BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CALVIN OWENS, Claimant, v. HERCULEAN CONCRETE SYSTEMS, INC., Employer, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2008-027750** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED: June 30, 2011

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 Boise, Idaho, on October 27, 2010. Claimant, Calvin Owens, was present in person and represented by Bruce D. Skaug, of Boise. Defendant Employer, Herculean Concrete Systems, Inc. (Herculean), and Defendant Surety, Employers Compensation Insurance Company, were represented by Lora Rainey Breen, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 23, 2011.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

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

2. Whether Claimant's condition is due, in whole or in part, to a pre-existing and/or subsequent injury/condition.

3. Claimant's entitlement to additional medical care.

4. Claimant's entitlement to additional temporary disability benefits.

5. Claimant's entitlement to additional permanent partial impairment benefits.

6. Claimant's entitlement to permanent disability benefits in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant asserts he suffered an industrial accident on August 18, 2008, resulting in back strain and torn back muscles, for which he is entitled to additional past and prospective medical treatment. He also claims additional temporary total disability benefits from January 30 through May 11, 2009. Claimant asserts he sustained permanent impairment of 5% of the whole person and permanent disability of 54% in excess of impairment due to his industrial accident.

Defendants acknowledge Claimant's August 18, 2008 industrial accident and resulting back strain. They acknowledge that Claimant suffers a 1% whole person permanent impairment, but assert he has no permanent disability beyond impairment and is not entitled to further medical or temporary disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition testimony of Claimant, taken March 25, 2003, and admitted as Defendants' Exhibit 13;

3. The pre-hearing deposition testimony of Claimant, taken April 20, 2010, and admitted as Defendants' Exhibit 14;

4. The testimony of Brian Cooper, George Eric Lambdin, Claimant's wife, Dianne R. Owens, and Claimant, taken at the October 27, 2010 hearing;

5. Claimant's Exhibits 1 through 17 and Defendants' Exhibits 1 through 16, 18, 20, and 21, admitted at the hearing;
6. The post-hearing deposition testimony of Terry L. Montague, taken November 2, 2010;
7. The post-hearing deposition testimony of Michael O'Brien, M.D., taken November 17, 2010;
8. The post-hearing deposition testimony of Roy Tyler Frizzell, M.D., taken November 22, 2010;
9. The post-hearing deposition testimony of Kevin Krafft, M.D., taken November 23, 2010.

The objections posed during Terry Montague's deposition are overruled. Defendants' objection to allowing Dr. O'Brien to examine Claimant during Dr. O'Brien's deposition and testify regarding any muscle spasm that may have been observable in Claimant's back at the time of Dr. O'Brien's deposition is sustained pursuant to J.R.P. 10(E)(4), as constituting testimony based upon evidence developed following the hearing. The balance of the objections posed during Dr. O'Brien's deposition are sustained except the objections posed at pages 27 and 28 thereof, which are overruled. All objections posed during Dr. Frizzell's deposition are overruled except the objection posed at page 14 thereof, which is sustained as constituting a new opinion regarding limitations not disclosed in response to discovery requests. The objections posed during Dr. Krafft's deposition are all overruled. The objections posed during Claimant's pre-hearing deposition (constituting Defendants' Exhibit 14) are overruled except for those at page 67 thereof, which are sustained.

After considering 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 1961. He was 49 years old and had lived in Nampa for approximately three years at the time of the hearing. Prior to that, Claimant had lived in Melba for approximately 15 years.

2. Claimant was raised on a ranch in Phelan, California. During high school he worked as a butcher, grocery bagger, and tire shop and gas station attendant. Claimant struggled scholastically and dropped out of high school in the twelfth grade. After leaving high school, he worked in construction and performed concrete work and framing. He worked as a restaurant cook for a few years. Claimant joined the Local 97 cement mixers union and became a union crew foreman. In approximately 1989, Claimant obtained his contractor's license in California. Claimant left the union because of corruption.

