BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FRANCISCO SERRANO, Claimant, v. FOUR SEASONS FRAMING, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2004-501845** **IC 2008-004757** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed March 20, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just. The matter was re-assigned to the Commissioners, who conducted a hearing on July 28, 2011. Claimant was present and represented by Richard Hammond of Caldwell. Defendants were represented by Kimberly A. Doyle of Boise. A post-hearing deposition was taken, and the parties submitted post-hearing briefs.[1] The matter came under advisement on July 26, 2012. It is now ready for decision.

ISSUES

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

[1] Defendants' post-hearing brief was filed by Roger L. Brown, who became Defendants' counsel of record on September 23, 2011. After Mr. Brown's unexpected death, Kent W. Day became Defendants' counsel of record on March 14, 2013.

1. Whether Claimant is entitled to additional temporary partial or temporary total disability benefits (TPD/TTD);

2. Whether Claimant is entitled to additional medical care benefits pursuant to Idaho Code § 72-432;

3. Whether Claimant is entitled to permanent partial impairment benefits (PPI); and

4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

The issue of Claimant's entitlement to retraining was withdrawn at hearing. Though Claimant raises additional issues in his briefs, those issues were not noticed or agreed upon at hearing and will not be considered by the Commission.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant was injured in two work-related accidents, which occurred on January 16, 2004 and January 28, 2008. In the first accident, Claimant, a framer, fell from a height of about fifteen feet at a construction site, suffering injuries to his back, shoulder, and pelvis. In the second accident, Claimant slipped on ice and fell on his back.

Claimant contends that, in addition to transverse process fractures at L2 and L3, he suffered a herniated disc at L5-S1 as a result of the 2004 accident. This injury was aggravated by the 2008 injury, from which Claimant has never attained medical stability. Claimant contends he is therefore entitled to additional workers' compensation benefits, including TPD/TTD and medical care. Curiously, even though Claimant contends that he is not medically stable, he also asserts entitlement to PPI benefits. Finally, Claimant argues that he is entitled to attorney fees based on Defendants' unreasonable denial of his present claim.

Defendants respond that Claimant has failed to meet his burden of proving that he is entitled to additional benefits. Claimant was found to be at maximum medical improvement (MMI) on September 16, 2008. Defendants assert that Claimant's symptoms after September 16,

2008 are not related to either of his accidents; rather, they were caused by his preexisting degenerative back condition. Because Claimant is not entitled to any additional benefits, there has been no unreasonable denial, and Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. The post-hearing deposition of Timothy E. Doerr, M.D., taken December 1, 2011;
3. Claimant's Exhibits A-R admitted into the record at hearing;
4. Defendants' Exhibits A-K and M-S admitted into the record at hearing;[2]
5. Defendants' Exhibit T admitted into the record post-hearing by agreement of the parties; and
6. The Industrial Commission legal file pertaining to this claim.

All objections posed during the depositions are overruled. The objection posed by Claimant at page 17, lines 23-24 of Dr. Doerr's deposition, and renewed on page 2 of Claimant's closing brief, is specifically addressed below.

Claimant objects to Dr. Doerr's deposition testimony, arguing that the opinions expressed therein are beyond the facts known and opinions held by Dr. Doerr as revealed in the course of discovery. Claimant's Closing Brief, p. 2. Furthermore, Claimant argues that Dr. Doerr's testimony should be excluded because Dr. Doerr testified without giving due consideration to Claimant's condition and medical records after September 16, 2008. *Id*. Before we can properly address Claimant's objection, it is necessary to examine the procedural history of this case.

On December 23, 2008, Claimant filed a complaint[3] ("First Complaint"), alleging an

[2] Defendants withdrew their Exhibit L by letter to the Commission on July 28, 2011.

[3] Claimant had previously filed a complaint on this claim on June 3, 2005, but that complaint was

industrial accident and injury that occurred on January 13, 2004. In the answer to the complaint, Defendants denied that an accident occurred on January 13 but acknowledged that one occurred on January 16, 2004.

In early 2009, as the parties engaged in discovery, Claimant served a list of interrogatories on Defendants, to which Defendants replied in April 2009. One interrogatory asked Defendants if they planned to contend that Claimant suffered from a condition that preexisted his industrial injury. Defendants replied that they were not aware of any preexisting conditions. Another interrogatory asked Defendants to identify experts who would be providing testimony and to summarize the expected testimony. Defendants replied that they had not yet determined any experts and referred Claimant to a list of individuals identified as potential witnesses. The list included Dr. Timothy Doerr and Dr. Richard Silver. Defendants stated that Dr. Doerr and Dr. Silver "may be called to testify to any matters at issue, including, but not limited to, Claimant's alleged injury, medical condition, diagnosis, prognosis, and opinions." *See* C. Ex. B7A.

The case proceeded through the preliminary stages of litigation, with a hearing scheduled for July 28, 2011. On July 18, 2011, Claimant filed his notice of hearing exhibits pursuant to J.R.P. 10(C). The next day, July 19, Defendants filed their Rule 10 notice, as well as notices to take post-hearing depositions of Dr. Silver and Dr. James Johnston. Also on July 19, Claimant's counsel sent an email to defense counsel:

> Kim,
>
> I also realized that the complaint filed by Sam did not include the 1-25-08 Slip on the Ice. Will you stipulate to include such in the complaint as we are only conforming the facts to the complaint?

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dismissed on June 21, 2006.

> The discovery also has addressed this incident and such should not be a surprise.

See Defendants' Response to Claimant's Motion to Conform to Evidence, Ex. A (filed July 26, 2011). The next day, July 22, Claimant filed a motion to amend complaint to conform to evidence. Claimant also supplemented his Rule 10 notice to include exhibits relating to the 2008 accident.

On July 25, defense counsel sent an email to Claimant's counsel:

> Richard, on Friday afternoon I received your motion regarding the addition of the 2008 claim to the current Complaint. While I strongly disagree with your reasoning and legal analysis, my client is willing to add the 2008 claim on two conditions: one, that we keep the hearing date and two, that I be permitted to supplement Defendants' Rule 10 disclosures this week (within the next few days) to include those documents related to the 2008 claim (in other words, that you agree not to object to the admission of the disclosures on the basis of timeliness but reserve your right to object to them on other grounds if necessary). If this email meets with your approval, we have an agreement to add the 2008 claim to the hearing next week. If you do not agree to these conditions, I will object to your motion.

