BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT RUNKLE, Claimant, v. WESTERN HEATING & AIR CONDITIONING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2010-011837** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 30, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on December 10, 2010. Richard S. Owen of Nampa represented Claimant. Kimberly A. Doyle of Boise represented Defendants throughout the proceedings. Ms. Doyle moved out of state after briefing was completed, and Roger Brown appeared as substitute counsel. The parties submitted oral and documentary evidence, took two post-hearing depositions, and filed post-hearing briefs. The matter came under advisement on April 4, 2011 and is now ready for decision.

ISSUES

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

1. Whether Claimant suffered an injury from an accident arising out of and in the

course of employment;

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

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

4. Whether and to what extent Claimant is entitled to the following benefits:

A. Medical care;

B. Temporary partial and/or temporary total disability benefits (TPD/TTD); and

C. Attorney fees.

All other issues are reserved pending determination on compensability of the claim.

CONTENTIONS OF THE PARTIES

Claimant asserts that on the morning of Monday, April 26, 2010, following his usual routine of opening the shop and office and making coffee, he suffered an immediate onset of acute low back pain that extended down both legs, causing him to fall to the floor. Claimant was diagnosed with cauda equina syndrome which did not respond to conservative treatment, necessitating surgical intervention. Claimant asserts that his low back injury and resultant surgery constitutes a compensable workers' compensation claim. At this time, he asks the Commission to find his injury compensable and order an award of medical and time loss benefits, as well as an award of attorney fees for unreasonable denial of his workers' compensation claim.

Defendants do not dispute Claimant's version of events that led to his low back surgery, but assert several defenses to Claimant's back injury claim. First, Defendants assert that

Claimant was not performing the duties of his job at the time the injury occurred and, therefore, the injury did not arise in the course of his employment. Second, Defendants argue that Claimant's injury was not the result of an "accident" as the workers' compensation statutes define the term. Third, Defendants contend that Claimant's claim is not compensable because the ultimate event that caused Claimant's back injury could have happened at any time or any place, and it was only happenstance that it occurred on Employer's premises. Defendants assert that, in the event the Commission determines that Claimant has a compensable claim, TTDs are limited to the period of recovery, which ended weeks before Claimant returned to work. And finally, even if the claim is compensable, Surety did not unreasonably delay or deny benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Sandra Runkle, taken at hearing;
2. Claimant's exhibits 1 through 14 admitted at hearing;
3. Defendants' exhibits A through Z admitted at hearing;
4. Post-hearing depositions of Ronald E. Jutzy, M.D., taken January 12, 2011, and Michael V. Hajjar, M.D., taken January 21, 2011.

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

PRELIMINARY ISSUES

EVIDENTIARY ISSUES

Correspondence

At the hearing, Defendants objected to the admission of Claimant's exhibit 13, which included letters between counsel. Defendants first objected to the relevance of the proposed

exhibit. Second, Defendants argued that the exhibit did not include all of the relevant correspondence. The Referee determined that the correspondence was relevant on the issue of attorney fees and made provision for Defendants to supplement the record with the missing correspondence, if any. Defendants did not serve or file any additional correspondence between the parties. Claimant's exhibit 13 stands as admitted on the date of the hearing.

Supplemental Medical Records

During the course of the hearing, a dispute arose regarding Claimant's exhibit 2, which included medical records from Knowles Chiropractic and Claimant's responses to Defendants' discovery requests. Defendants offered no objection to the admission of Claimant's exhibit 2. While questioning Claimant, Defendants asserted that Claimant failed to list the treatment provided by Knowles Chiropractic in responding to Defendants' interrogatories. Claimant averred that he had provided the records to Defendants, and asked that the record remain open for proof that he had disclosed the existence of the provider and the medical records to Defendants. In essence, Claimant believed he had provided the information, and Defendants did not believe they had received it. Again, the Referee made provision for supplementing the record, if necessary to resolve the dispute. In re-reading the hearing transcript, it appears that while Defendants had received the *medical records* in question, Claimant may not have supplemented his *discovery responses* to identify Knowles Chiropractic as a medical provider. In any event, Defendants did not object to the admission of the medical records that constituted Claimant's exhibit 2, and were aware that Claimant had treated with Knowles Chiropractic. Neither party filed additional evidence to sort out the issue.

MOTION TO STRIKE REPLY BRIEF

The Referee issued an Order setting a briefing schedule on February 3, 2011. The Order required that Claimant file his opening brief on or before February 24, 2011. Defendants' response brief was due on or before March 17, 2011. Claimant's reply brief, if he filed one, was due on or before March 31, 2011.

Claimant mailed his opening brief on February 24, and the Commission received it the following day, February 25, 2011. Defendants filed their responsive brief by fax on March 17, with the hard copies arriving by mail the following day, March 18, 2011. Claimant mailed his reply brief on March 31, and the Commission received and filed it the following day, April 1, 2011.

The matter came under advisement on April 4, 2011. On April 6, 2011, Defendants filed their Motion to Strike Claimant's Reply Brief (Motion to Strike). Defendants asserted that Claimant was required to *file* his reply brief on or before March 31. Since he had *served* it on March 31, but did not file it until the following day, the brief was untimely and the Referee should not consider the untimely brief in reaching a decision on the compensability of Claimant's claim. Defendants did not assert prejudice, or any improper behavior on the part of Claimant's counsel (there were no improper documents attached to the brief, and there was nothing objectionable in the brief itself); their Motion was strictly based on a literal reading of Rule 11, J.R.P.

Claimant filed his Response to Defendants' Motion to Strike Claimant's Reply Brief (Response to Motion) on April 11, 2011. Claimant conceded that under Rule 11, J.R.P., he *filed* the brief a day late. Claimant noted, however, that Defendants could not and did not claim any prejudice as a result of the late filing, and that the Motion appeared to be exploiting a technicality

for no purpose except that Defendants were able to do so. Claimant pointed out that in most of the cases where an issue of late filing came before the Commission, the Commission first looked to whether a party was prejudiced by the late filing, denying the motion when the moving party could not show prejudice. In the few cases where the Commission granted a motion to strike a brief, there was some substantive factual matter that played into the Commission's decision.

The Referee declines Defendants' invitation to strike Claimant's reply brief. Admittedly, Claimant was in technical violation of Rule 11. Presumably in the future, counsel will pay more heed to the distinction between *serving* and *filing* pleadings, so as to not be subject to a motion to strike based purely on technical grounds. However, Defendants alleged no prejudice, nor could they, since the reply brief triggered no obligation on Defendants' part. In particular, the Referee notes that Defendants did not seek similar relief when Claimant mailed his *opening brief* the day it was due and the Commission filed it the day after it was due.