3. Claimant pursued an active life style. He trapped bobcats and coyotes, hunted big game, skied, and played softball and baseball. He commenced studying martial arts at age 15 and lifted weights, punched and kicked the heavy bag, and taught martial arts from middle school through high school and all of his adult life prior to August 2008. He trained his son and son-in-law in martial arts. His son is now a professional UFC fighter.

4. In approximately 1992, Claimant moved to Idaho to raise his family. He opened his own concrete business and also worked for several concrete companies. From approximately 1995 until 2000, Claimant worked as a security guard.

5. In approximately 1997, Claimant was hit in the face by a concrete pump and sustained four facial fractures. He recovered and resumed working. Claimant also suffered bilateral carpal tunnel syndrome, for which he underwent surgical treatment. He recovered and resumed working. Claimant worked for Micron for approximately two years. He supervised employees who cleaned up after construction projects in clean rooms. He maintained the employees' time records on a computer; however, he developed no appreciable computer skills.

6. In approximately 2003, Claimant obtained his GED. He then obtained his Idaho real estate license and pursued real estate sales for about two years. However, his sales efforts were mostly unsuccessful.

7. In approximately 2006 or 2007, Claimant and his friend, George Lambdin, worked together building out a small subdivision. Claimant drove heavy equipment, managed the building crew, and performed the concrete work on the project. He earned $30.00 to $35.00 per hour for supervisory work on the project.

8. In 2007, Claimant began working for Herculean Concrete. He left for a time and then returned to Herculean Concrete in March 2008. By August 2008, he was working approximately full-time and earning $17.00 per hour.

9. Claimant had no back pain prior to August 18, 2008.

10. On August 18, 2008, Claimant was at work finishing concrete when he attempted to jump a five foot span over newly finished concrete. As he jumped, his boot caught between a bolt and a wooden footing, wrenching his back and promptly producing debilitating back pain. He immediately reported the accident and accepted his supervisor's offer to drive him to the hospital for medical treatment. Claimant was diagnosed with lumbar strain and given prescriptions for Flexeril and Vicodin.

11. On August 26, 2008, Claimant was examined again and found to have vertebral spine and paraspinal tenderness with paraspinal spasm. He walked painfully, with a noticeable limp. He was referred to physical therapy. On September 3, 2008, Claimant was again examined and noted to have paraspinal spasm. Over the next several weeks, Claimant was treated conservatively by Stephen Martinez, M.D., with medications and physical therapy. On October 7, 2008, Claimant underwent a lumbar MRI which showed mild degenerative disc disease with no evidence of stenosis, compromise, or intervertebral neural foraminal narrowing. Dr. Martinez referred Claimant to physiatrist Michael McMartin, M.D.

12. On November 12, 2008, Dr. McMartin examined Claimant and diagnosed chronic and acute musculoligamentous low back pain syndrome. Dr. McMartin prescribed medications and physical therapy. Claimant's condition improved somewhat, then worsened. On December 19, 2008, Dr. McMartin examined Claimant and found he was clearly not able to return to work. Dr. McMartin referred Claimant to St. Alphonsus Rehabilitation Services (STARS) for a work hardening program.

13. On January 5, 2009, Claimant was examined by physiatrist Kevin Krafft, M.D., director of the STARS work hardening program. Dr. Krafft noted that Claimant was taking Norco, Motrin, Trazodone, and Celebrex and drinking a 12-pack of beer per week with some liquor. Dr. Krafft prescribed Baclofen to address Claimant's muscle spasms. Claimant attended the STARS program five days per week from January 7 through 29, 2009. On January 21, 2009, Dr. Krafft noted that Claimant appeared listless and had increased pain and difficulty sleeping. Dr. Krafft noted that he would consider an alternative antispasmodic, Skelaxin, if the Baclofen was not helpful. On January 30, 2009, Dr. Krafft found Claimant at maximum medical improvement, rated his permanent impairment at 1% of the whole person, and opined that he could return to work without restrictions in a heavy work capacity, with occasional lifting of 100 pounds. Nevertheless, Dr. Krafft indicated that he would initiate Claimant on neuropathic pain medication to help his reported shooting back pain. Claimant testified that he was heavily medicated during his participation at STARS and that his performance was enhanced due to a high concentration of pain medications and alcohol, which masked his true symptoms.

