

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH A. WEATHERBY,
Claimant,
v.
THOMPSON MICHIE ASSOCIATES,
Employer,
and
TOWER INSURANCE COMPANY OF NEW YORK,
Surety,
Defendants.

IC 2010-024365

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

Filed October 29, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on December 6, 2011. Claimant was represented by Daniel J. Luker. Defendants were represented by Susan R. Veltman. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The case came under advisement on May 14, 2012 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues as agreed upon by the parties at hearing include:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether Claimant is medically stable, and if so, the date thereof; and
3. Whether and to what extent Claimant is entitled to benefits for:
 - a. Temporary total or partial disability (TTD/TPD),
 - b. Permanent partial impairment (PPI),
 - c. Permanent disability in excess of PPI, and
 - d. Medical care.

The previously noticed issue of average weekly wage was waived by agreement; Claimant's wage was stipulated to be \$667.01 per week.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered a back and hip injury while lifting barrels of chlorine on July 2, 2010 (the "Accident"). After a series of unfortunate coincidences, Claimant was misdiagnosed and incorrectly deemed able to return to work. He is entitled to medical care and temporary total and partial disability through the date of the hearing because he has not reached medical stability. Alternatively, if deemed stable, he should be awarded 5% PPI and 28% permanent disability, inclusive, which reflects his wage loss at his new job.

Defendants contend Claimant suffered a short-lived groin strain which healed by November 23, 2010. Claimant failed to show a causal relationship between his additional complaints and the Accident. His lingering complaints are primarily due to a pre-existing ilioinguinal nerve entrapment in scar tissue following a 2008 non-industrial hernia repair. The hip and back condition did not become symptomatic for months after the Accident and is not related to it. All compensable medical and temporary disability benefits have been paid. No physician has rated Claimant for PPI; no permanent restrictions have been imposed; Claimant suffers no permanent impairment related to the Accident.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The hearing testimony of Claimant and his father;
2. Claimant's exhibits A – E;
3. Defendants' exhibits 1-10; and
4. Post-hearing depositions of Richard Radnovich, D.O., John M. Livingston, M.D., together with exhibits 1 and 2, and R. Tyler Frizzell, M.D.

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At hearing, Defendants offered exhibit 11, a two-page letter from Thomas Manning, M.D. to Defendants' attorney which purportedly "clarifies" his medical records. This document was untimely produced pursuant to JRP Rule 10 and was ruled inadmissible at that time. Defendants failed to show good cause why this letter was not obtained from Dr. Manning in a timely manner. The Referee did allow Defendants the opportunity to depose Dr. Manning post-hearing. Defendants elected to vacate the scheduled deposition. In briefing, Defendants urged for reconsideration of the ruling. Claimant's arguments in briefing about this exhibit are well taken. The Referee's original ruling that exhibit 11 was inadmissible shall stand. (Having reviewed proposed exhibit 11 after deciding this matter, the Referee found Dr. Manning's opinions expressed in that exhibit would not alter any finding or conclusion reached herein.)

FINDINGS OF FACT

1. Claimant worked for Employer performing repairs, remodels, and maintenance on an apartment complex. On or about July 2, 2010, Claimant was stacking chlorine barrels, when he experienced the sudden onset of pain. Claimant described the incident, and his resulting symptoms as follows:

A During stacking the chlorine I was putting a barrel up – up on the – another barrel and I felt a pain – and it's – not in my groin, it's off to the – I guess – mid pelvis I guess. It's hard to describe exactly where it is. Relatively close to the – the hernia repair that I had received and I felt a burning sensation go down my thigh. I told Ben Blau about it, said, wow, I think I might have pulled something. I don't know.

Tr. 14/2-9.

2. By the following Monday, with the pain continuing, Claimant orally notified his supervisor. No Form 1 or other documentation was generated at that time. By this time Claimant was beginning to think he had damaged a prior hernia repair.

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3. Claimant made a claim for the Accident; he completed a Form 1 in pen and gave it to Employer. That document is not in evidence. An undated Form 1 was received by the Commission on October 6, 2010.

4. Defendants' electronically stored version of Form 1 data states that Employer was notified on August 26, 2010.

5. Claimant's groin and left lower extremity discomfort did not relent. (Tr. 15/21-16). However, he did not immediately seek medical care following the accident, in the hope that his discomfort would, in time, resolve. In fact, Claimant testified that his symptomatology increased following the July 2, 2010 accident:

(By Mr. Luker)

Q Okay. During this time period how – how were your symptoms doing?