FINDINGS OF FACT

BACKGROUND

1. At the time of hearing, Claimant was sixty-two years of age. He lived in Boise with his wife of forty-two years.

2. After graduating from Capital High School, Claimant went to work as a mechanic. In 1994, he went to work for Employer as the fleet mechanic. When Employer began selling gas fireplaces, he also worked as an installer. When Employer sold the fireplace business to Intermountain Fireplaces in 2003, Claimant continued working with Intermountain Fireplace. That company closed in 2007 and Claimant returned to work for Employer. Claimant continued working for Employer until the date of his injury. At the time of hearing, Claimant had just returned to work for Employer.

THE JOB

3. Employer sells, installs, and services heating, ventilation, and air conditioning (HVAC) systems. The business includes a fleet of service and delivery trucks, and Claimant's primary responsibility was as the fleet mechanic. This included preventive maintenance as well as repairs. In addition, Claimant and another employee were responsible for unloading used HVAC equipment from the trucks, cleaning the trucks, and loading in the HVAC parts and equipment needed for the day's service and installation work. Claimant had other duties, such as mowing the lawn in the summer and shoveling snow in the winter. Finally, Claimant assisted in breaking down used HVAC equipment for disposal and scrap.

4. Bob Barnes, Sr., was Employer/owner of the business at the time Claimant began working for Employer in 1994. Claimant and the senior Mr. Barnes became friends and the two couples often socialized. By the time Claimant returned to work for Employer in 2007, Bob Barnes, Sr., had turned the business over to his son, Bob Barnes, Jr. Claimant worked full-time for Employer until about 2008, when the economy slowed. Employer let some employees go, and those that remained, like Claimant, worked fewer hours and took cuts in pay.

5. Claimant described his day as starting about 6:00 a.m. He would arrive at Employer's premises and open up his workshop, turn on the lights, heating and cooling systems if necessary, and start the air compressor. Then he would proceed to the warehouse and make sure the work orders were ready. He would unlock the bullpen where Employer kept the fleet vehicles and open the vehicles. He next opened the service area, turning on the lights. Then he proceeded to the office, turned on the lights, brought in the paper, and made coffee. After completing this routine, Claimant would clock in and begin his workday. He testified, and time cards confirm, that it was not unusual to forget to clock in, and at the end of the day, he would

tell Employer that he had forgotten to clock in, and Employer would write in his start time on the time card.

6. Claimant also testified that early mornings were often the only time he could change the oil in the delivery trucks, as the drivers would want to load and leave as quickly as they could in the mornings.

7. In his deposition, Bob Barnes, Jr., testified that Claimant's supervisor, Dustin, had reprimanded Claimant about his starting time in the past:

> Well, on a couple of occasions Dustin had to reprimand [Claimant] about his early starting hours, because he was pretty much starting at his own leisure. When he wanted to. And was unsupervised during that time. And we were paying him for – because our installation crew starts at 7:30 in the morning. So he was basically around here unchecked in the mornings for quite sometime. And our workload had slowed down quite a bit. So we were really watching our costs. And he had to be asked to clock in at a specific time and go to work and do specific things that needed to be done. And that just clocking in, and walking around, and turning on the lights, and making sure the light bulbs are on, and the locks are unlocked so that when the guys show up two hours later it will be ready for him [sic] was excessive and they asked him to stop doing it.

Bob Barnes, Jr., Deposition, pp. 15-16. Mr. Barnes believed that this issue had arisen more than once, but could not recollect when the problem had surfaced. At the time of his deposition, Mr. Barnes did not know what arrangements Claimant and Dustin had made regarding Claimant's starting time, though he thought Claimant was not supposed to clock in before 6:00 or 6:15 a.m.:

> [Claimant] wanted to work earlier in the mornings. And Dustin adjusted his schedule so that he could do that. So exactly what arrangements they made for when he was starting, I am not exactly up to speed on that.

Id., at p. 14. In 2010, time cards show Claimant fairly consistently clocking in around 6:10 or 6:15 am.

THE EVENT

8. On the morning of April 26, 2010, Claimant arrived at Employer's premises at approximately 6:00 a.m. He followed his normal routine, walking through the workshop, turning on lights and machinery, unlocking doors, etc. He entered the main office, turned on the lights, and brought the paper into the break room. In the break room, Claimant made the coffee. After he made the coffee, he turned to leave the break room and clock in for the day's work. When Claimant turned, he experienced a sudden onset of low back pain and fell to his knees. Claimant described the pain as the worst he had ever felt. He had a tingling sensation in both legs, and his legs would not move. Claimant remained on the floor for a short period of time until the low back pain had receded a bit. He was able to stand up with some difficulty, describing his legs as "dead," and by leaning on furniture and walls was able to ambulate to his vehicle. As Claimant was leaving the premises, a co-worker arrived and Claimant told the co-worker he had hurt his back and was going home. Claimant's symptoms waxed and waned on Monday. By Tuesday, he was experiencing bowel and bladder changes.

MEDICAL CARE

9. On Wednesday, April 28, Claimant sought medical care. He presented at an urgent care clinic, where the staff immediately dispatched him to the emergency room at Saint Luke's Regional Medical Center (SLRMC)-Meridian. ER staff admitted Claimant and transported him by ambulance to SLRMC-Boise.

10. An MRI showed multi-level disc and facet degeneration. Particularly notable were findings at L2-3 and L4-5. At L2-3, a severe bilateral facet hypertrophy severely narrowed the central canal, which forced the spinal fluid away from the nerve roots. At L4-5, a disc bulge displaced the L5 nerve roots, and bilateral posterior lateral disc osteophyte development and

severe facet hypertrophy severely narrowed the neuroforamina and impinged upon the exiting L4 nerve roots. Once at SLRMC-Boise, Dr. Jutzy took over Claimant's care. He reviewed the MRI and Claimant's symptoms and diagnosed cauda equina syndrome. Dr. Jutzy initially tried conservative therapy, but Claimant's symptoms continued to wax and wane. By Saturday, May 1, Dr. Jutzy determined that surgical intervention was necessary.

11. Dr. Jutzy performed an L1-2 to L3-4 wide laminectomy with decompression of the central canal on May 1. Claimant remained hospitalized until May 7, when the hospital discharged him to his home. The surgery immediately relieved most of Claimant's complaints, including his low back pain and bowel function problems. Claimant's urinary complications took a bit longer to resolve.

12. Dr. Jutzy found Claimant medically stable on October 5, 2010. He expressed some concern regarding whether Claimant would be able to return to his time-of-injury position, and recommended a work-fit program if Claimant planned to return to mechanic work. He suggested that Claimant wait a full six months following surgery before increasing his activity and ramping up to his pre-injury status.

