The mere fact that Claimant suffered an industrial accident on October 13, 2012, does not automatically mean he has a compensable claim. In order to recover benefits, he must show he suffered an injury in the accident. The recent Industrial Commission case of *Davis v. U.S. Silver-Idaho, Inc.,* IC-2008-031273, (December 20, 2012) clearly sets forth Claimant's burden of proof. As noted therein at p. 14 of the opinion:

> …Claimant must demonstrate that the accident caused an injury. An injury is construed to include only an injury caused by accident which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). [Now § 72-102(18)(c).] The occurrence of pain alone, without evidence of damage to the physical structure of a Claimant's body, is not sufficient to constitute an "injury". (Citation omitted). Therefore, the question which we must answer in the affirmative in order to award benefits in this case is not whether Claimant experienced a sudden and severe worsening of his pain contemporaneous with his work activities…Rather, in order to conclude that Claimant is entitled to workers' compensation benefits, we must be satisfied that the accident…is responsible for causing physical injury to the structure of his body. If this question is answered in the affirmative, then we must make some determination as to whether Claimant's injury was temporary and self-limiting in nature, or instead whether Claimant continues to suffer to this day from the effects of a permanent worsening of his underlying condition.

There is no evidence of a new injury on Claimant's MRIs or x-rays. There is no outward manifestation of injury, such as a bruise, cut, or swelling. Claimant says his pain is much

worse after this most recent accident than it was after his Florida accident, but pain alone is not compensable. However, in addition to increased pain, Dr. Doerr noted Claimant's symptoms to include limitation of movement, and paresthesias radiating into the left leg. Defendants' Exhibit D, p. 3. Dr. Montalbano reported symptoms of decreased sensation at L5-S1 distribution and urinary hesitancy, in addition to bilateral lumbar radiculopathies.[5] Claimant's Exhibit 4, p. 5. These symptoms are indicative of injury, but most of them were present after Claimant's industrial accident of 2011, and none of them standing alone prove Claimant suffered a new injury in October 2012.

35. When Claimant was initially injured in 2011, he was prescribed physical therapy in an effort to resolve his pain and improve his function. Certainly, if Claimant went through physical therapy and his symptoms resolved, he would not be a surgical candidate, even though the underlying spinal issue would still exist. Instead, he would likely be released from care. Claimant got better after his September 2011 industrial accident. By the end of April, he was fully functional, and his pain resolved.[6] On October 12, 2012, Claimant had no symptoms indicative of a back injury. He did not have pain, limitation of movement, paresthesias, or urinary hesitation as of that date. While lifting the piano at work, he experienced a recurrence of the symptoms he had first experienced after his Florida accident. The Idaho accident produced pain and symptoms which were not present the day before the accident and which had not been present for approximately six months. Admittedly, the pain and symptoms were mostly the same as he experienced

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[5] Claimant's previous complaints included *left sided* radiculopathy. Defendants' Exhibit B, p. 8.

[6] Even if he had told Dr. McBride in March he was in pain and wanted surgery, there is nothing in the record which would show Claimant was still symptomatic by the end of April.

during a prior injury[7], but that fact alone does not disqualify Claimant from obtaining benefits.

36. The final question for consideration is whether the injury of October 13, 2012, was simply a temporary exacerbation of a pre-existing condition, or whether it was a permanent worsening of his condition to the point where surgery is now necessary. This is especially important in this case where identical surgery was proposed in response to a previous injury less than a year prior to the accident in question. After all, if Claimant needed surgery the day before his October 13, 2012, accident, and still needed it the day after, the surety herein should not be obligated to pay for what it did not cause. There is nothing in the record to suggest Claimant was a surgical candidate at any time from his first day working at Idaho Youth Ranch to the date of the accident. He engaged in heavy lifting on a regular basis with no problems. He was not limited in any fashion by his prior back injury. He was not in pain. Dr. Doerr pointed out people such as Claimant who are not in pain and have no limitations are not surgical candidates, even if they have degenerative processes ongoing, and even if they had previously been surgical candidates based upon their condition at the time.