See Defendants' Response to Claimant's Motion to Conform to Evidence, Ex. B (filed July 26, 2011). Claimant agreed not to object on timeliness grounds. *Id*. at Ex. E.

On July 26, 2011, Defendants supplemented their Rule 10 notice with additional exhibits relating to the 2008 accident, as well as a notice to take the post-hearing deposition of Dr. Doerr, who treated Claimant in 2008. Also on July 26, Defendants filed a response to Claimant's motion to amend, in which Defendants stated:

> As of today, Claimant has filed a Complaint against Defendants only on his January 16, 2004 industrial accident. Claimant has never filed a Complaint for his January 28, 2008 industrial accident. Even though the July 28, 2011 hearing in this matter has been set since March 3, 2011, Claimant waited until the week prior to hearing to let Defendants and the Commission know he would like the 2008 claim to also be decided at hearing. That is,

> Defendants first learned on Tuesday, July 19, 2011 — via email — that Claimant seeks to pursue his 2008 claim in litigation…Claimant did not file a motion to this effect, however, until Friday, July 22, 2011 — a *mere four business days* prior to hearing. In other words, Claimant has known about his 2008 claim for three and a half years, and his 2004 claim has been in litigation for two and a half years, but he waited until the eleventh hour to seek to add his 2008 claim to a hearing that has been set for five months. Notably, Claimant provided absolutely no justification for his extreme tardiness.

Defendants' Response to Claimant's Motion to Conform to Evidence, p. 2 (emphasis in original). Defendants also pointed out that J.R.P. 3(B)(1) requires that a separate complaint be filed for each accident. Nevertheless, Defendants stated that they would not oppose including the 2008 claim at hearing, provided, first, that the hearing proceed as scheduled on July 28, 2011, and second, that Defendants be permitted to supplement their Rule 10 disclosures to include evidence relating to the 2008 claim.

On July 27, 2011, the Commissioners conducted a telephone conference, at which it was agreed that Claimant should file a separate complaint for the 2008 claim ("Second Complaint"), which would then be consolidated with the First Complaint and considered at hearing. *See* Hearing Tr. 5, ll. 6-24. The Second Complaint was filed later that same day; i.e., one day prior to hearing.

On July 28, 2011, at hearing, Claimant objected to inclusion of Defendants' Exhibit L, an independent medical examination (IME) report by Dr. Richard Silver. Though Defendants ultimately withdrew Exhibit L for other reasons, it is worth examining Claimant's objection at length, as it is essentially identical to his current objection regarding Dr. Doerr's testimony:

> MRS. DOYLE: Defendants would like to offer Exhibits A through S, as in Sierra.
>
> COMM. BASKIN: Mr. Hammond, do you have any objection to any of those exhibits?

MR. HAMMOND: The only one I have any objection to is the reference to Dr. Silver, for two reasons. One, if you look at my chart —

COMM. BASKIN: What exhibit are we talking about?

MR. HAMMOND: The notice of deposition of him is the first one.

MRS. DOYLE: Okay.

MR. HAMMOND: The reasons are, one, I asked for expert opinions in my discovery and the first time it was notified that he was going to testify was when I got the Rule 10 disclosure that he was going to testify by post-hearing deposition and if you look at page seven —

COMM. BASKIN: Hang on. Hang on a second. Let's go through the exhibits and, then, we will talk about the post-hearing depo notices, okay? All right. So do you have any objections to any of Mrs. Doyle's exhibits?

MR. HAMMOND: The only exhibit is the one report — the report from Dr. Silver and, I apologize, I do not have that listed in my 25 pages — notebook pages.

MRS. DOYLE: It's Exhibit L.

COMM. BASKIN: Okay.

MRS. DOYLE: Page 117.

MR. HAMMOND: Okay.

COMM. BASKIN: So, let me ask you this, Mr. Hammond. When were you first provided with a copy of Mr. — or, excuse me, Dr. Silver's report?

MR. HAMMOND: At the very beginning. It was provided, from my recollection, in the discovery that was provided to me by Mr. Johnson at the very beginning of the case.

…

COMM. BASKIN: Well, let me ask Mrs. Doyle this. Mrs. Doyle, did you reveal to Mr. Hammond, per his discovery responses, that you intended to rely on Dr. Silver's expert opinion in connection with your defense of this case?

…

MRS. DOYLE: [I]n the original discovery responses that were filed in this case, as I mentioned earlier, in April 2009, one of the questions…is Interrogatory No. 6….[I]n short — I'm going to paraphrase — it says state the name, address, telephone number of those who have knowledge of the facts of this case. Defendants' answer — Defendants have not yet determined potential witnesses and state that the following individuals may be called as a witness and it lists a number of individuals, one of whom is Dr. Silver, and the expected testimony is listed as may be called to testify to any matters at issue, including, but not limited to, Claimant's alleged injury, medical condition, diagnosis, prognosis, and opinion. And then, the following — I believe it's the following interrogatory — actually, I take that back. Interrogatory No. 8 asks for Defendants to state the name, current address, telephone numbers of experts with whom Defendants have consulted. Defendants' answer to that question was: Defendants have not determined experts and refer Claimant to those individuals identified in response to Interrogatory No. 6, which, as I just stated, includes Dr. Silver. So, I guess I would just respectfully disagree with counsel and say that Dr. Silver was listed in [Defendants'] discovery responses as a potential expert witness.

COMM. BASKIN: Okay. I tend to agree that that puts Claimant on notice that Dr. Silver would be called to

testify to facts, as well as opinions, as stated in your answer and, of course, you had previously provided Mr. Hammond with copies of the report at issue?

MRS. DOYLE: Yes.

…

MR. HAMMOND: The only concern I had was the specifics of that doctor — the Rule 26 for expert disclosure, we have the right to know these questions we asked and they never produced that information….

COMM. BASKIN: I'm satisfied that if Mrs. Doyle provided you with copies of the report originated by Dr. Silver she's complied with the spirit of that rule sufficient to satisfy me.

Hearing Tr. 12-19.