A They just progressively got worse. The pain in my leg actually had started going down into my lower leg and into my foot. The pain level had dramatically increased. I actually developed a severe limp. So, overall it was going bad.

Q How – during the time period were you – were you working?

A Yeah. I was actually working.

Q How – how was that going?

A I was not doing well. I had extreme difficulty in doing the every day tasks that were required of my job.

Q Like what?

A Packing stuff up flights of stairs. We had tubs of materials that we had to take up to the apartments to the [sic] get them ready for the next tenant. Just walking was a challenge. Doing even the littlest things was – had become a challenge for me.

Q Before July 2nd did you have any problem doing any of that?

A No.

Q Did anything you were doing make it anything [sic] worse while you were working?

A Lifting stuff and walking and bending over and twisting and everything that I did caused it to be more painful.

Q Anything in particular that stands out in your mind as saying, hey, that – that really hurt?

A Moving a refrigerator up three flights of stairs.

Q Okay.

A It was on a – like a Saturday. Refrigerator failed on the third floor and I moved it down by myself and called in another employee to help me bring a new one up the stairs and we installed it. I was on the downhill side of this –

Tr. 29/12-30/22.

...

(By Ms. Veltman)

Q When did you move the refrigerator downstairs?

A Approximately – I don't know the exact date, but it was sometime during the first part of August.

Q All right. How did your symptoms change, if at all, after that?

A They got significantly worse. The pain that I had got a whole lot worse and the – I guess the limp got worse. If you can – a limb [sic] is a limp, but it seemed to be more problematic for me and after that it – if I lifted anything, it caused me even greater amounts of pain. So, the pain got significantly worse.

Q Okay. Was it different in any way in any different body part or the same body part?

A It just spread out more. There was more – it went from, you know, a smaller area to a much larger area.

Tr. 57/5-19.

From the foregoing, it is clear that Claimant testified that his groin and left lower extremity complaints have persisted ever since the July 2, 2010 accident, but were significantly worsened after he moved a refrigerator down and up three flights of stairs.

6. The record does not reflect whether Claimant notified Employer of the “refrigerator incident.” Neither does the record reflect whether Claimant made timely claim for this incident. Finally, the refrigerator incident is not the subject of the instant claim, and whether such event constitutes a compensable accident/injury is not among the issues noticed for hearing.

7. Claimant did not seek medical care for these complaints until August 20, 2010, when he presented for evaluation by Dr. Michaud at Primary Health. Claimant testified that his reason for seeing Dr. Michaud was to obtain Dr. Michaud’s opinion for his (Claimant’s) pelvic and left lower extremity pain:

(By Mr. Luker)

Q Okay. What – what were you going to Dr. Michaud for?

A I was going to him to find out why I had pain in the – like pelvic region and down my leg.

Q What – tell me about the appointment. What happened in the appointment?

A Went in, told him I have got this – this pain. I told him what I had done and when I first felt the pain. They said I have got – you know, I have got pain through my pelvis, across the top of my pelvis, into my groin and down my leg and I don’t know why.

Tr. 19/14-24.

8. Claimant testified that he described the July 2, 2010 accident to Dr. Michaud, and explained how he experienced the immediate onset of pelvic pain and burning sensation going down his left leg. (Tr. 55/19-24).

9. In sharp contrast to Claimant's testimony, Dr. Michaud's detailed notes from the visit of August 20, 2010 reveal an entirely different reason for Claimant's visit, as well as a different description of Claimant's presenting complaints. First, Dr. Michaud noted Claimant's reasons for the visit:

Reason for Appointment

1. Not feeling good/ache all over/muscles hurt for the last month
2. Possible sinus infection
3. Mid epigastric pain

C. Ex C-1, p. 2.

10. Dr. Michaud took the following history from Claimant concerning his presenting complaints:

History of Present Illness

Note: [sic]

"Muscles and joints hurting all over."

Polyarthralgia:

c/o Stiffness.

Denies : Worse in Am. Worse after rest. Worse after extensive activity.

Joint Pain for 4 weeks hands, wrists, elbows, shoulders, neck and lowback [sic] pain, knees; no pain in ankles or hips. Chest sore "nonstop" for several weeks. . [sic]

Using ibuprofen occasionally to self treat – only once this week.