13. On November 16, 2010, at the request of Claimant's counsel, Dr. Jutzy awarded Claimant 10% permanent partial impairment of the whole person based upon a single-level discectomy at L2-3 with permanent residual low back pain and dysthesias. Dr. Jutzy imposed the following permanent restrictions:

- No lifting more than fifty pounds;
- No pushing/pulling more than seventy pounds;
- No lifting of more than twenty-five pounds repeatedly;
- Avoid repeated bending and twisting;
- Use caution on ladders, working at heights, and walking or standing on slippery surfaces.

Dr. Jutzy concluded that Claimant should be able to return to his usual and customary work with minimal restrictions.

14. At the time of hearing, Claimant reported that he was feeling great.

15. There is no dispute that Claimant suffered from cauda equina syndrome, that surgery was required, and that the medical care Claimant received was reasonable and necessary.

ACTIVITIES PRIOR TO EVENT

16. Claimant's back symptoms arose on the morning of April 26, 2011. The time and nature of his activities during the prior week are germaine to the causation issue.

At Work

17. There is some mention in the medical records that the week of April 19, 2010, Claimant had been doing very strenuous work and heavy lifting. However, Claimant testified at hearing and in his October 2010 deposition that there were a lot of jobs that week, requiring quite a bit of loading and unloading (accomplished with a forklift), but the work he did for Employer the week of April 19 was typical, and did not involve unusual amounts of heavy lifting.

At Home and at Play

18. The weekend prior to his acute low back failure, Claimant was at his cabin in Garden Valley. On Saturday, he re-erected a dog kennel that collapsed due to heavy snow the prior winter. The kennel was twelve feet long, six feet wide, and eight feet tall. It consisted of four pieces of steel frame with chain link. One of the short ends attached to the side of the house with the other short end attached to posts sunk in the ground. The two largest pieces were the twelve-foot sides, weighing about thirty-five or forty pounds each. Claimant used his four-wheeler to drag the pieces into place and then tilted them upright and attached them to the end pieces. The entire project took about two hours. After fixing the kennel, Claimant trimmed some

bushes and removed the lower limbs on some of the trees. On Sunday, Claimant and his wife played eighteen holes of golf in the morning and then returned to Boise.

19. Claimant experienced no unusual back pain or discomfort from any of the activities he engaged in over the weekend. On Monday morning when he arose to prepare for work, he felt fine, with no unusual symptoms.

MEDICAL CAUSATION OPINIONS

Dr. Jutzy

20. In his operative report, Dr. Jutzy described Claimant as:

> . . . a 61-year-old white male who did very heavy lifting 8 days prior to this surgery. He had severe back pain that evening. He had moderate pain the next day and then no pain following that. However, 2 days later he then developed inability to move his legs, severe low back pain and inability to empty his bowel or bladder.
>
> * * *
>
> An MRI scan was eventually obtained and shows L2-3 focal stenosis superimposed on spondylosis at other levels of his lumbar spine. He has a little retrolisthesis at that level as well but has primarily ligamentum flavum hypertrophy and joint hypertrophy. The patient relates back injuries many years ago and also relates that he lifts constantly very heavy equipment in his work as an air conditioning specialist.

Ex. D, pp. 35-36.

21. In the discharge summary he prepared on May 17, 2010, Dr. Jutzy noted:

> His immediate long-term prognosis is guarded at this time because he has residual significant deficits related to his cauda equina syndrome, which was felt to be secondary to an acute disk herniation associated with herniated facet joints at the L2-3 level causing concentric lumbar spinal stenosis causing acute cauda equina syndrome.

Id., at p. 38.

22. By letter dated July 7, 2010, counsel for Claimant provided Dr. Jutzy with a summary of Claimant's history immediately prior to the onset of his acute symptoms on April 26, 2010. In particular, counsel reported that Claimant told him that:

- Claimant was involved in some very heavy work for Employer for the four to five days preceding the onset of his symptoms;
- Claimant was lifting and moving heavy air conditioning units and taking the units apart and then lifting and moving the parts to various locations;
- Claimant had vague muscle soreness in his low back which was relieved by the use of NSAIDs;
- Claimant performed minor work at his cabin and played golf on the weekend, and experienced no additional symptoms except for the vague muscle stiffness in his low back.

23. Based upon the reported history, counsel posed two questions to Dr. Jutzy:

> Based upon this history, I do need your opinion about whether you feel that Mr. Runkle's twisting activity at work was the final straw that caused his disk to herniate and leading to the injury which brought him to your offices for surgery.
>
> I would also appreciate it if you would comment upon the heavy work which [Claimant] was doing prior to this seemingly minor twisting incident and let me know if you think this set the stage for his injury in some fashion.

Ex. E, p. 42. Dr. Jutzy responded by letter dated July 8. He recapitulated the main points of counsel's letter, adding that at the time he first saw Claimant, Claimant was in extreme distress and was vague about the events that led to his acute symptoms. Dr. Jutzy went on to state that in his conversations with Claimant since their initial meeting, Claimant did tell Dr. Jutzy that he did heavy work for Employer moving large pieces of equipment and heavy HVAC units. Dr. Jutzy opined:

> This sequence of events is very typical for an extruded lumbar disc, that the fibers will separate around the outside of the disc and the nucleus will gradually work through the fibers and a final fiber burst of the disc will deliver itself. I think this is exactly what happened in [Claimant's] case and I do relate the extruded disc to

> the extremely hard work he did for a four or five day period prior to him having the sudden excruciating pain that extended down his leg.

Id., at p. 44.

24. By letter dated November 5, 2010, Surety contacted Dr. Jutzy. Surety provided additional information that it had received after Dr. Jutzy's July 8, 2010 letter to Claimant's counsel. In particular, Surety noted a discrepancy between statements in counsel's letter that Claimant had been doing "very heavy work" for Employer the week before his acute symptoms and Claimant's testimony in his deposition that his job duties during that week were not unusually strenuous. Surety also provided more detailed information regarding Claimant's weekend activities consistent with those set out elsewhere in these findings.

25. Surety asked Dr. Jutzy for an updated opinion based on the additional information and posed several specific questions:

- Is it more probable than not that Claimant's described mechanism of injury would have resulted in the pathology findings that necessitated his surgery?
- Is it more probable than not that Claimant's personal activities the weekend before the acute onset of symptoms describe a mechanism of injury that resulted in the pathology findings that necessitated his surgery?
- Explain what you meant when you say Claimant "was rather vague about events that had led to his sudden injury?"
- Are you aware, or did Claimant tell you about any back injuries or treatment that pre-dated the event of April 26, 2010?

26. Dr. Jutzy's hand-written response to Surety's first question was:

> Karma—all of the events, including work-related lifting, personal activities, and bending and twisting as he made coffee, led to his experience of pain and weakness.