Dr. Silver's report was ultimately withdrawn because he died prior to hearing and could not testify at post-hearing deposition.[4]

On August 3, 2011, Defendants filed an amended notice to take Dr. Doerr's post-hearing deposition. Claimant objected on the grounds that any expert opinion stated by Dr. Doerr would be beyond the scope of discovery. Claimant argued that Dr. Doerr's testimony should be limited to facts relating to his treatment of Claimant. Defendants replied that Dr. Doerr would be asked questions based only on exhibits in evidence, which the plain language of J.R.P. 10 allows. The Commission agreed:

> Dr. Doerr was properly disclosed by Defendants and he may testify to Claimant's alleged injury, medical condition, diagnosis, prognosis, and opinion. Dr. Doerr is not permitted to testify regarding Dr. Silver's withdrawn IME report.

[4] The Commission agreed to admit Exhibit L into evidence provided that Claimant be afforded the opportunity to retain an expert witness for the purpose of rebutting Dr. Silver's report; however, Defendants chose to withdraw the report instead.

See Order Regarding Objection to Deposition (filed August 15, 2011).

Despite this order and the discussion regarding I.R.C.P. 26 at hearing, Claimant continues to object to the admissibility of Dr. Doerr's opinion, because the nature of the opinion was not detailed in discovery. Claimant cites I.R.C.P. 26 and I.R.E. 705 in support of his objection, but Claimant's reliance on I.R.E. 705 is misplaced. "Strict adherence to the rules of evidence *is not* required in Industrial Commission proceedings." *Hagler v. Micron Technology*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990) (emphasis in original). Likewise, the Idaho Rules of Civil Procedure do not normally apply in Commission cases. *Page v. McCain Foods*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008). Rather, the Commission's Judicial Rules of Practice and Procedure govern workers' compensation cases. IDAPA 17.01.01.021. *See also* Idaho Code § 72-508. However, J.R.P. 7(C) states that procedural matters relating to discovery shall be "controlled by the appropriate provisions of the Idaho Rules of Civil Procedure." Rule 26 is a discovery provision and therefore applies.

I.R.C.P. 26(b)(1) provides that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Regarding expert opinions, I.R.C.P. 26(b)(4) establishes that "discovery of facts known and opinions held by experts…acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition," including a "complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions [and] any exhibits to be used as a summary of or support for the opinions."

In its entirety, I.R.C.P. 26(e) states:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> 1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.
>
> 2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> 3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.
>
> 4) If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court *may* exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party (emphasis added).

Thus, Rule 26 "unambiguously imposes a continuing duty to supplement responses to discovery with respect to the substance and subject matter of an expert's testimony." *Duspiva v. Fillmore*, 293 P.3d 651 (2013), *citing Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897, 900 (1991). However, the decision whether to exclude undisclosed expert testimony is "committed to the sound discretion of the trial court," or here, the Commission. *Id*., citing *Schmechel v. Dille*, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009). In considering how to exercise its discretion, the Commission should act within the "outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available." *See Id*., *citing Sirius LC v. Erickson*, 150 Idaho 80, 87, 244 P.3d 224, 231 (2010). The decision whether

to exclude should be reached by an "exercise of reason." *Id*.

Thus, we must consider, first, whether Defendants violated Rule 26 by failing to disclose Dr. Doerr's opinion, and if so, second, whether Dr. Doerr's testimony or portions thereof should be excluded.

We find that Defendants have not violated Rule 26. Dr. Doerr, like Dr. Silver, was disclosed in April 2009 as a potential witness who might provide opinion testimony. This demonstrates that Dr. Doerr was not a surprise witness revealed to Claimant at the last minute. Commissioner Baskin's statement at hearing that Defendants have complied with the spirit of Rule 26 applies to their disclosures regarding Dr. Doerr as well as to their disclosures regarding Dr. Silver. The opinions to which Dr. Doerr ultimately testified were essentially the same as the opinions set forth in his records, which had previously been disclosed to Claimant.

The Idaho Supreme Court addressed the application of Rule 26 in workers' compensation cases in *Watson v. Joslin Millwork*, 149 Idaho 850, 243 P. 3d 666 (2010). In that case, the claimant moved to strike an expert's deposition testimony because some of the medical opinions expressed in it were not contained in the expert's IME report. The Court found that the opinions were admissible because they "expounded" on those expressed in the report:

> Dr. Weiss's IME Report offers two paragraphs of analysis, and does not directly state an opinion on whether or not Watson's injuries are related to his occupation, but it may be easily inferred that Dr. Weiss did not find it to be more likely than not that Watson's injuries were caused by his occupation….[T]wo small paragraphs are the extent of Dr. Weiss's analysis in his IME Report. Dr. Weiss's deposition, on the other hand, comprises nearly 68 pages of transcript….All-in-all Dr. Weiss's deposition testimony explains in greater detail why he believes it is impossible to determine causation for Watson's injuries [and] this testimony does not involve evidence developed, manufactured, or discovered following the December hearing.

Watson, 149 Idaho at 857-858, 243 P.3d at 673-674. Essentially, the Court has ruled that, in

workers' compensation cases, it is permissible for experts to provide greater detail and explanation in their testimony than was previously provided in reports or medical records, and even to state opinions that were not explicitly stated before, as long as the conclusions are based on evidence in the record and may be reasonably inferred from earlier records or reports.

Here, Dr. Doerr's opinion that Claimant had a preexisting degenerative condition was based on medical records admitted into evidence at hearing. Dr. Doerr's opinion that Claimant's pain was due to this condition was stated in the medical records. *See e.g.* D. Ex. P, p. 243 ("I suspect that Francisco's low back pain is secondary to his degenerative changes at L5-S1"). Dr. Doerr's testimony complies with the admissibility standards described by the Court in *Watson*.

Even if Defendants did violate Rule 26 by failing to properly disclose Dr. Doerr's opinion, exclusion of his opinion would not be mandatory. Rule 26(e) states that testimony of an expert witness *may*, not *shall*, be excluded based on a party's failure to supplement discovery. Furthermore, even if Rule 26 required mandatory exclusion, that sanction would not apply here; Rule 26 controls in Commission cases only as provided by J.R.P. 7, and J.R.P. 7 specifically excludes sanctions as matters to be controlled by the Rules of Civil Procedure. The Commission determines its own sanctions pursuant to J.R.P. 16.