Gastroenterology:

c/o Abdominal pain epigastric and nausea; , [sic] no radiation, occasional burning. . [sic] c/o Nausea:. [sic] c/o Constipation alternates with loose stools. c/o Diarrhea.

Denies : Vomiting. Rectal bleeding.

Fever tactile.

ENT/Respiratory:

Earaches and pressure in cheeks. Some green nasal discharge.

C. Ex. C-1, p. 2.

11. Dr. Michaud's exam, which included a neurologic and musculoskeletal exam, yielded the following findings:

Examination

Detailed Exam:

GENERAL APPEARANCE: NAD, well nourished. **HEENT: atraumatic, normoccephalic, PERRI, EOMI, normal inspection ears, nose, throat. ORAL CAVITY: moist mucous membranes, no lesions. **NECK: supple, no thromegaly, no adenopathy, HEART: normal S1S2, no murmur. *CHEST: normal shape and expansion. LUNGS: clear to auscultation bilaterally, no wheezes/rhonci/rales. ABDOMEN: soft, non-tender without organomegaly or masses. **NEUROLOGIC EXAM: alert and oriented x 3, non-focal exam. SKIN: warm, dry. EXTREMITIES: normal ROM, no clubbing, no edema. *BACK: normal range of motion of spine, no evidence of scoliosis, no CVA tenderness. *MUSCULOSKELETAL: grossly normal range of motion all joints. *LYMPH NODES: no axillary, supraclavicular or inguinal nodes. *PSYCH: normal affect, normal mood.

C. Ex. C-1, p. 3.

12. Based on Claimant's presenting complaints and findings on exam, Dr. Michaud proposed the following preliminary assessments:

Assessments

1. Polyarthralgia – 719.49 (Primary)
2. Chest Pain Atypical – 786.59
3. Sinusitis Acute NOS – 461.9
4. Abdominal pain, epigastric – 789.06

C. Ex. C-1, page 3.

Notably, nowhere in Dr. Michaud's detailed notes of August 20, 2010, is there to be found a description of either the subject accident of July 2, 2010, or a subsequent refrigerator incident occurring during the first part of August 2010. Nor does the note reveal anything resembling the specific complaints described by Claimant in his hearing testimony that led him to seek evaluation by Dr. Michaud.

13. Claimant disputes the tenor of Dr. Michaud's August 20 medical record. Claimant testified he visited for pain in his "pelvic region and down [his] leg"; Dr. Michaud began asking about Claimant's joints and other conditions and symptoms. Claimant offered

no documentary or other evidentiary support for his recollection. Claimant's recollection is inconsistent with Dr. Michaud's contemporaneously made medical record.

14. On August 27, 2010, Claimant again visited Dr. Michaud. This visit represents the first record in which Claimant told a physician about the Accident. The recorded date of the Accident as 7/21/10 is clearly a typographical error. Dr. Michaud's occupational medicine report correctly identifies the 7/2/10 date. On examination, Dr. Michaud focused on a "subjective ache" which Claimant reported as the basis for a diagnosis of an inguinal hernia on Claimant's left side. This record contains no mention of low back or leg pain. Dr. Michaud's occupational medicine report of this visit contains a checkmark that it is the "Initial" visit. Dr. Michaud provided temporary light-duty restrictions. He referred Claimant to Dr. Martinez.

15. On August 30, 2010, Claimant visited Stephen Martinez, M.D. After examination, Dr. Martinez diagnosed a groin sprain without hernia. He released Claimant to work without restrictions.

16. On August 31, 2010, Claimant visited Peggy Ann Rupp, M.D., on referral from Dr. Michaud. Claimant testified that he gave Dr. Rupp an accurate history of his complaints as of the date of his evaluation. (Tr. 45/12-46/8). However, in her August 31, 2010 report to Dr. Michaud, Dr. Rupp recounted the following history taken from Claimant at the time of his initial visit with Dr. Rupp:

He was seen in our office on August 31st and is a very pleasant, 36 year old male who has been noting aching in numerous joints since his mid 20's. In particular, he notes discomfort in his shoulders, elbows, wrists, hands, and knees.

C. Ex. C-2, p. 1.

Dr. Rupp's letter reflects that Claimant's musculoskeletal exam was normal with full range of motion in both upper and lower extremities.

17. On September 1, 2010, Claimant telephoned Primary Health to dispute an ancillary diagnosis of diverticulitis. He again reported groin pain without mention of low back or leg pain.