Id., at p. 47. Dr. Jutzy went on to say that his comment about Claimant being vague on their first visit was self-explanatory, and that he treated Claimant for an acute condition and had no knowledge of Claimant's medical history.

27. Claimant took Dr. Jutzy's post-hearing deposition. Throughout the deposition, Dr. Jutzy discussed the difficulty in sorting out the factors that contributed to Claimant's acute symptoms and determining which one, if any, was more likely than not the predominant cause. Dr. Jutzy explained that Claimant had some pre-existing pathology in his lumbar spine:

> . . . [Claimant] had a congenitally narrow canal at all levels of his lumbar spine, and then he had acquired overgrowth of joints at each of the levels L1-2, L2-3, L3-4, L4-5, and L5-S1, with central bulging disks also at each of those levels. And the combination of those features, both congenitally narrowed canal and bulging disks and bulging joints, combined to create several levels of narrowing in the spinal canal, the worst of which was at L2-3.

Dr. Jutzy Deposition, p. 7. Dr. Jutzy described synovial cysts (chronically inflamed bursa) associated with Claimant's degenerative facet joints. The inflamed bursa had torn and leaked fluid, causing the facet joints to overgrow, further narrowing the spinal canal. Based on the findings of Claimant's pre-existing pathology, Dr. Jutzy opined that Claimant's acute symptoms were the result of a small movement causing a "sub-millimeter increase in pressure" on one of his facet capsules that was already bulging and impinging on the spinal canal. *Id.*, at p. 20. That small increase in pressure was enough to block the blood supply to his nerve and cause the onset of his cauda equina syndrome. Dr. Jutzy also explained that Claimant's symptoms improved when he was lying down, but returned when he stood up and tried to walk. Dr. Jutzy described this as further evidence that an unstable facet joint was causing the acute symptoms.

28. Dr. Jutzy repeatedly stated that Claimant's congenitally narrow spine, together with his years as a mechanic working and lifting from a bending position, set Claimant up for the acute failure that occurred on April 26, 2010.

Dr. Hajjar

29. At Defendants' request, Claimant saw Michael Hajjar, M.D., for an independent medical evaluation (IME) on August 27, 2010. Defendants provided Dr. Hajjar with relevant medical records, including those from Claimant's treating physician, Dr. Jutzy, as well as a summary of Claimant's activities at work the preceding week and his activities over the weekend immediately preceding the onset of his acute symptoms. Defendants asked Dr. Hajjar to address three issues: 1) A diagnosis of Claimant's condition and a prognosis for his recovery; 2) an opinion regarding what caused Claimant to require surgery; and 3) whether Dr. Hajjar agrees or disagrees with Dr. Jutzy's July 8, 2010 causation letter.

30. In his report, Dr. Hajjar summarized the medical records pertaining to the onset of Claimant's acute symptomatology on April 26, 2010 and his subsequent treatment and recovery to the date of the IME. Dr. Hajjar also reviewed the April 28, 2010 MRI images and chiropractic records from August 2007. During the IME, Dr. Hajjar took Claimant's medical history and performed an examination.

31. Dr. Hajjar diagnosed Claimant with: Lumbar stenosis; degenerative lumbar spondylosis; degenerative lumbar foraminal stenosis; and acute cauda equina syndrome (resolved). Dr. Hajjar noted that Claimant was doing well, and "his prognosis is excellent." Ex. F, p. 59.

32. Dr. Hajjar provided the following analysis regarding medical causation in Claimant's case:

> On a more probable then [*sic*] not basis, the patient's event that led to surgery was related to the work related event. The notes that were provided are very sketchy regarding this issue. It is implied by Dr. Jutzy that [Claimant's] heavy work as an air conditioning and heating delivery man and mechanic led to the cause of the herniated disk. However, other notes state that when [Claimant] was in his break room while at work he turned and he suddenly felt symptomatology. Regardless

> of the cause, my understanding of Idaho law is that since the occurrence happened while [Claimant] was at work including the new primary symptomatology, the injury is in fact a work related event. I believe that the acute disk pathology and the cauda quina [*sic*] syndrome is the work related to the work related [*sic*] event. However [Claimant] does have some pre-existing conditions including multi-level degenerative stenosis and spondylosis which was treated with the lumbar decompression and it was likely relived [*sic*] from the lumbar decompression.

Id.

33. In response to Surety's third question, whether Dr. Hajjar agreed or disagreed with Dr. Jutzy's causation opinion, he wrote:

> I disagree with the rationale of this letter [Jutzy letter of July 8, 2010] but unfortunately, this disagreement is trivial when it comes to this case. [Claimant's] onset of symptomatology seems to be confirmed by multiple sources to be from the event which occurred at work on April 26, 2010. If there is another note from somewhere stating that his symptomatology started at a place other than work, then causation related to a work induced cause would be much more debatable. However, all of the notes state that the pain started while he was at work while he was making coffee. This is a trivial activity which is unrelated to his actual job, but nevertheless it is at work. I believe that the rationale which is set forth by Dr. Jutzy related to the cascade of events including the heavy lifting which took place the week prior to April 26, 2010, related to the disc herniation is speculative and sketchy at best. It is clearly a reasonable hypothesis, but I do not believe that it stands up to the legal standards of more likely than not especially when patients [*sic*] attorney's [*sic*] and other parties that have an invested interest of stating that the patients [*sic*] symptomatology would have started from nonspecific work related causes. This is true in this case and this is true in all other cases. This type of rationale leads to [*sic*] surety down a slippery slope where [they?] could potentially be liable for any potential pathology that is a tribute [*sic*] to any proceeding [*sic*] work related event no matter how trivial. According to my interpretation of Idaho law and the manner in which I evaluate these cases, I believe that the onset of symptomatology is the primary event and not an event which may have occurred days earlier. I also believe that according [to?] state law, symptomatology and not radiographic findings are the basis for determining the extent of pathology, causation as well as potential impairment.

Id., at p. 60.

34. In early November 2010, Surety wrote Dr. Hajjar with additional information and asked him to consider whether the new information changed his previously tendered opinions. In particular, Surety advised Dr. Hajjar of Claimant's deposition testimony in which he stated

that his job duties in the week before his acute symptoms were "about the same" as usual. Surety noted that this statement seemed contrary to the information that appears throughout the records that Claimant had done "very heavy work" and had an "unusually active week" during the week preceding his low back failure. Surety also provided further information about Claimant's weekend activities that it had obtained from his deposition. Surety posed the following question:

> Please provide your medical opinion on a more probable than not basis as to whether the activity of "making coffee" (see p. 5, paragraph 3 of your IME) is a mechanism of injury that would have resulted in the pathology findings for which surgery was performed (i.e., cauda equina syndrome and lumbar spondylolysis maximal at L2-3 with lumbar spinal stenosis) or are the personal activities on April 24 and 25, 2010 to which [Claimant] testified the mechanism of injury that would have resulted in these pathology findings and subsequent surgery?