14. Claimant requested authorization to be examined by a surgeon. Defendants granted the request and, on February 5, 2009, Claimant presented to neurosurgeon R. Tyler Frizzell, M.D. Dr. Frizzell diagnosed lumbar sprain with no evidence of disk hernation or nerve root compromise.

15. On May 11, 2009, Claimant presented to neurologist Michael O'Brien, M.D., who diagnosed marked back spasms on the left. Dr. O'Brien explained Claimant's injury as a muscle

tear resulting in persisting scar tissue with associated pain and spasm. Dr. O'Brien rated Claimant's permanent impairment at 5% of the whole person. Dr. O'Brien temporarily restricted Claimant from any bending at the waist and from climbing, squatting, and lifting more than 20 pounds occasionally.

16. In the fall of 2009, Claimant and his long-time friend, George Lambdin, went deer and elk hunting together. Lambdin testified that Claimant was the physically toughest person he knew. Nevertheless, after three days of hunting, Claimant was almost unable to move due to back pain and Lambdin had to help Claimant into the truck and return home.

17. In early 2010, Claimant helped Lambdin drive a piece of heavy equipment back from Texas to Nevada or Idaho. After one day of driving, Claimant was in substantial pain and, thereafter, they had to stop frequently so Claimant could walk to help ease his back pain.

18. On April 27, 2010, Dr. O'Brien examined Claimant and again found persisting back spasms. Dr. O'Brien concluded that, based upon Claimant's failure to improve after nearly one year, his bending and lifting restrictions were permanent.

19. On October 7, 2010, Dr. Krafft examined Claimant again at Defendants' request. Dr. Krafft identified no objective findings to warrant permanent restrictions.

20. At the time of hearing, Claimant testified he continued to have moderate ongoing back pain that significantly increases with activity. He could do no house or yard work that required bending. He no longer participates in softball, basketball, martial arts, or skiing because of his back pain. Claimant believes that he could work as a cashier or hotel attendant. He does not believe he could perform concrete work given his persisting back pain. He has submitted hundreds of applications for work since his industrial accident, but he has not yet found work.

21. Claimant recently started his own business called "Nuisance Nabbers," which captures and removes unwanted animals, most commonly skunks and badgers, from residential

and commercial areas. He has earned a maximum of $400.00 in one month from his business. Claimant is a gifted singer and has produced an album of gospel songs.

22. Claimant's memory is imperfect. However, having reviewed the evidence and observed Claimant, Claimant's wife, and Eric Lambdin at hearing, the Referee finds that all are generally credible witnesses.

DISCUSSION AND FURTHER FINDINGS

23. The provisions of the Idaho 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. **Causation**. The first noticed issues concern the cause of Claimant's current back complaints. Claimant alleges that his ongoing back condition is caused by his industrial accident. Defendants assert that Claimant has not established that his ongoing back complaints are related to his industrial accident.

25. A claimant must prove not only that he 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). 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, 890 P.2d 732 (1995).

26. In the present case, Defendants note the absence of objective findings, specifically of muscle spasm, in the records of Claimant's treating physicians after approximately September 2008 and emphasize that Dr. Krafft did not observe muscle spasm in any of his examinations during Claimant's participation in the STARS work hardening program.