We note that J.R.P. 10(E), which governs post-hearing depositions, does not prohibit the development of an *opinion* post-hearing; rather, "it prohibits an opinion based on evidence or information *developed* or *obtained* post-hearing." *Lockett v. Quality Electric, Inc.*, 2005 IIC 0075.2 (February 11, 2005) (discussing a prior but substantively similar version of the rule; emphasis in original). While we do not interpret, and do not believe the Supreme Court has interpreted, I.R.C.P. 26 in a way that would conflict with Commission rules, to the extent that it might, J.R.P. 10(E) would control, as it is a Commission rule written specifically to apply to

workers' compensation cases.

Finally, we note that the circumstances of this case would support leniency regardless of how I.R.C.P. 26 is interpreted and the extent to which it applies. Dr. Doerr provided medical treatment for Claimant's 2008, not 2004, injury. Defendants were not aware that the 2008 claim was being contested until a few days prior to hearing. Defendants could have objected, with good reason, to consideration of the 2008 claim at hearing; they had not prepared to litigate it, and, as such, had not intended to depose Dr. Doerr. Nevertheless, Defendants agreed to the inclusion of the 2008 claim. They acted in the interest of judicial economy and should not be punished for it. Furthermore, if Claimant sincerely believed that Defendants' disclosures were insufficient, he could have addressed his objection well prior to hearing by way of a motion to compel. Several motions to compel were filed in this case, by both Claimant and Defendants, as early as May 2009; Claimant was therefore aware of this remedy. His failure to avail himself of it, with regard to expert opinions, suggests that his objection now is based more on strategic considerations than substantive or equitable ones.

For the foregoing reasons, Claimant's objection to Dr. Doerr's opinion as beyond the scope of discovery is overruled. Claimant's remaining objection to Dr. Doerr's opinion — that it lacks credibility because it was made without due consideration to medical evidence generated after September 2008 — is likewise overruled. It is for the Commission, not Claimant, to weigh the evidence and determine its credibility. *Watson*, 149 at 855, 243 P.3d at 671, *citing Neufeld v. Browning Industries*, 109 Idaho 899, 902, 712 P.2d 600, 603 (1985). In weighing the evidence, the Commission will certainly consider Claimant's arguments as to its sufficiency or insufficiency; however, the Commission will not exclude opinion evidence merely because Claimant believes the opinion is incorrect.

After having considered the evidence and the briefs of the parties, the undersigned Commissioners make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born on June 4, 1963. At the time of hearing, he was 48 years old and resided in Boise.

2. Claimant began working for Employer as a framer on September 10, 2001. He worked 40-45 hours per week.

First Accident

3. On January 16, 2004, Claimant was working on a roof at a construction site when he fell to the ground from a height of approximately fifteen feet. He landed on his right side. He was transported by private vehicle to the emergency room at St. Luke's Regional Medical Center in Boise, where he was evaluated by Barton F. Hill, M.D. Claimant reported pain in his hips and on the right side of his body. He did not hit his head when he fell, and he experienced no loss of consciousness. Claimant was able to ambulate after his fall. A CT scan revealed transverse process fractures at L2 and L3 and a mildly displaced left inferior pubic ramus fracture. Dr. Hill requested a surgical consultation; however, the surgeon at the site had limited trauma experience. Claimant was transferred by ambulance to St. Alphonsus Regional Medical Center, because Dr. Hill believed Claimant could be evaluated and treated more appropriately there.

4. At St. Alphonsus, Claimant was first seen by Scott Henson, M.D. Dr. Henson confirmed the diagnoses of transverse process and pelvic fractures and admitted Claimant for observation and pain control. Dr. Henson consulted with Dr. Timothy Doerr, a spinal surgeon, about Claimant's transverse process fractures and was informed that no surgical intervention was necessary. Claimant could be treated symptomatically for pain. Dr. Henson arranged an

orthopedic consultation with James M. Johnston, M.D., for the pelvic injury.

5. On January 17, 2004, Claimant was evaluated by Dr. Johnston, who found that Claimant's pelvic injury did not require surgery. As with Claimant's transverse process fractures, the pelvic fracture could be managed with weight bearing as tolerated and temporary work restrictions. Dr. Johnston noted that he would treat Claimant on an outpatient basis, and Claimant was released from the hospital.

6. On January 22, 2004, Claimant saw Dr. Johnston for follow-up. Claimant's symptoms included pelvic pain and significant right shoulder pain, especially with overhead activities. On physical examination, Dr. Johnston observed "trace tenderness of the lumbar spine on the right" as well as positive impingement findings in Claimant's right shoulder. D. Ex. I, p. 67. Dr. Johnston diagnosed traumatic onset impingement syndrome and noted that if the pain persisted, he would order shoulder X-rays and possibly a subacromial steroid injection.

7. Claimant returned to Dr. Johnston on February 12, 2004. His major complaints were shoulder and rib pain, but he also reported numerous other symptoms, including mild to moderate low back pain. On examination, Dr. Johnston observed a mild lumbar spasm, rib tenderness, and positive impingement findings on the right shoulder. He obtained shoulder X-rays, which revealed a Type II-III acromion, consistent with impingement syndrome. Dr. Johnston noted:

> Francisco's multiple pains are certainly explainable and he seems to be tolerating these very well. His lumbar pain is from his transverse process fracture [sic] and his left groin pain from his pelvic ramus fracture. These should resolve uneventfully. His shoulder pain is from traumatic onset impingement and I believe that he did have a couple of rib fractures, although I do not see these on the shoulder films today.

D. Ex. I, p. 69. Dr. Johnston injected Claimant in the subacromial space with Betamethasone and

Marcaine. He scheduled Claimant for follow-up in two weeks, at which time further treatment would be considered if Claimant's pain persisted.

8. On February 26, 2004, Claimant informed Dr. Johnston that the injection had provided no relief. Claimant continued to experience pain in his hip and ribs and significant pain in his shoulder. Back pain was not noted on this date. Dr. Johnston told Claimant that his hip and rib pain would resolve slowly over the course of several weeks or even months and required no treatment beyond stretching exercises. For Claimant's shoulder, Dr. Johnston recommended surgery, as he believed that Claimant's shoulder symptoms were unlikely to resolve through continued conservative treatment.

9. Claimant agreed to proceed with surgery, an arthroscopic decompression including acromioplasty and distal clavicle resection, which was performed by Dr. Johnston on March 19, 2004. On March 25, 2004, after examining Claimant, Dr. Johnston noted that he was ready to proceed to physical therapy for "both his right shoulder and his low back problems." D. Ex. I, p. 74.