Id., at p. 62. Dr. Hajjar responded to Surety by letter dated November 11, 2010, stating:

> I have reviewed the additional information that you have provided me in the present correspondence and I have formulated the following opinion:
>
> I believe that it is much more likely that [Claimant's] pathological findings which led him to surgery in late April of 2010 were related to the activities that he described such as putting up a ten foot kennel, cleaning up some brush and putting [it?] in a pile as well as playing a round of golf and [*sic*] simply making coffee.

Id., at p. 64.

35. Dr. Hajjar was deposed post-hearing. Following some preliminary matters, Dr. Hajjar discussed the MRI findings:

> The MRI showed findings mainly at the top of the lumbar spine, including narrowing of the spinal canal, *a herniated disk at the L2-3 level*, and more subtle findings at L3-4. The primary problem was between the second and third lumbar vertebrae.

Dr. Hajjar Depo., p. 9. Counsel for Defendants then asked Dr. Hajjar if he could distinguish between acute injuries and degenerative conditions as shown in the MRI. He responded:

> The degenerative issues would have included the findings of lumbar stenosis, overgrowth of the ligament in the spine, and things of that nature.
>
> The more acute problems would be related to the disk pathology, particularly at the L2-3 segment. It appeared that that was the primary factor that led to the change that ended up causing [Claimant] to require surgery.

Id., pp. 8-9.

36. Counsel for Defendants directed Dr. Hajjar's attention to the topic of medical causation:

> Q. [By Ms. Doyle] Well, and you alluded to, Doctor, the causation issue is pretty much the crux of this case and what actually led to [Claimant's] injury and need for surgery. Do you have a medical opinion on that issue as to medical causation?
>
> A. Medical causation, particularly in Idaho, in my opinion, typically relates to the time at which symptoms started almost regardless of when films demonstrate preexisting condition such as degenerative changes. I mean, that's typically how I conduct my opinions in these reports.
>
> * * *
>
> So I believe in reviewing this case, as well as the addendum that I did to my original report, that that is at least as likely as not the case, but the prior activities were much more the main causative factor in this case rather than the coffee room incident.
>
> Q. And when you use the term prior activities, Doctor, what are you referring to?
>
> A. Everything that was described in that previous two or three-day interval, including golf, dog kennels, and all other findings.

Id., at pp. 11-12. Dr. Hajjar reiterated that, "it is one event that causes the one disk to herniate, not a cascade of events. Most of the time when people have issues like this, they remember the one event. In this case, the event that's more chronicled than any other event, are [*sic*] the events of the weekend. *Id.,* at p. 12. Dr. Hajjar went on to explain:

> But I think that to have an event cause the cascade and the ball rolling occur, and then to blame all of the consequences of the cascade on showing up for work is, number one, not a fair representation of the nature of the pathology and, number two, it's not fair to the employer and the surety who are in some sense an innocent bystander in this case, although they are the ones that hold the insurance product, and there is a vested interest in folks putting an injury like this on work.

Id., at p. 15. Counsel for Defendants asked Dr. Hajjar what one event caused Claimant's acute symptomatology. He replied that it could have been any of the work or non-work activities that Claimant engaged in prior to the events of April 26, 2010.

37. On cross-examination, Claimant's counsel and Dr. Hajjar engaged in the following colloquy:

> Q. [By Mr. Owen] The history given to you from the medical records indicates that when [Claimant] was at work on the morning of April 26th he had a fairly severe onset of pain, his legs went numb, and he lost his ability to control his bowel and bladder?
> A. Correct.
> Q. What in your opinion caused that, the pain down – the pain in the legs, the numbness and the inability to use his legs, and the inability to control his bowel and bladder?
> A. The disk herniation caused that.
> Q. Okay. That was a pretty acute event, was it not, sir?
> A. The disk herniation is an acute event, correct.
> Q. Okay. And do you have any disagreement with the idea that the disk herniation caused those symptoms?
> A. No.
> Q. Okay. Is there any indication in the records anywhere that [Claimant] had those symptoms at any time prior to the morning of April 26, 2010?
> A. There is not.
> Q. Okay. Without those symptoms, did [Claimant] need surgery?
> A. No. Virtually all of the surgeries that are performed for this circumstance are symptom based.

Id., at pp. 24-25.

38. Finally, Claimant's counsel asked Dr. Hajjar a few questions to clarify some murky points in his original IME report. In particular, Dr. Hajjar testified that he was talking about the April 26, 2010 event when he wrote in his report, "[on] a more probable than not basis, the patient's event that led to surgery was related to the work related event." Counsel synthesized Dr. Hajjar's medical causation opinion:

> Q. So am I correct, Dr. Hajjar, that your opinion is that all of the work that this man did was a factor, but the turning on the morning of April 26, 2010, which led to the acute onset of symptoms was also a factor in leading this man to surgery?
> A. Yes, that's a fair statement without quantifying the factors, I guess.

Id., at p. 27.

DISCUSSION AND FURTHER FINDINGS

ACCIDENT

39. A compensable claim under the Idaho workers' compensation statutes requires that a worker suffer an injury as a result of an accident. Idaho Code § 72-102(17)(b) sets out the definition of an accident:

> "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

Defendants dispute that an accident occurred, citing to *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004), and *Perez v. J.R. Simplot Company,* 120 Idaho 435, 816 P.2d 992 (1991). *Konvalinka* and *Perez* both stand for the proposition that an onset of pain while at work does not constitute an accident as defined by Idaho Code.

40. In *Konvalinka*, the Claimant was a court reporter with a history of bilateral osteoarthritis at the base of her thumbs. During the course of a lengthy trial where she recorded testimony during the day and typed transcripts in the evenings, her thumbs began to hurt. When the trial was over, the pain went away. Several months later, the pain returned. Claimant sought medical treatment and filed a workers' compensation claim. The Industrial Commission found that the aggravation of her preexisting condition in March and August 1997 constituted an accident, that the aggravation in August 1997 was permanent, and that she was, therefore, entitled to benefits. The Idaho Supreme Court overturned the Commission's decision, noting

that an accident also required an "unexpected, undesigned, and unlooked for mishap, or untoward event":

> Although an accident may and usually does cause the onset of pain, an "accident" under the worker's compensation law is not simply the onset of pain. To establish that a mishap or event occurred, an injured worker must do more than show an onset of pain while at work.

Konvalinka, 140 Idaho at 479, 95 P2.d at 630.