37. While Claimant recovered from his 2011 back injury, he has not been so lucky this time. As Dr. Montalbano points out, Claimant has not returned to his base line, thus suggesting a permanent aspect to his symptoms. Clearly, when Claimant felt that stab of pain and shock down his leg upon lifting the piano, it was more than a fleeting exacerbation of his pre-existing condition. The action of lifting the piano contributed to

[7] The urinary hesitancy and *bilateral* radiculopathies appear to be new.

the symptoms and disability from which Claimant now suffers. These symptoms have persisted through a course of conservative treatment. Claimant's relative inactivity has not caused his symptoms to wane, and time has not helped his recovery.

38. Claimant was not a surgical candidate by May 2012 since, as Dr. Doerr noted previously, "[i]f people's symptoms go away, we don't recommend that they proceed with surgery." His symptoms went away prior to the surety authorizing surgery in Florida, and he remained symptom free until he lifted the piano on October 13, 2012. But for the act of lifting the piano,[8] there is nothing to suggest Claimant would be symptomatic today. After all, there is no sign of further degeneration noted in his latest MRI. Dr. Garabedian even noted marked improvement in Claimant's disc herniation. It is hard to accept Dr. Doerr's analysis that Claimant's symptoms just "came back." It is more likely than not that Claimant's pre-existing condition was aggravated by his work-related accident and injury, and once aggravated his condition has not resolved. He continues to suffer from physical limitations and pain, which necessitates surgery to correct at this time. All parties agree surgery is necessary and reasonable in this case. On the issue of causation, the Referee finds the opinion of Dr. Montalbano to be more persuasive and better reasoned than that of Dr. Doerr.

39. To summarize, this case is made difficult by the finding that there is no objective medical evidence supporting the occurrence of an injury related to the October 13, 2012 accident. Furthermore, there is no medical testimony or record which describes, in any detail, the nature of the injury which Claimant is thought to have suffered. Rather,

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[8] Both opining doctors agree the mechanism of lifting a piano is sufficient to produce back injury, or aggravate a pre-existing but asymptomatic back condition.

the Referee is asked to infer that the accident caused damage to the physical structure of Claimant's body from the following facts:

- Claimant suffered an accident in 2011 from which he responded to conservative treatment;
- Claimant was symptom free for a period of several months prior to the accident of October 13, 2012;
- Claimant worked at a physically demanding job with no difficulties for a month prior to this accident;
- Claimant was not a surgical candidate immediately prior to October 13, 2012;
- Following the October 13, 2012 accident Claimant experienced the immediate return of low back and lower extremity symptoms;
- These symptoms did not respond to conservative treatment and Claimant has not returned to his pre-injury baseline.

Although this a close case, the facts referenced above are sufficient to support the conclusion that the accident of October 13, 2012 did cause damage (of some type) to the physical structure of Claimant's body sufficient to explain Claimant's current symptoms.

40. Because the accident of October 13, 2012, permanently aggravated Claimant's pre-existing condition, Claimant is entitled, pursuant to I.C. §72-432, to reasonable and necessary medical benefits, including those associated with surgery as proposed by Dr. Montalbano, and for a reasonable time thereafter.

41. Dr. Montalbano took Claimant off work until further notice as of December 7, 2012, and he was terminated from employment on December 11, 2012. Claimant has not

worked since he was terminated from the Idaho Youth Ranch. Employer improperly terminated Claimant's temporary disability benefits after receiving Dr. Doerr's report and causation analysis. Claimant is entitled to temporary benefit payments from the time of their termination until such time as he no longer qualifies for them.

CONCLUSIONS OF LAW

1. Claimant is entitled to reasonable and necessary medical benefits pursuant to I.C. §72-432, including those charges associated with the recommended lumbar surgery, and for a reasonable time thereafter.

2. Claimant is entitled to temporary total disability benefits (TTD) from the date his temporary benefits were terminated until such time as Claimant no longer qualifies for them.

RECOMMENDATION

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

DATED this 27th day of November, 2013.

INDUSTRIAL COMMISSION

/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2013, 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:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

kla /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY MCCREA, Claimant, v. IDAHO YOUTH RANCH, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-026908** **ORDER** **FILED: 3 DECEMBER 2013**

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 entitled to reasonable and necessary medical benefits pursuant to I.C. §72-432, including those charges associated with the recommended lumbar surgery, and for a reasonable time thereafter.
2. Claimant is entitled to temporary total disability benefits (TTD) from the date his temporary benefits were terminated until such time as Claimant no longer

qualifies for them.

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

DATED this 3rd day of December, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

/s/_____
R.D. Maynard, Commissioner

_____Participated but did not sign_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

kla /s/_____