27. It is clear that Claimant's early medical care providers observed and recorded muscle spasms in Claimant's low back from the time of his August 18, 2008 accident through at least September 2008. Dr. Krafft did not observe any back spasm when he examined Claimant in January 2009 during the STARS program. However, during these examinations, Dr. Krafft recorded Claimant's complaints of muscle spasms and also prescribed two different antispasmodic medications for Claimant's use during the STARS program. Dr. Krafft ultimately rated Claimant's permanent impairment at 1% of the whole person, thus acknowledging the persisting nature of Claimant's back pain due to his industrial accident. Dr. Frizzell agreed with Dr. Krafft that Claimant has a permanent impairment due to his industrial accident, although Dr. Frizzell did not quantify it.

28. Defendants further attack the veracity of Claimant's alleged muscle spasms by asserting that Dr. O'Brien reported observing spasms on the left side of Claimant's back while Claimant's wife testified that she had observed spasms on the right side of Claimant's back.

29. Close examination of Claimant's wife's testimony establishes that she occasionally used the word "right" as a synonym for "yes," and that the substance of her testimony was that Claimant has muscle spasms from time to time on both sides of his back:

> Q. Now you mentioned the back spasms. How would you describe Calvin's back spasms?
>
> A. Tight, kind of a raised muscle on the side.
>
> Q. Have you—
>
> A. I have to rub it out.
>
> Q. Can you see anything on his back that you're rubbing out?
>
> A. The muscle.
>
> Q. What do you see?
>
> A. Yeah, it's just raised and hard and ..

Q. Compared to his—

A. Compared to the other side.

Q. Okay. Tell the Referee—I know you're pointing to an area of your back. But describe it, for the written record, where you're pointing.

A. Okay. Well, it's not the lower, lower back. But it's below the middle back. So it's the loin in here.

Q. On the right or left side?

A. The right.

Q. And so on Calvin's right side, if he's hurting—

A. I think it's on both sides. But, right, if he's having a spasm or whatever, it's raised and tight on the right side.

Q. You can see that visibly?

A. Right.

….

Q. When was the last time you had to rub his—that knot out of his back?

A. Probably a couple days ago.

Transcript, p. 61, l. 4—p. 62, l. 14.

30. Dr. O'Brien noted muscle spasm, predominantly on Claimant's left side, when he examined Claimant on May 11, 2009, and April 27, 2010. However, in his deposition, Dr. O'Brien explained:

Q. What size is that spasm on my client's back? Can you describe that in inches or centimeters? How big is the spasm when you looked at it?

A. Well, when I looked at it, it would probably be the size of a fist on the one side and the size of two or three fingers on the other.

O'Brien Deposition, p. 21 ll. 11-16. Thus, Dr. O'Brien's testimony does not contradict, but rather corroborates, Claimant's wife's testimony. Dr. O'Brien affirmed that muscle spasm is an objective finding that a patient cannot fake. He testified that Claimant's ongoing back complaints, including muscle spasms, were caused by the industrial accident.

31. Defendants argue that Dr. O'Brien's opinions should be stricken from the record or given no weight because he was unable to recall what prior medical records he reviewed. Although Dr. O'Brien's opinions may not be premised upon a complete review of Claimant's prior medical records, they are founded upon Dr. O'Brien's personal physical examinations of Claimant on at least two occasions and will not be stricken from the record.

32. Dr. McMartin considered Claimant's complaints credible and found Claimant clearly unable to return to work on December 19, 2008. Dr. O'Brien considered Claimant's complaints credible and found Claimant unable to return to heavy work in May 2009 and April 2010. Dr. O'Brien opined that scarred and torn muscles produced Claimant's continued symptoms. In contrast, Dr. Krafft found Claimant ready to return to heavy work based upon his performance at STARS in January 2009. Claimant's performance at STARS was influenced by prescription narcotics and antispasmodics accentuated by overusing alcohol. Dr. Krafft testified that such a combination could sedate Claimant "quite a bit." Krafft Deposition, p. 36, l. 11. Dr. O'Brien concurred. Dr. Krafft also observed that Claimant was listless at one point during the STARS program.