41. In *Perez,* the Claimant felt a sharp pain in her left hip after standing on an inspection line performing her regular job duties for about two hours. The Commission determined that "standing for two hours does not an accident make," and that Claimant "must do more than show an onset of pain while at work in order to sustain his or her burden of proving an event or mishap occurred." *Perez,* 1988 IIC 0695 at p. 0700 (September 9, 1988). Citing extensively from the Commission's decision, and with little additional analysis of its own, the Idaho Supreme Court affirmed the Commission's decision.

42. Claimant cites to *Wynn v. J.R. Simplot Company,* 105 Idaho 102, 666 P.2d 629 (1983) and *Spivey v. Novartis Seed,* 137 Idaho 29, 43 P.3d 788 (2002) in support of its position that Claimant has carried his burden of proving that an accident, as the term is defined by statute, occurred on April 26, 2010. The Claimant in *Wynn* was a front-end loader operator. Claimant could identify a particular time and place when his injury, a ruptured disc, occurred—7:30 p.m., March 17, 1980, on employer's premises at the Gay Mine, while Claimant was engaged in his usual work of operating a front-end loader. However, the Commission determined that Wynn did not carry his burden of proving that his injury occurred as the result of an accident because he had led a physically active life, including a period of time as a rodeo performer. The Commission opined that Claimant's lifestyle predisposed him to the spinal injury which he ultimately sustained, and that conditions resulting from repetitive trauma over a period of time

are not compensable under the injury/accident requirements. The Idaho Supreme Court overturned the Commission's decision, stating:

> It is enough to note that claimant here, as indicated by the medical evidence, suffered his injury at a particular time, at a particular place, while engaged in his normal and ordinary work for his employer. The fact that Wynn's spine may have been weak and predisposed him to a ruptured disc does not prevent an award since 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.

Wynn, 105 Idaho at 104, 666 P.2d at 631.

43. In *Spivey,* Claimant worked as a seed sorter, sitting or standing for eight hours per day and picking debris and defective seeds off the conveyor in front of her. On the day of her injury, she reached across the conveyor to pick up a kernel of corn, and felt a pain in her shoulder. Eventually she required a rotator cuff repair. In the course of her treatment, it became evident that Claimant had some pre-existing degenerative arthritis, including the presence of osteophytes that might have weakened and compromised the rotator cuff until a minor trauma could cause a tear. Defendants argued that Claimant failed to show that her injury was the result of a work-related accident, because her muscle mass had degenerated to the point where reaching for anything could have caused the tear. In particular, Defendants asserted that the act of reaching across a conveyor belt did not meet the definition of an accident, because the motion was not an unexpected or untoward event. The Commission found the claim compensable, and the Idaho Supreme Court affirmed, stating:

> The damage resulting from reaching across the belt meets the definition of an accident as defined by I.C. Section 72-102(17)(b). It was an unexpected, unlooked for mishap resulting from her employment. The pop, burning, and subsequent pain can be reasonably located in time and place to the specific reaching incident that occurred on October 28, 1997.

Spivey, 137 Idaho at 34, 43P.3d at 793.

44. Although the parties in *Vawter v. United Parcel Service, Inc.,* 2011 IIC 0030 did not dispute that an accident had occurred, the facts surrounding the nature of the accident are instructive in the present case. In *Vawter,* Claimant was a delivery driver for Employer. He worked in Cascade, Idaho, at a satellite facility co-located with an aviation company at the Cascade airport. On the day of Claimant's accident, it was twenty degrees below zero. He arrived at work, started the truck so it could warm up, came into the building to retrieve equipment, and then bent over to tie his shoelaces. When Claimant bent over he felt a pop in his low back and experienced immediate pain. Claimant was diagnosed with a herniated disc and early cauda equina syndrome. While many elements of compensability were before the commission in *Vawter*, there was no dispute that the act of bending over to tie one's shoes constituted an accident. The Commission noted that Claimant was where he was supposed to be, doing what he was supposed to do, at the time he was supposed to be doing it, and that having properly tied shoes was related to his job. "Here, it is clear that the mishap described by Claimant is one that would qualify as an 'accident' under the statutory scheme," citing to *Wynn* and *Spivey. Id.,* at 0030.6

45. The Referee finds that the facts in the instant case are most akin to those in *Wynn, Spivey,* and *Vawter*, and constitute an accident as the statute defines the term:

- Claimant was on Employer's premises;
- Claimant was performing activities that were incidental to and preparatory to his job duties;
- The mishap that led to Claimant's symptoms was unexpected, undesigned, and unlooked for; and
- Claimant could locate with specificity the time and place at which the mishap occurred.

46. Determining that the event that occurred on the morning of April 26, 2010 was an "accident" under the workers' compensation statute is only the first step in evaluating the compensability of Claimant's claim.

INJURY

47. "Injury" is defined by Idaho Code § 72-102(18)(a) and (c):

> (a) "Injury" means a personal injury caused by an accident *arising out of and in the course of* any employment covered by worker's [*sic*] compensation law.
>
> * * *
>
> (c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury. (Emphasis added.)

In order to be compensable, then, a claimant's injury must be the result of an accident, and meet an additional two-pronged test: It must "arise out of" employment and it must occur "in the course" of employment. The number of cases that address "arising" and "course" issues is testament to the confusion that both concepts engender, and to the careful analysis necessary to resolve the disputes.

In The Course Of

48. One of the reasons cited by Defendants in denying the instant claim was that at the time of the acute onset of symptoms on April 26, 2010, Claimant had not clocked in, and was not performing his job duties. In other words, Claimant was not acting in the "course" of his employment at the time of the mishap. Claimant asserts that even though he had not yet clocked in when his accident occurred, he was on Employer's premises and was engaged in activities that were incidental to his employment and which accrued to the benefit of Employer.

49. The Idaho Court has, on numerous occasions, discussed the "in the course of" language of Idaho Code § 72-102(18)(a). One of the best restatements of the doctrine appears in *Mahoney v. Silver Wood Good Samaritan Center,* 1986 IIC 0091 (February 10, 1986):

> "Course of employment" refers to the course of an activity related to employment which is generally said to be related if it *carries out the employer's purpose or advances his interests*. Thus, an accident is said to arise out of employment if it is

> within the time and space limitations of employment and is in the course of employment if it is in an activity related to employment. *Larson*, The Law of Workmen's Compensation, Sections 6 and 20.

Id., at p. 0091.4 (Emphasis added). See also, *Thompson v. Clear Springs Food, Inc.,* 148 Idaho 697, 228 P.3d 378 (2010), and *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999).