18. After a follow-up visit on September 8, Dr. Martinez again recorded that Claimant was released to full work without restrictions. At this visit, Claimant reported he was tolerating work but felt increased left groin soreness at the end of his shift. Dr. Martinez referred Claimant to a general surgeon, Dr. Martin, to assess whether a possible left inguinal hernia was present and surgically treatable.

19. Employer failed to promptly identify Surety as the proper company to look to for benefits. On September 15, 2010, Claimant notified Primary Health he would seek his own physician. On that date, Employer had not yet identified Surety or paid any medical bills itself.

20. On September 20, 2010, Claimant visited John Livingston, M.D. Dr. Livingston had performed Claimant's 2008 hernia surgery. An ultrasound was ambiguous. A CT scan of Claimant's pelvis showed no hernia.

21. Having found no hernia, Dr. Livingston considered the possibility of nerve entrapment by scarring from the earlier surgery. He suggested neurolysis. Claimant was initially agreeable, but reconsidered within two weeks.

22. Claimant requested that Dr. Livingston provide work restrictions on October 21, 2010.

23. On October 28, 2010, Dr. Livingston recommended Claimant be off work for two weeks. He later gave a two-week extension.

24. On November 23, 2010, Dr. Livingston released Claimant, stating that he was "fit for full duty and full activity and can resume his normal job." (See D. Ex. 4, p. 103).

25. On December 7, 2010, Dr. Livingston opined Claimant had “returned to baseline.”

26. In late February 2011, Claimant was seen by Richard Radnovich, D.O. at the instance of Claimant’s counsel. Originally, it was anticipated that Dr. Radnovich would see Claimant for the purposes of an independent medical evaluation and impairment rating. However, based on his exam of Claimant, Dr. Radnovich concluded that Claimant was not at a point of medical stability. Therefore, he made certain treatment recommendations for Claimant and eventually provided treatment to Claimant. At the time of his initial evaluation of Claimant, certain of Claimant’s physical findings suggested the existence of orthopedic injuries. Dr. Radnovich ordered MRI evaluation of Claimant’s pelvis and lumbar spine. These studies were performed on February 24, 2011. The pelvic MRI was read as follows:

IMPRESSION: Mild subchondral increased signal in the lateral portions of the bilateral acetabular roofs suggesting early degenerative changes on a chronic basis. Questionable small nondisplaced tear in the right superior labrum which also may be chronic, please note lack of intra-articular contrast and a large field of view imaging of the hips limits labral and cartilage evaluation.

Left L5-S1 foraminal disc protrusion as described on recent lumbar MRI.

Tiny fat-containing bilateral inguinal hernias.

No tendon pathology.

C. Ex. C-10, p. 12.

27. The lumbar spine MRI was read as follows:

CONCLUSION: There is a flat foraminal disc protrusion on the left at L5-S1 such that exiting left L5 nerve root compression could occur; correlate clinically.

C. Ex. C-10, p. 14.

28. Although Claimant did not have evidence of active radiculopathy at the time of his evaluation by Dr. Radnovich in February 2011, Dr. Radnovich testified that the absence of a

radicular component does not rule out structural injury to Claimant's L5-S1 disc. Dr. Radnovich testified that the MRI studies referenced above confirmed his suspicions about Claimant's hip and lumbar spine injuries. He testified to his belief that the subject accident is responsible for causing the L5-S1 lesion, as well as the labral tear. Interestingly, Dr. Radnovich testified that chiropractic care would not ordinarily be on his short list of recommended therapies for problems such as those suffered by Claimant. However, on cross-examination, he acknowledged that he made a retroactive referral on Claimant's behalf to Dr. Hollingsworth in order to assist either Claimant, or Dr. Hollingsworth, in obtaining "reimbursement," presumably from an insurance carrier. (See Radnovich Depo., 36/14-21). Concerning the refrigerator incident of early August 2010, Dr. Radnovich acknowledged that the history he took from Claimant strongly suggested that Claimant had not had any complaints of pain going down into the left thigh until after that incident. He proposed that the refrigerator incident "either caused or aggravated the problems from lifting the chlorine drum." (See Radnovich Depo., 32/18-23).