10. Claimant's shoulder progressed well in physical therapy, but his low back pain persisted. Dr. Johnston was concerned that there might be a neurological injury and ordered an MRI of the lumbar spine, which was taken on April 28, 2004. It revealed minimal posterior non-compressive annular disc bulging and disc desiccation at L4-L5 and, at L5-S1, degenerative disc disease, posterior annular disc bulging, central/left paramedian subligamentous disc protrusion, possible minimal impingement of the left S1 nerve root, non-compressive neural foraminal narrowing and facet arthrosis.

11. On May 4, 2004, Dr. Johnston met with Claimant to discuss the MRI. Dr. Johnston interpreted the MRI to show "mild degenerative changes" with no apparent nerve root

impingement. D. Ex. I, p. 77. Dr. Johnston noted that he would return Claimant to light duty work in a week and a half and to full work in a month. He would follow up with Claimant at that time.

12. On May 20, 2004, Claimant presented to Dr. Johnston for back pain. Claimant reported that work was aggravating his pain. Dr. Johnston noted:

> I think much of Francisco's pain is from degenerative changes. However, it is possible that he does have a truly symptomatic disc problem…I have recommended a referral to a pain specialist, and I will have Francisco see Sandra Thompson, M.D., for probable epidural steroid injections.

D. Ex. I, p. 80.

13. Claimant received two epidural steroid injections from Dr. Thompson, which succeeded in alleviating Claimant's back pain. On June 28, 2004, Dr. Johnston noted that Claimant had experienced no back pain since receiving his injections. Dr. Johnston informed Surety that Claimant was medically stable with no permanent impairment. *See* D. Ex. I, pp. 83-84.

14. On November 16, 2004, Claimant returned to Dr. Johnston with complaints of severe back pain. Dr. Johnston noted that he was "concerned that Francisco's previous MRI findings of degenerative disc disease with disc bulge/herniation may have progressed." D. Ex. I, p. 85. He referred Claimant to Tim Floyd, M.D., for further evaluation. It is unclear whether Claimant ever saw Dr. Floyd. Neither Claimant nor Defendants included records from Dr. Floyd in their exhibits.

15. In May 2005, Surety sent Dr. Johnston a letter asking if Dr. Johnston agreed or disagreed with the proposition that Claimant's disc pathology was a preexisting condition unrelated to the industrial accident. Dr. Johnston replied that Claimant's disc pathology was

"almost certainly preexisting," but was also "exacerbated" by his fall from the roof. D. Ex. I, p. 88. However, Dr. Johnston did not detail the extent of the exacerbation, i.e., whether it was permanent or temporary, and he did not revise his finding that Claimant had suffered no permanent impairment as a result of the industrial injury.

16. Claimant testified at hearing that he saw no medical providers between July 2004 and January 2008. *See* Hearing Tr. 73, ll. 13-15. While this is not entirely accurate — as stated above, Claimant saw Dr. Johnston as late as November 2004 — this testimony does tend to support a conclusion that Claimant ceased to see medical providers for his back pain by late 2004 or early 2005. Claimant was able to return to his time-of-injury position and resume working full time.

Second Accident and Aftermath

17. On January 28, 2008, Claimant was at work when he slipped and fell on ice. He landed on his back. For several days, he did not seek medical care, but he presented to the emergency department at St. Alphonsus on February 4, 2008, reporting back pain. He was diagnosed with acute myofascial strain and low back pain, acute onset. C. Ex. O (page number illegible). He was prescribed medications and released.

18. Two days later, on February 6, Claimant presented to Joseph M. Verska, M.D., for evaluation. Claimant complained of low back pain and bilateral leg pain, numbness, and tingling. Plain films taken of Claimant's lumbar spine showed moderate disc space narrowing at L5-S1 and an osteophyte at L5-S1. Dr. Verska assessed sciatica, degenerative disc disease, and a herniated disc. He ordered an MRI, which was taken on February 21, 2008 by Michael Rothman, M.D. Dr. Rothman compared Claimant's 2008 MRI to the one taken in April 2004. *See* ¶ 10 above. Dr. Rothman found "[m]inor L4-L5 degenerative changes, unchanged from prior study"

and "[m]ild/moderate degenerative changes [at] L5-S1 with central disc herniation and minor left more than right foraminal stenosis, unchanged from prior study." D. Ex. G, p. 60B.

19. On February 28, 2008, Claimant presented to Dr. Verska to review the MRI. Dr. Verska interpreted the MRI as showing "some degenerative changes at L5-S1 with a central canal herniation at L5-S1." D. Ex. O, p. 228. Dr. Verska noted that he did not believe Claimant's condition would "warrant surgery." *Id*. He referred Claimant to Beth Rogers, M.D., for epidural steroid injections; however, Claimant declined to receive any injections. On April 2, 2008, Dr. Verska "offered [Claimant] a microdiskectomy [at] L5-S1 on the left." D. Ex. O, p. 232. Dr. Verska noted that he would seek authorization from Surety.

20. Claimant underwent a surgical evaluation with Dr. Verska on April 16, 2008. Contrary to his prior recommendation, Dr. Verska concluded that Claimant did not require surgery:

> I do not feel this gentleman needs a microdiskectomy at this time. His symptoms are not bad enough and he has no motor or sensory deficits or reflex changes to indicate ongoing radiculopathy.
>
> The patient desires to have surgical intervention but in my professional opinion, I do not think he will do well with this operation.

D. Ex. O, p. 234. Dr. Verska referred Claimant to Dr. Timothy Doerr for a second opinion regarding surgery, and to Dr. Beth Rogers for an impairment rating.

21. On April 21, 2008, Claimant presented to Dr. Rogers for an impairment evaluation. Using the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, Dr. Rogers found a whole person PPI rating of 6%:

> [Claimant] most closely corresponds to Motion Segment Lesions, Intervertebral Disc[5] Herniation, Class 1, which corresponds to 5-

[5] The word "disc" is spelled inconsistently in the medical records in evidence, with some providers, such as

> 9% whole person impairment. The patient does have a documented disc protrusion at a single level, L5-S1, and in my medical opinion, I would say he has some non-verifiable or inconsistent radicular complaints. Using Table 17-6, Functional History Adjustment, patient's Grade Modifier is 0. The patient has somewhat inconsistent symptoms. Using Table 17-7, Physical Examination Adjustment, the patient would correspond to a Grade Modifier of 0. He does have a negative straight leg raise and somewhat inconsistent sensory findings. He has normal motor strength and no significant lower extremity atrophy. Using Clinical Studies Adjustment, Table 17-9, the patient would correspond to a Grade Modifier of 2. He does have a documented L5-S1 disc protrusion and on initial clinical presentation, did document pain in appropriate distribution, although there have been inconsistencies on exam. There is a reasonable amount of consistency with a disc at this level. The Net Adjustment Value then corresponds to -1, for a whole person impairment of 6%. This impairment rating does not apportion to the 2004 injury. If the injury was at the same level, it is likely that apportionment would apply.