50. From the record in this proceeding, it is clear that at the time his accident occurred, Claimant was at the employer's premises preparing for his workday. Unlocking doors and turning on lights and equipment is often the *de facto* responsibility of the first employee in the door, as is making coffee. Many of the activities that Claimant performed upon his arrival were necessary for his comfort and safety. If Claimant did more than the minimum that was required for his comfort and safety, the time spent inured to the benefit of Employer because when other employees arrived, the workplace—and the coffee—were ready for them.

51. The fact that Claimant was making coffee, not turning on equipment, when his accident happened was a recurring point in Defendants' case. Throughout the record there is an undercurrent of incredulity and even dismissiveness that such a trivial act could be the basis of an industrial claim. However, it is evident that even if Claimant had done nothing but unlock the door, turn on a light, and make a pot of coffee, he would be in the course of his employment pursuant to the personal comfort doctrine as discussed in *Thompson:*

> A class of activities widely recognized as "incidental" to employment are those acts engaged in by the employee to minister to his personal comfort. Such acts ordinarily include satisfying thirst or hunger, seeking fresh air, using the restroom, making telephone calls, and the like. An employee does not leave the course of employment by engaging in such acts unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual or unreasonable that the conduct cannot be considered an incident of the employment.

Thompson, 148 Idaho at 698, 228 P.3d at 379, citing *Kennecott Corp., Kennecott Minerals Co. Div. v. Industrial Comm'n. of Utah*, 675 P.2d 1187, 1190 (1983).

52. The personal comfort doctrine aside, a review of Commission cases where the language "in the course of" was at issue provides guidance on this matter. In addition to *Vawter,* the Referee takes notice of the following cases cited by Claimant:

- *Mahoney v. Silver Wood Good Samaritan Center,* 1986 IIC 0091 (February 10, 1986); Employee was in the course of her employment when she had clocked out for her mandatory lunch period and sustained a herniated disc when she bent over to retrieve a candy bar from the vending machine in the employee lunchroom.

- *Cheryl Gilbert v. Mercy Medical Center,* 1998 IIC 0629 (June 4, 1998); Claimant was in the course of her employment when she left her duty station in order to have a visiting contractor, whom she knew to be a physical therapist, help her stretch her back muscles which were sore from sitting in an ill-fitting work chair.

- *Martha Amyx v. Hickory Farms,* 1990 IIC 0253 (April 24, 1990); Claimant was within the course of her employment when she arrived at work early on a snowy day, returned to her car to check her headlights before entering her workplace, and slipped and fell in the icy parking lot on the way back to the building.

53. The Referee finds that the facts, and the case law, support a finding that Claimant's injury arose in the course of his employment.

Arising Out Of

54. The Commission has recently had the occasion to examine the development of Idaho's "arising out of" test in *Vawter*, *supra*. *Vawter* recognized that in order for an accident to be said to "arise" out of employment, it is no longer necessary for an injured worker to demonstrate that his employment subjected him to a risk of injury greater than that to which he was exposed apart from his employment:

> Therefore, after *Spivey,* it seems clear that where the risk of injury is one to which claimant is equally exposed both in, and without, his employment, the resulting injury is one which will be deemed to arise out of employment.

Vawter, 2011 IIC at 0030.13. The Commission reached this conclusion following a discussion of *Eriksen v. Nez Perce County,* 72 Idaho 1, 235 P.2d 736 (1951), the seminal case setting out the rule for determining whether an injury "arises out of" employment. As originally set out in *Eriksen*:

> It is sufficient to say that an injury . . . arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment . . .

Id. 72 Idaho at 6. The *Eriksen* court then goes on to circumscribe the bounds of its definition:

> But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment.

Id.

55. In the years since the 1951 *Eriksen* decision, the Idaho Supreme Court revisited the "arising out of" test as particular situations seemed to demand (see *Vawter,* and *Mayo v. Safeway Stores, Inc.,* 93 Idaho 161, 457 P.2d 400 (1969)). When *Spivey* came before the Court in 2002, the Court concluded that Idaho law no longer supported the proposition that a claimant must demonstrate that her employment subjects her to a risk greater than the risk she encounters apart from her employment in order to meet the "arising" component of Idaho Code § 72-102(18)(a).

56. Finally, the Referee notes that the Idaho Court has created a presumption in favor of determining that an injury arises "out of" and in the "course" of employment. "If there is doubt surrounding whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the employee." *Page v. McCain Foods, Inc.*,

141 Idaho 342, 347, 109 P.3d 1084, 1089 (2005). The Referee finds that Claimant's injury arose "out of" his employment. This finding, however, is not the ultimate determinate of the compensability of this Claim.

MEDICAL CAUSATION

57. The burden of proof in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

58. As is evident in the findings pertaining to medical causation, both doctors struggled with the issue of causation in much the same way that the Commission and the Idaho Court have struggled with cases where pre-existing conditions, whether patent or not, set a claimant up for a catastrophic injury from a trivial act. In light of the Referee's findings that Claimant in the instant proceeding did suffer an accident arising out of and in the course of his employment, the question whether the medical condition for which Claimant seeks benefits is more likely than not the result of his industrial accident is squarely before the Referee.

59. Given the nature of this case, where activity and ancestry each contribute to a medical outcome, teasing out medical causation can be difficult. Given the ambiguity and uncertainty

apparent in each medical opinion, it would not be difficult to make a finding, based on substantial evidence, for either position. For the reasons set out below, the Referee finds Dr. Jutzy's opinion to be the more persuasive of the two causation opinions. After much consideration, and a careful reading and re-reading of the medical evidence, the Referee finds that Claimant has proven that it is more likely than not that his low back injury is causally related to the accident on April 26, 2010.

60. As a preliminary to the medical causation discussion, the Referee feels compelled to mention and discuss two particular matters. First, there is the matter of Claimant's extensive chiropractic history. Medical records from Knowles Chiropractic establish that Claimant had in excess of seventy chiropractic treatments from October 1998 to early January 2001. At least one of those medical records suggests that Claimant was experiencing numbness in his legs after sitting for a short period of time. The parties discussed these chiropractic visits at some length during the hearing, but the Referee declines to discuss the import of the records in these findings for two reasons: First, no medical expert believed they were relevant; and second, the issue of apportionment of disability is not before the Commission at this time. The Referee did review the records and considered their import in making these findings and conclusions.