33. Dr. Frizzell examined Claimant on February 5, 2009, at Defendants' request. Dr. Frizzell found no evidence of disk herniation or nerve root compromise and concluded that Claimant suffered a lumbar sprain from his August 18, 2008, industrial accident. Dr. Frizzell did not observe muscle spasms at that time. However, he testified that Claimant could have had muscle spasms both before and after the date of his examination. Dr. Frizzell reviewed the MRI taken approximately two months after Claimant's industrial accident and noted that it did not show any muscle tear. He opined that this MRI would likely have revealed a severe muscle tear, but would be less reliable in diagnosing a moderate tear. He acknowledged that he could not say whether Claimant suffered a moderate muscle tear from his industrial accident or not.

34. The absence of back muscle spasm when Dr. Krafft examined Claimant while he was medicated at the STARS program, and on one later occasion, does not disprove the presence of back spasms as observed by Dr. O'Brien on other occasions. Conversely, the fact that Dr. O'Brien observed muscle spasms when examining Claimant's back, but Drs. Krafft and Frizzell did not, does not destroy the validity of any physician's observations. Rather, it corroborates the essence of Claimant's testimony and that of his wife—that Claimant's back pain increases with activity and his back spasms are intermittent.

35. Claimant has proven that his ongoing back complaints, including back muscle spasms, are related to his industrial accident.

36. **Additional medical care**. The next issues concern Claimant's entitlement to additional medical care. Claimant alleges that he is entitled to reimbursement of $111.00 for his expenses for a medical appointment on January 8, 2010, at Primary Health. He also alleges entitlement to reasonable and necessary future medical care as recommended by Dr. Michael O'Brien, including acupuncture.

37. Idaho Code § 72-432(1) mandates 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 required by the employee's physician or needed immediately after an injury or disability from 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. Idaho Code § 72-432(1). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. An 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).

38. Past medical expenses. Claimant herein requests $111.00 for past medical expenses incurred from a visit to Primary Health on January 8, 2010.

39. Defendants paid for Claimant's medical care until Drs. Krafft and Frizzell found Claimant medically stable on January 30, 2009, and February 17, 2009, respectively. Thereafter, Defendants denied Claimant further medical care. Claimant attempted to return to Dr. Krafft, but was informed that his case was closed. Claimant's counsel requested further medical treatment for Claimant from Dr. Krafft, which Defendants denied on or about January 4, 2010. The denial of further medical care was based upon the absence of muscle spasm when Dr. Krafft and Dr. Frizzell examined Claimant earlier. As noted, Dr. O'Brien's subsequent examinations of Claimant document intermittent ongoing back muscle spasms.

40. Although Claimant was medically stable when he sought further medical care on January 8, 2010, his treatment on that date was palliative. At that visit, physician's assistant Daryn Barnes prescribed Norco (10 mg.) and Motrin (800 mg.) as treatment for Claimant's low back pain from his August 2008 injury. These medications appear to be identical to those previously prescribed by Dr. Martinez and recognized by Dr. Krafft.

41. Claimant's January 8, 2010 medical expenses constitute reasonable palliative treatment needed for his injury, which Defendants failed to provide. Claimant has proven his entitlement to reimbursement for these expenses.

42. Prospective medical treatment. Claimant also requests future medical treatment as recommended by Dr. O'Brien, including acupuncture.

43. As already noted, Drs. Krafft and Frizzell opined that Claimant needed no further treatment due to his industrial accident and Defendants have denied further medical treatment. However, the denial was based upon the absence of muscle spasm when Dr. Krafft and Dr. Frizzell examined Claimant and the mistaken notion that Claimant has no objective evidence of ongoing back pathology. Dr. O'Brien's examinations of Claimant document ongoing intermittent back muscle spasms and his opinion as to additional palliative medical treatment is,

therefore, more persuasive. Pursuant to Dr. O'Brien's recommendation, Claimant is entitled to further reasonable palliative medical care, which may include acupuncture.