D. Ex. O, p. 237-238. It appears that Dr. Rogers only reviewed the 2008 MRI, as she did not refer to the 2004 MRI in her report. Her opinion that Claimant's disc herniation at L5-S1 is attributable solely to the 2008 accident is not credible, because Claimant's herniation preexisted the 2008 accident, appearing on the 2004 MRI.

22. On April 22, 2008, Claimant presented to Dr. Doerr for a second opinion regarding surgery. Dr. Doerr described the history of Claimant's injury as follows:

> Francisco is a 44-year-old gentleman who comes in today after a previous work injury [in] 2004. He was doing well until a repeat injury 01/28/08. Since that time, he has had predominant symptoms of back pain with some radiation into both legs. He has had some intermittent numbness in both legs as well, but no weakness. He reports normal bowel or bladder function. He has had persistent symptoms despite activity modifications and oral medication.

D. Ex. P, p. 243. Dr. Doerr examined Claimant and reviewed the 2008 MRI. He noted:

> At this point, I suspect that Francisco's low back pain is secondary

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Dr. Rogers, preferring "disk." For purposes of uniformity and clarity, we have used "disc" throughout this decision.

> to his degenerative changes at L5-S1 greater than L4-5. He does not have any significant neurologic impingement. Given this, I would certainly not recommend any surgical intervention at this point in time, especially since he has not had any physical therapy or rehabilitation. I would recommend a physiatry directed rehab program with the goal towards rapid reintegration into the workplace. I think that he should be reevaluated by a spinal surgeon in 8 to 12 weeks should his symptoms not be controlled with formal rehab.

Id. Following his visit with Dr. Doerr, Claimant commenced with physical therapy.

23. Claimant returned to Dr. Doerr on June 6, 2008. He stated that physical therapy had failed to improve his pain. Noting that Claimant had experienced several "months [of] persistent symptoms despite anti-inflammatories, activity modifications and physical therapy," Dr. Doerr ordered a discogram to determine if Claimant's discs were causing his symptoms. D. Ex. P, p. 248; Doerr Depo. 11, ll. 22-25.

24. On July 16, 2008, Dr. Sandra Thompson, who had given injections to Claimant in 2004, performed a discogram on Claimant. He demonstrated no pain at L3-L4 or at L4-L5. At L5-S1, Dr. Thompson's attempts to access the space proved unsuccessful, as she could not access the space without irritating the nerve root. She believed that because of Claimant's disc herniation at L5-S1, the "tract along which the nerve root generally passes has been distorted somewhat, making it impossible to avoid." D. Ex. Q, p. 272. Dr. Thompson went on to note:

> Subsequent to the procedure the patient stated that his back pain and lower extremity pain was back to baseline. My conclusion is that this patient has a non-concordant pain, implying that his pain was not just discogenic in nature.

Id. Non-concordant pain is pain that is inconsistent with a discogenic[6] source. *See* Doerr Depo. 13, ll. 21-25. Nevertheless, Dr. Thompson informed Dr. Doerr that she believed Claimant's disc

[6] "Discogenic" is defined by *Stedman's Medical Dictionary*, 26th Edition, as "denoting a disorder originating in or from an intervertebral disc."

herniation was causing his pain.

25. On August 7, 2008, Claimant met with Dr. Doerr to review the discogram results. Dr. Doerr suggested a series of epidural steroid injections at L5-S1. Claimant received two injections, but neither provided any relief. On August 28, 2008, Dr. Doerr ordered another discogram in an attempt to access L5-S1. He noted:

> If [the discogram] is positive and concordant, [Claimant] may benefit from an L5-S1 fusion. If it is negative, he is likely at maximal medical improvement.

D. Ex. P, p. 253.

26. On September 8, 2008, William Binegar, M.D., performed the discogram on Claimant. Dr. Binegar first injected Claimant at L4-5. Claimant exhibited no pain. Dr. Bineger then attempted to access L5-S1:

> At this level prior to the injection of any dye Mr. Serrano began noting some pain and pressure. He indicated this persisted for some time before I even injected any dye. We talked to him some more and he finally indicated he was not having increasing pain. I then continued with the procedure, where we started again, fluoroscopy and I then began the injection of dye. During this entire time of the injection he indicated minor pain and minor pressure. At no time during the injection did he indicate any significant pain. The maximum pressure I obtained was 43 psi. I did inject 3.5 cc of dye. This did reveal a degenerative pattern with a fissure noted on the right. When I informed Mr. Serrano that we finished he then indicates his pain level is now suddenly 7/10 to 8/10. I repeated injection of dye of approximately 0.3 cc and during this repeat injection he did not indicate increased pain.

D. Ex. H, p. 65K-65L.

27. Dr. Binegar recorded his interpretation of Claimant's discogram results as follows:

> At [L4-5] there is a normal pattern without extravasation of dye and no pain noted during the injection. It does not appear this disc is contributing to [Claimant's] typical back pain.

> At [L5-S1] there really is not pain noted during the injection of the dye. Only at the end of the injection of dye does Mr. Serrano indicate any pain. There is a noted right-sided fissure. I feel this discogram is indeterminant [sic] for determining if this L5-S1 disc is contributing to his pain. I felt Mr. Serrano was somewhat unreliable in his presentation indicating pain even prior to the injection of dye at this level. Also I will state during the entire injection process he kept asking which disc are we doing. He wanted to know if it was the disc that they had trouble getting into before. He wanted to know if it was disc level 1 or disc level 2. Again, my interpretation at this time is the L5-S1 discogram is indeterminant [sic] for determining of the L5-S1 is contributing to Mr. Serrano's typical low back pain.

Id. at 65L.