61. The record in this proceeding includes information that suggests that Claimant had performed unusually heavy lifting at work the week before the onset of his acute symptoms, and had experienced a vague ache in his low back over the weekend as a result of that particular work. The Referee specifically finds that the work Claimant performed the week preceding his April 26, 2010 accident was not out of the ordinary or unusually heavy. In fact, the Claimant testified that he had equipment available to do heavy lifting and pushing, and the record demonstrates that most of the lifting Claimant did at work involved items weighing less than

fifty pounds. The Referee also specifically finds that there is insufficient evidence to support a finding that Claimant suffered from a vague low backache the weekend before his accident. Some of this information Claimant gave to Dr. Jutzy when Claimant was in the hospital, and some of it apparently arose during conversations between Claimant and his attorney, who then conveyed the information to Dr. Jutzy. Much of this information is hearsay and is not supported by Claimant's testimony. Claimant may have made such statements, or similar statements, to his attorney or Dr. Jutzy, or Claimant, Dr. Jutzy, and counsel may have misunderstood or miscommunicated with regard to some of these details. Claimant did testify that he had occasional low back discomfort that he treated with OTC NSAIDs, but there is nothing in the Claimant's testimony or medical records suggesting that he had these symptoms the weekend preceding his accident. Similarly, Claimant's regular work might have involved frequent lifting and working from a forward-bending position, but there is insufficient testimony or documentary evidence to suggest that the work he did the week before his accident was unusual.

Dr. Jutzy

62. Dr. Jutzy was Claimant's treating physician. He examined Claimant prior to surgery, and was able to observe first-hand the pathology in Claimant's low back. Dr. Jutzy's opinions are not unflawed. During a portion of the time he was involved with Claimant's care, his knowledge of the history preceding Claimant's acute symptoms was inadequate or lacking. In his written correspondence with Claimant's attorney and Surety, he was somewhat cavalier in his responses ("Karma" caused Claimant's low back problem, which he incorrectly described as a herniated disc). However, during the course of his deposition, Dr. Jutzy acknowledged that his flip response to Surety was not his finest hour, and then did an admirable job of rehabilitating himself. His explanation of how Claimant's congenital condition and his degenerative condition

and his accident combined to cause Claimant's cauda equina syndrome was clear and convincing. Dr. Jutzy acknowledged the complexity of Claimant's condition, but after evaluating all of the information available to him, he was clearly comfortable with his purely medical opinion.

Dr. Hajjar

63. Initially, Dr. Hajjar opined that the event that occurred on the morning of April 26, 2010 caused Claimant's cauda equina syndrome and necessitated surgery. Ex. F, p. 59. However, Dr. Hajjar was never comfortable with his opinion, as evidenced by his testimony that he believed that Idaho law demanded such a result:

> According to my interpretation of Idaho law and the manner in which I evaluate these cases, I believe that the onset of symptomatology is the primary event and not an event which may have occurred days earlier. I also believe that according [to?] state law, symptomatology and not radiographic findings are the basis for determining the extent of pathology, causation as well as potential impairment.

Id., at p. 60. Dr. Hajjar discussed this issue further during his deposition when he noted that such an approach is unfair for two reasons:

- It blames all of the consequences of the pre-existing conditions and activity on showing up for work, which is not a fair representation of the nature of the pathology; and

- It is not fair to the employer and the surety who are in some sense "innocent bystanders" in this kind of claim, because employees have a "vested interest" in putting the liability for this kind of injury on an employer. *Id.*, at p. 15.

64. After issuing his initial opinion, which agreed with Dr. Jutzy's opinion that the work accident caused Claimant's cauda equina syndrome, Dr. Hajjar began backing away from his opinion. When Surety provided Dr. Hajjar with more details about Claimant's weekend activities at his cabin and asked him to review his opinion in light of the new information, Dr. Hajjar revised his opinion, attributing medical causation to Claimant's weekend activities. Yet later, in his deposition, Dr. Hajjar reiterated his view that Idaho law focuses on the event that

precipitated the acute symptoms, and not on the lifetime of events and conditions that he believed were more important factors in Claimant's ultimate back failure.

65. The Referee finds Dr. Hajjar's opinions troubling in several respects. First, he seems to be under the impression, throughout his involvement in the case, that Claimant suffered a herniated disc at L2-3. Dr. Jutzy made some incorrect references to a disc herniation in his initial correspondence, but during the course of his deposition, he was careful to ascribe Claimant's acute symptoms to a torn facet capsule. Second, Dr. Hajjar's insistence on couching his opinions in terms of his understanding of Idaho law diminishes the value of these opinions in addressing the medical question of causation.

MEDICAL CARE

66. Having found that Claimant suffered an injury from an accident arising out of and in the course of his employment, and having found that Claimant's injury was more likely than not the result of the accident, Claimant is entitled to reasonable medical care pursuant to Idaho Code § 72-432.

TTDs

67. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Compan*y, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

68. Claimant has established a period of recovery extending from the date of the accident, April 26, 2010 through the date that he reached medical stability, October 5, 2010, a period of twenty-three weeks and two days. Claimant is entitled to TTD benefits at the rate of 67% of his average weekly wage for twenty-three weeks and two days.

ATTORNEY FEES

69. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, and may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides in relevant part:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, . . . the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

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

70. The Referee finds that Defendants' initial denial of Claimant's claim for the reason that he was not on the clock was dubious at best. However, as evidenced by the portion of this recommendation devoted to the complex and unsettled law pertaining to the "course" of and arising "out of," provisions, the law on this area is hardly a beacon lighting the way for Defendants. On these facts, the Referee cannot make the findings necessary to award attorney fees to Claimant.

CONCLUSIONS OF LAW

1. Claimant suffered an injury from an accident arising out of and in the course of employment.

2. The condition for which Claimant seeks benefits is causally related to the industrial accident.

3. Claimant is entitled to reimbursement for the medical care he received relating to his cauda equina syndrome, including hospitalization, surgery, physicians, imaging, and medications. Reimbursement to Claimant and his private insurer is subject to the provisions of *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

4. Claimant is entitled to TTD benefits at the rate of 67% of his average weekly wage for twenty-three weeks and two days.

5. An award of attorney fees pursuant to Idaho Code § 72-804 is not warranted on the facts of this proceeding.

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 16 day of November, 2011.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT RUNKLE, Claimant, v. WESTERN HEATING & AIR CONDITIONING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2010-011837** **ORDER** Filed: November 30, 2011

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 suffered an injury from an accident arising out of and in the course of employment.

2. The condition for which Claimant seeks benefits is causally related to the industrial accident.

3. Claimant is entitled to reimbursement for the reasonable medical care he received relating to his cauda equina syndrome, including hospitalization, surgery, physicians, imaging,

and medications. Reimbursement to Claimant and his private insurer is subject to the provisions of *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

4. Claimant is entitled to TTD benefits at the rate of 67% of his average weekly wage for twenty-three weeks and two days.

5. An award of attorney fees pursuant to Idaho Code § 72-804 is not warranted on the facts of this proceeding.

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

DATED this 30 day of November, 2011.

INDUSTRIAL COMMISSION

Participated but did not sign
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 30 day of November, 2011, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653-0278

ROGER BROWN
PO BOX 6358
BOISE ID 83707-6358

djb /s/_____