44. Defendants allege that Claimant requests reimbursement for his consultations with Dr. O'Brien on May 11, 2009, and April 27, 2010. However, it does not appear that Claimant makes any such request and the Referee makes no such determination.

45. **Additional temporary disability benefits.** Claimant alleges that he is entitled to temporary total disability benefits for the period between January 30, 2009 and May 11, 2009.

46. 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). Once a claimant establishes by medical evidence that she is still within the period of recovery from the original industrial accident, she is entitled to temporary disability benefits unless and until such evidence is presented that she has been released for light duty work and that (1) her former employer has made a reasonable and legitimate offer of employment to her which she is capable of performing under the terms of her light work release and which employment is likely to continue throughout the period of recovery or that (2) there is employment available in the general labor market which she has a reasonable opportunity of securing and which employment is consistent with the terms of her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219 (1986).

47. In the present case, Defendants paid total temporary disability benefits until February 17, 2009. Dr. Krafft and Dr. Frizzell found Claimant medically stable by January 30, 2009. Dr. O'Brien also found Claimant medically stable on May 11, 2009. Although Dr. O'Brien's finding comes later than Dr. Krafft's, there is no indication that Claimant was not medically stable between the time of Dr. Krafft's finding of stability and Dr. O'Brien's finding.

Dr. O'Brien's finding effectively confirms Dr. Krafft's finding. Claimant has not proven that he is entitled to additional temporary disability benefits.

48. **Permanent partial impairment.** Claimant alleges that he suffers a permanent impairment of 5% of the whole person due to his industrial accident. Defendants assert that Claimant suffers a 1% whole person impairment due to his accident.

49. "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).

50. Dr. Krafft concluded that Claimant suffers a permanent impairment of 1% of the whole person due to his industrial accident and Defendants have paid Claimant benefits accordingly. Dr. Frizzell agreed that Claimant has a permanent impairment, but offered no rating thereof. Dr. Krafft formulated his opinion of Claimant's impairment based upon the absence of objective evidence of back pathology, including muscle spasms, when he examined Claimant and upon Claimant's performance at STARS.

51. The record establishes that Claimant took hydrocodone and alcohol while participating in STARS. Dr. Krafft recorded Claimant's report that he drank a 12-pack of beer per week, plus liquor. During a January 16, 2009 STARS staffing meeting, "Dr. Krafft expressed concerns that the [Claimant] is on narcotics and may be drinking in the evening." Defendants' Exhibit 7, p. 103. Claimant testified that he drank alcohol to ease his back pain during this period

and was sufficiently medicated that he elected to take a taxi to STARS. Dr. Calhoun's notes corroborate Claimant's transportation via taxi and that Claimant told him he was using hydrocodone, Celebrex, Motrin, and a couple of shots of whiskey when his pain was intense. Dr. Krafft noted at one point that Claimant appeared listless and later testified that ingesting alcohol while taking Norco could have had an impact on Claimant's performance at STARS.

52. Dr. O'Brien opined that Claimant suffered a severe back sprain with scarring due to his industrial accident. He examined Claimant on May 11, 2009, and again on April 27, 2010, and testified that Claimant continued to exhibit the same muscle spasms each time. He rated Claimant's permanent impairment at 5% of the whole person. Dr. O'Brien also testified that Claimant's high level of performance at the STARS program was the product of Claimant being medicated at the time he was evaluated. Dr. O'Brien noted that a patient completing physical capacity testing while medicated will not experience the same degree of pain and, thus, could perform more in physical testing.

53. Dr. O'Brien's opinion is more persuasive, as it recognizes Claimant's intermittent muscle spasms and considers the circumstances surrounding Claimant's performance at STARS.

54. Claimant has proven that he suffers a permanent impairment of 5% of the whole person due to his industrial accident.

55. **Permanent partial disability.** Claimant alleges that he suffers a permanent partial disability of 54% in excess of his permanent impairment. Defendants maintain that he suffers no disability in excess of impairment.

56. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by

the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

57. Work restrictions. Dr. Krafft imposed no work restrictions and opined that Claimant could return to heavy work, including concrete finishing. As previously discussed, Dr. Krafft's opinion of Claimant's restrictions is founded upon a mistaken notion that Claimant has no objective signs of back pathology and upon Claimant's performance at STARS, where his back pain was masked by prescription medications and alcohol.

58. As noted above, Dr. O'Brien explained that Claimant's performance at STARS was the result of Claimant being significantly medicated at the time of testing:

> Q. And the STARS program has a whole different set of restrictions on my client, if at all. Do you know why they would be so different than yours?
>
> A. Yes.
>
> Q. Why is that?
>
> A. I think the patient was medicated at the time he went through the program.
>
> Q. And would medications affect the testing that they would do for restrictions?

A. They most certainly would.

Q. How so?

A. Well, if you are taking pain pills, you don't have the pain when you are going through the testing.

Q. So a patient could do more in physical testing if they are on pain pills?

A. That's right.

O'Brien Deposition, p. 22, l. 13—p. 23, l. 3.

59. Vocational consultant, Terry Montague, offered a similar observation:

> I have had many clients have functional capacity evaluations. And normally, just as a protocol before the FCE begins, the physical therapist looks at what pain medications are, what the client might be taking that would mask their ability to do certain things during the functional capacity evaluation, and if possible, they try to wean them off at least so, when they actually come to the testing day, they are not heavily medicated and they can get the best and most accurate result they can. That's something that I generally see happen.
>
> Whether or not that occurred here, I don't know. But based on what Mr. Owens told me and the kinds of pain medication he was having to take, not only before he went, but as soon as he finished and got back home, I say, Well, that could have changed the outcome. Had you not been taking that, you may not have done as well in which case they would have come up with some work restrictions for you. And that could have had a whole different result.

Montague Deposition, p. 29 l. 17—p. 30, l. 11.

60. Claimant's physical capacity demonstrated on one day at STARS, while significantly medicated, does not accurately reflect his capacity for actual employment on a sustained basis.

61. Dr. O'Brien restricted Claimant from bending, from lifting more than 20 pounds, and from standing or walking for more than two hours continuously. The Referee finds the opinion of Dr. O'Brien regarding Claimant's restrictions more persuasive and valid than that of Dr. Krafft.

62. Employment opportunities. After his examination by Dr. O'Brien, Claimant sought vocational assistance from the Idaho Division of Vocational Rehabilitation. However,

they closed his file, ostensibly because they did not believe they could assist him in finding employment given Dr. O'Brien's work restrictions. In spite of filing hundreds of work applications since his industrial accident, Claimant has not found work except in his own business, Nuisance Nabbers, where he earned $400.00 during his most profitable month.

63. Vocational rehabilitation consultant Terry Montague performed a vocational disability assessment of Claimant in July 2010. He evaluated Claimant's transferable skills as a former concrete finisher. He noted that Claimant earned approximately $30,000.00 per year for several years prior to his industrial accident. Montague testified, assuming Dr. Krafft's conclusion that Claimant had a 1% permanent impairment and no work restrictions, that Claimant had no permanent disability in excess of impairment. Montague also concluded that if the work restrictions imposed by Dr. O'Brien are applied, then Claimant has suffered a permanent disability of 40 to 54%. Montague also testified that the no bending restriction imposed by Dr. O'Brien was very limiting. However, Montague utilized the less-limiting 20-pound weight restriction in determining potential positions for Claimant.

64. Montague testified that, applying Dr. O'Brien's restrictions, Claimant could work in unskilled, semiskilled, and perhaps some skilled positions, paying from minimum wage up to approximately $10.00 per hour. Montague noted that although Claimant had a realtor's license and tried to sell real estate, he was not successful and has no license currently. Montague opined that Claimant would sustain a 40% wage loss if he were successful in obtaining employment at $10.00 per hour.