28. Claimant returned to Dr. Doerr on September 16, 2008 to review the discogram results. Dr. Doerr noted:

> Discogram of the lumbar spine from 09/08/08 was negative at L4-5 and indeterminate at L5-S1 with the patient's responses concerning for possible nonorganic symptoms. I personally discussed the discogram results with Dr. Binegar who performed in the discogram, who was in agreement that it is unlikely that L4-5 and L5-S1 is [sic] contributing to any of Francisco's symptoms….
>
> His discogram reveals no definitive discogenic source for his symptoms. At this point, I believe that he is at maximal medical improvement. I do not see any objective evidence to support any work restrictions at this time. He has 0% permanent partial impairment.

D. Ex. P, p. 260. Following this appointment, Surety ceased paying benefits on Claimant's 2008 claim.

29. On October 5, 2008, Claimant suffered severe pain when he felt a pop in his back and fell to the floor after attempting to rise from a couch. He was transported by ambulance to the emergency department at St. Alphonsus. An MRI was taken, which showed mild L4-L5 disc desiccation with no central canal or foraminal stenosis, and mild disc bulging at L5-S1 with no

central canal or foraminal stenosis. The radiologist who wrote the report did not compare it to Claimant's April 2004 or February 2008 MRIs; however, at deposition, Dr. Doerr testified that there was not "any significant change between the three exams, other than that which would be expected with normal lumbar degenerative disc disease." Doerr Depo. 18, ll. 19-23.

30. Peter Angleton, M.D., who treated Claimant at the emergency department, noted that the "cause of [Claimant's] pain is unclear but seems to be related to lumbar disc disease." D. Ex. F, p. 48K. Claimant was admitted into the hospital for pain control and treated by Kenneth Little, M.D. After an evaluation found no acute injury, Claimant was released and instructed to follow up with Dr. Thompson for appropriate pain management.

31. Claimant presented to Dr. Thompson on October 13, 2008. Dr. Thompson diagnosed pain medications and noted that she would be consulting with Dr. Little about Claimant's condition. Dr. Thompson wrote, "I believe that unless Dr. Little disagrees that [Claimant] is now a surgical candidate since injection therapy has not helped him in the past." D. Ex. Q, p. 278. It is unclear from the record whether Dr. Thompson ever consulted with Dr. Little. No consultation is recorded in Dr. Thompson's notes. However, on April 16, 2009, she wrote that Claimant had been "deemed to not be a surgical candidate." D. Ex. Q, p. 281.

32. During 2009 and 2010, Dr. Thompson treated Claimant with medications. On March 25, 2010, she noted that Claimant was unable to afford a new surgical consultation and that she would attempt to assist in procuring one. Dr. Thompson ultimately referred Claimant to Michael Hajjar, M.D., for consultation.

33. Claimant presented to Dr. Hajjar on August 18, 2010. Dr. Hajjar performed an examination of Claimant and reviewed some of Claimant's past medical records. He opined that Claimant may be a "potential candidate for further lumbar treatment or intervention"; however,

new studies, including a new MRI, would have to be done to determine the appropriate treatment. D. Ex. T, p. 301. Claimant did not follow up with Dr. Hajjar due to the expense of the proposed studies.

34. Claimant ceased working for Employer in February 2008. In 2009, he began to work for a landscaping company, for which he still worked at the time of hearing. His duties in his new position included installing sprinkler systems. He testified that his brothers and nephew, who were on a work crew with him, would assist him with his duties and handle any heavy lifting.

35. At hearing, Claimant testified that he suffers from constant pain and popping in his back. He stated that he has difficulty sleeping, which he never had prior to his industrial accidents. He stated that his prescribed medications fail to alleviate his pain and also make him feel dizzy and nauseated; consequently, he relies on over-the-counter medications, such as Tylenol, for pain relief.

36. Having reviewed the record and observed Claimant testify at hearing, the Commissioners find that Claimant is not an entirely credible witness. His conduct during the discogram with Dr. Binegar is troubling. Furthermore, at hearing, Claimant testified that three doctors — Dr. Little, Dr. Thompson, and Dr. Hajjar — suggested to Claimant that he needed surgery. *See* Hearing Tr. 87, ll. 12-15. Yet, except for Dr. Thompson, these opinions are not reflected in the medical records. Dr. Little referred Claimant to Dr. Thompson for pain management, which Claimant acknowledged in his testimony. *See* Hearing Tr. 44, ll. 13-20. Dr. Hajjar wanted further studies done before determining an appropriate treatment for Claimant. Thus, where Claimant's testimony conflicts with the medical records, we treat the medical records as the more credible evidence.

DISCUSSION AND FURTHER FINDINGS

37. The provisions of the workers' compensation law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes that 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 liberally construed in favor of the worker when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Causation

38. It is undisputed that Claimant suffered two industrial accidents that resulted in injuries. Claimant argues that he is entitled to additional benefits on his claim. Defendants dispute Claimant's entitlement to additional benefits. In order to address the issue of Claimant's entitlement to benefits, we must first address the threshold issue of causation; that is, whether the condition for which Claimant claims benefits was caused by his industrial accidents.

39. Causation was not a noticed issue in this case. However, "causation is an issue whenever entitlement to benefits is at question." *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012). The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). The claimant is required to establish a probable, not merely possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-561, 511 P.2d 1334, 1336-1337 (1973) (*overruled on other grounds by Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000)). "Probable" is defined as having more evidence for than against. *Fisher v. Bunker Hill*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Medical evidence does not necessarily need to take the form of oral

opinion testimony in order to be substantial and competent evidence of causation. *Jones*, 134 Idaho at 164, 997 P.2d at 625. While deposition or hearing testimony by a medical expert might sometimes be "necessary to meet the substantial and competent burden…this does not mean that medical reports are inadequate *per se* when there is no contrary medical evidence." *Id.*

40. Claimant argues that he suffers from severe back and leg pain as a result of a herniated disc at L5-S1. He further argues that the disc injury was caused by his 2004 accident and aggravated by his 2008 accident. However, Claimant offers no expert medical testimony in support of this contention, and the medical evidence in the record is insufficient to establish causation. In Claimant's opening brief, he cites to "the St. Alphonsus records by Sandra Thompson on the 28th of June 2004" as proof that Claimant's 2004 accident caused a disc herniation. Yet Dr. Thompson's note does not support this contention; in its entirety, her June 28, 2004 note reads:

> Mr. Serrano suffers from lower back pain as the result of a herniated disc. He has had two epidural steroid injections and returns today stating that his pain is a level of 0/10 (10 being unbearable). At this point, he is discharged from this clinic and will only be seen in follow-up should his pain return. I would like to thank Dr. Johnston for this referral.

D. Ex. K, p. 116. While this note demonstrates Dr. Thompson's belief that Claimant's disc herniation caused his pain, it does not even mention Claimant's industrial accident, let alone purport that the accident caused a herniated disc.

41. The closest Dr. Thompson came to offering a causation opinion in 2004 was in her June 7, 2004 note. On that date, Dr. Thompson gave Claimant his first epidural steroid injection. She wrote:

> Mr. Serrano is a 41-year-old gentleman who sustained an accident at work where he fell from a second story roof that resulted in fractured ribs and new onset low back pain. His MRI shows a disc

> bulge at L4-5, a posterior [annular] disc bulge at L5-S1, and a central and left paramedian subligamentous disc protrusion with some impingement on the left S1 nerve root….My impression at this time is low back pain most likely due to disc protrusion at L5-S1; however, the patient does have facet arthrosis which might have been aggravated by his fall.

D. Ex. K, p. 113. It could be inferred from this note that Dr. Thompson believed there was a connection between Claimant's fall and his herniated disc — otherwise, it is unlikely that she would have mentioned the accident — but an inferred opinion is not enough to prove causation where there is conflicting evidence in the record.

42. Dr. Johnston, as Claimant's primary treating physician, was in the best position to assess Claimant's overall condition and the causes of his various symptoms in 2004; he had the most information about Claimant's condition and saw him on a regular basis. According to his notes, Dr. Johnston believed Claimant's back pain was mostly related to degenerative changes, or possibly to a "symptomatic disc problem." *See* ¶ 12 above. In a letter to Surety, he opined that Claimant's "discogenic back problems" preexisted the accident but had been "exacerbated" by it. D. Ex. I, p. 88. Dr. Johnston did not explain the degree to which the accident aggravated Claimant's condition, and he did not attribute any permanent impairment to Claimant's accident. Thus, it may be presumed that Dr. Johnston either did not believe that the exacerbation was permanent or did not believe that Claimant's disc herniation was a condition that qualified for a permanent impairment rating. Without further elaboration from Dr. Johnston, his records are inadequate to establish that on a more likely than not basis, the subject accident permanently aggravated Claimant's preexisting low back disease.

43. There is no indication in the record that Claimant sought treatment for back pain between July 2004 and January 2008, with the exception of one visit to Dr. Johnston in November 2004. Claimant was able to return to his time-of-injury position. This supports Dr.

Johnston's conclusion that Claimant attained medical stability in June 2004.

44. Following Claimant's second accident in January 2008, he was treated first by Dr. Verska and then by Dr. Doerr. Dr. Verska ordered an MRI of Claimant's lumbar spine, which showed no change from the 2004 MRI. These two MRIs constitute objective medical evidence that Claimant's 2008 accident neither caused nor worsened Claimant's herniated disc. Dr. Verska's notes contain no opinion on the issue of whether Claimant's 2004 accident caused his disc herniation.

45. Dr. Doerr attempted to ascertain the source of Claimant's back and leg pain, ultimately concluding, based on Claimant's discograms, his unreliable presentation, and his nonorganic symptoms, that Claimant's discs were unlikely to be causing his pain. According to Dr. Doerr's notes, Dr. Binegar concurred. Dr. Doerr believes that Claimant's recurrent back symptoms are most likely due to his preexisting degenerative disc disease rather than to Claimant's 2008 industrial accident. He reasoned that there was no significant change from Claimant's 2004 MRI to his February 2008 or October 2008 MRIs; Claimant's lumbar spine looked about the same in late 2008 as it did in early 2004. Claimant's subjective complaints constitute the only evidence that his condition worsened after his 2008 accident, and, as we stated above, Claimant is not a wholly reliable witness. Dr. Doerr, Dr. Rogers, and even Dr. Thompson observed that Claimant reported symptoms that were inconsistent, non-concordant, or nonorganic.

46. Essentially, what we know is this. In January 2004, Claimant fell from a roof. He suffered various injuries, including transverse process fractures, a pelvic fracture, possible rib fractures, and impingement syndrome. His shoulder was initially the major source of his pain, but after a successful surgery, his back pain became his major complaint. His treating physician

at the time, Dr. Johnston, ordered an MRI, which showed degenerative changes and a herniated disc. Dr. Johnston believed that Claimant's discogenic problems preexisted the accident but were exacerbated by it. Unfortunately, Dr. Johnston did not detail the extent of the exacerbation or state whether he believed it was permanent. His decision not to assign any permanent impairment to Claimant's accident arguably reflects his belief that the accident had not caused any permanent change to Claimant's condition. Regardless, without more, his records are insufficient to meet Claimant's burden of proof.

47. In January 2008, Claimant suffered another accident. He reported severe back pain, but an MRI demonstrated that his lumbar spine condition was unchanged from 2004. Other than Claimant's subjective, unreliable complaints, there is simply no evidence that his condition was made worse.

48. The burden of proof lies with Claimant. While there are some cases in which causation may be proven through medical records alone, this is not one of those cases. Dr. Thompson's medical records, on which Claimant relies, contain conclusory statements at best. Her records do not draw clear lines, supported by well-reasoned analysis, that connect Claimant's accidents to his disc herniation, and his disc herniation to his pain; and while Dr. Johnston did opine that Claimant's accident exacerbated his preexisting condition, Dr. Johnston did not detail the nature of the exacerbation and whether it was permanent. Though it is certainly possible that Claimant's disc herniation was caused or worsened by his 2004 accident, it is not enough for Claimant to show that it is possible. He must show that it is probable.

49. Claimant has failed to prove that the condition for which he claims benefits was caused by either his 2004 or 2008 industrial accidents. Because he has failed to prove causation, he has failed to prove entitlement to additional benefits. Having failed to show entitlement to

additional benefits, he has also failed to show that Defendants unreasonably denied or delayed payment of benefits. Therefore, Claimant is not entitled to attorney fees.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, the undersigned Commissioners conclude that:

1. Claimant failed to prove that the condition for which he claims benefits was caused by either his 2004 or 2008 industrial accidents.

2. Other issues are moot.

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

IT IS SO ORDERED.

DATED this __20th_____ day of March, 2013.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __20th_____ day of March, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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