65. Claimant has not worked since leaving Herculean in 2008. He has submitted substantial evidence of his current employment opportunities and his efforts in submitting hundreds of employment applications. Claimant and other credible witnesses testified that he is significantly limited by back pain. Dr. O'Brien restricted Claimant to lifting no more than 20 pounds. Claimant was earning approximately $17.00 per hour at the time of his 2008 industrial

injury. He has prior experience as a cook, trapper, bouncer, security guard, gospel singer and songwriter, concrete finisher, custodial supervisor, and construction laborer.

66. Terry Montague's opinion that Claimant suffers permanent disability of 40% or greater is founded upon the work restrictions imposed by Dr. O'Brien. Although Dr. O'Brien restricted Claimant to lifting no more than 20 pounds, he is clearly capable of lifting far more than 20 pounds. His performance at STARS established that he is capable of lifting 100 pounds occasionally. However, his STARS performance was increased by prescription medications and alcohol to an extent difficult to quantify from the record. Claimant's current self-employment at Nuisance Nabbers would require bending and lifting more than 20 pounds to trap and remove a single badger. The record taken as a whole persuades the Referee that Montague's opinion overestimates the actual extent of Claimant's disability.

67. Based on Claimant's impairment rating of 5% of the whole person and his permanent physical restrictions—especially, but not limited to, his standing, walking, and lifting restrictions—and considering his non-medical factors including his age of 47 at the time of the accident, limited formal education, limited variety of work experience, limited scholastic skills, and inability to return to most of his previous positions, Claimant's ability to engage in regular gainful activity has been reduced. The Referee concludes Claimant has established a permanent disability of 35%, inclusive of his 5% whole person impairment.

CONCLUSIONS OF LAW

1. Claimant has proven that his current low back complaints are related to his industrial accident.

2. Claimant has proven his entitlement to additional medical benefits of $111.00 for his January 8, 2010 treatment at Primary Health and to reasonable palliative medical care pursuant to Dr. O'Brien's recommendation, which may include acupuncture.

3. Claimant has not proven his entitlement to total temporary disability benefits for the period of January 30 through May 11, 2009.

4. Claimant has proven that he suffers a permanent partial impairment of 5% of the whole person due to his industrial accident.

5. Claimant has proven that he suffers a permanent disability of 35%, inclusive of his 5% whole person permanent impairment, due to his industrial accident. Defendants are entitled to credit for all amounts previously paid for Claimant's permanent partial impairment.

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 28th day of June, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2011, 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:

BRUCE D SKAUG
1226 E KARCHER RD
NAMPA ID 83687-3075

LORA RAINEY BREEN
PO BOX 2528
BOISE ID 83701-2528

sc

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CALVIN OWENS, Claimant, v. HERCULEAN CONCRETE SYSTEMS, INC., Employer, and EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	)	**IC 2008-027750** **ORDER** FILED: June 30, 2011

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 has proven that his current low back complaints are related to his industrial accident.

2. Claimant has proven his entitlement to additional medical benefits of $111.00 for his January 8, 2010 treatment at Primary Health and to reasonable palliative medical care pursuant to Dr. O'Brien's recommendation, which may include acupuncture.

3. Claimant has not proven his entitlement to total temporary disability benefits for the period of January 30 through May 11, 2009.

4. Claimant has proven that he suffers a permanent partial impairment of 5% of the whole person due to his industrial accident.

5. Claimant has proven that he suffers a permanent disability of 35%, inclusive of his 5% whole person permanent impairment, due to his industrial accident. Defendants are entitled to credit for all amounts previously paid for Claimant's permanent partial impairment.

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

DATED this 30th day of June, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRUCE D SKAUG
1226 E KARCHER RD
NAMPA ID 83687-3075

LORA RAINEY BREEN
PO BOX 2528
BOISE ID 83701-2528

sc _/s/_____