29. On May 2, 2011, Claimant visited neurosurgeon R. Tyler Frizzell, M.D., at Defendants' request for evaluation. Examination showed small reductions of strength in some left leg muscles. Claimant described the location of his pain and other symptoms. Dr. Frizzell found no evidence of L5 radiculopathy and no hypoesthesia in the L5 dermatome. Claimant's pain as described does not associate with the lumbar spine. Per Dr. Frizzell, the MRI finding of a degenerative L5-S1 disc "appears to be asymptomatic." Dr. Frizzell opined that the disc protrusion was unrelated to the Accident.

30. On June 9, 2011 Dr. Radnovich performed an injection into Claimant's hip joint. It helped reduce Claimant's hip pain for a few days.

31. Also on June 9, 2011, Dr. Livingston reviewed the lumbar MRI. He confirmed the radiologists' report regarding the lumbar pathology. Dr. Livingston equivocated when asked for a causation opinion about the lumbar pathology. He suggested the lumbar pathology may have been related to an automobile accident which occurred before the 2008 surgery.

32. In a June 22, 2011 letter to Defendants' attorney, Dr. Livingston noted Claimant exhibited no lumbar pathology in either the 2008 or the 2010 visits. Dr. Livingston opined Claimant's lumbar pathology was not related to the Accident. He reiterated his recommendation for chemical neurolysis for the diagnosis of nerve entrapment.

33. Claimant first saw Dr. Hollingsworth on June 8, 2011. Dr. Hollingsworth treated Claimant for an L3 subluxation at a rate of four times per week until July 6, and twice a week thereafter until August 5, 2011. Dr. Hollingsworth's notes of each visit are largely repetitive, as from a form, with occasional minimal adjustments.

34. On or about August 12, 2011, Claimant was evaluated by neurosurgeon Thomas Manning, M.D., on referral from Dr. Hollingsworth. Dr. Manning's August 15, 2011 letter contains a recitation of the history obtained from Claimant on the occasion of the August 12, 2011 exam. The history recorded by Dr. Manning contains yet another version of the development of Claimant's symptomatology:

As you know, he is a thirty-seven-year-old gentleman who in July of 2010 while at work was moving a large heavy tub of chlorine. He felt immediate onset of left leg pain. It was exacerbated again a month later when he was moving a refrigerator. He complains of a burning pain in the back down into the left groin to the medial leg and foot. He has paresthesias in the left big toe.

C. Ex. C-8, p. 1

Following his exam of Claimant, Dr. Manning proposed that Claimant suffered from a symptomatic left L5 radiculopathy. He recommended an epidural steroid injection along with

physical therapy. The injection was performed on August 26, and provided immediate relief. Per Claimant's report, the physical therapy recommended by Dr. Manning was also helpful. Dr. Manning's records do not reflect that he hazarded a guess concerning the cause of Claimant's L5 radiculopathy.

35. Claimant received physical therapy from Kathy Berg, DPT. He attended at least 13 sessions, was cooperative in the clinic and with a home exercise program. Claimant reported significant improvement in all aspects of his low back condition: increased mobility, better biomechanics, and reduced pain. Ms. Berg recorded that Claimant also complained of left groin pain. None of the therapy or exercises provided was directed at Claimant's left groin pain except as subsumed in the treatment of his low back condition.

36. In deposition, Dr. Radnovich opined that at the time of examination, Claimant was not medically stable. He opined that Dr. Michaud was "kind of led down the garden path" when asking Claimant questions to arrive at a diagnosis. Dr. Radnovich attributed this to the fact that Claimant "is not a great historian. He does not present the data in a clear way, and it would have been fairly easy to get misdirected, I suppose." Although initially contacted to perform an IME at Claimant's request, Dr. Radnovich did not record which medical records, if any, he reviewed at that time. Because he found Claimant not to be medically stable, he did not complete a formal IME report. Instead, he treated Claimant.

37. In his deposition, Dr. Frizzell found no reason to argue with Dr. Manning's conclusion that as of August 12, 2011, Claimant suffered from an active left-sided L5 radiculopathy. Nor did Dr. Frizzell quarrel with the MRI findings showing the existence of an L5-S1 lesion, as of February 24, 2011. However, Dr. Frizzell testified that, based on Claimant's clinical history, it is difficult to relate Claimant's current radiculopathy and the MRI findings to

the accident of July 2, 2010. Dr. Frizzell noted that at the time he evaluated Claimant on or about May 2, 2011, Claimant presented with complaints of pain into the left groin, pain along the iliac crest on the left side, and pain in the top of the left thigh. On exam, Dr. Frizzell noted the following findings:

On examination he is a pleasant gentleman who ambulates with a pronounced limp on the left side. He has a negative Patrick's on the left and right side. His neurological examination shows that he has 5/5 adduction strength bilaterally. He has 4+/5 abduction on the left and 5/5 on the right. Iliopsoas is 5/5 on the right and 4+/5 on the left. Quadriceps strength is 5/5 bilaterally. Anterior tibialis strength is 5/5 bilaterally. Extensor hallucis longus strength 5/5 bilaterally. Gastrocnemius strength 5/5 bilaterally. He has slight decreased pin prick sensation into the left groin region and some dysesthesia over the left upper thigh as well as iliac crest. His sensation in the lower thigh, leg and foot is normal bilaterally. He has a 5cm. left groin incision. He has tenderness to palpation in the left groin. He has a negative straight leg raise test, and 2+ reflexes in lower extremities. Assessment for hernia was not made.

D. Ex. 8, p. 113.

38. Following his exam of Claimant, and review of prior records referenced in his report, Dr. Frizzell reached the following clinical synthesis concerning Claimant's diagnosis:

I do not find any evidence of L5 radiculopathy on examination of Mr. Joseph Weatherby or in the history he provided to me. The L5 nerve root supplies dorsal flexion of the foot as well as sensation over the top of the foot and the toes. Mr. Weatherby has no weakness in the extensor hallucis longus or any hypesthesia in the L5 dermatome.

In addition, the L5 nerve root is part of the sciatic nerve complex and would give pain in the lateral aspect of the calf. Mr. Weatherby has no sciatic symptoms, including no pain into the calf region.

Mr. Weatherby also does not have any pain associated with the lumbar spine. His pain involves the top of the iliac crest, as well as the groin as well as the top of the thigh.

I am in agreement that he does have a disk protrusion but it appears to be asymptomatic. Asymptomatic disk protrusions are commonly found and I cannot

on a more probably [sic] than not basis relate this disk protrusion to his work injury July 2, 2010.

D. Ex. 8, p. 116.

39. Therefore, as of May 2, 2011, Claimant had no findings on exam suggestive of the existence of an L5 radiculopathy. In further explaining his position, Dr. Frizzell testified that since he did not find any evidence of radiculopathy on May 5, 2011, but since Claimant had clearly developed an L5 radiculopathy as of the date of Dr. Manning's exam, it follows that the active radiculopathy developed at some point in time between those two dates. Based on the lengthy period of time between the date of accident and the development of Claimant's radiculopathy, Dr. Frizzell found it impossible to relate the radiculopathy to the subject accident:

(By Ms. Veltman)

Q. Sure. Is it significant to you that the symptoms documented by Dr. Manning were not noted in the records you previously reviewed?

A. Yes, because it tells me that after I saw him on May 2nd and before August 15th, he then did develop L5 radicular symptoms.

Q. Okay. Based on that timing, would you attribute the radicular symptoms to the lifting the jug of chlorine in July of 2010?

A. I wouldn't. And the rationale is that this was July 2nd, and his radicular symptoms came on after May 2nd, 2011, or ten months later.

So, I wouldn't be able, with medical probability, to relate the two since there's at least a ten-month gap.

...

Q. Okay. On a more-probable-than-not basis, do you believe that Claimant's February 24th, 2011, lumbar MRI findings were either caused or aggravated by the industrial injury of July 2nd, 2010?

A. I can't, with medical probability, relate the MRI findings to the work injury on July 2nd, 2010.

Frizzell Depo. 13/18-14/7, 15/13-20.

Dr. Frizzell candidly admitted that he is unable to date the L5-S1 lesion. He further acknowledged on cross examination that disc herniations can go from symptomatic to asymptomatic, asymptomatic to symptomatic, or can be symptomatic or asymptomatic from the outset.

40. In deposition, Dr. Livingston opined Claimant had continuing groin pain for at least two months after he performed the 2008 hernia surgery. At that time, Dr. Livingston was concerned about possible ilioinguinal nerve entrapment as a result of scarring from the surgery. Upon examination in 2010, Claimant presented no signs or symptoms of a lumbar problem, but did present with signs and symptoms, verified by a consistent CT scan, of ilioinguinal and/or iliohypogastric nerve entrapment. Dr. Livingston opined that Claimant suffered a groin strain. Groin strain is an inclusive diagnosis of which nerve entrapment is one of several subsets. As such, there could be a variety of causes. Dr. Livingston opined that Claimant's groin strain was caused by scar tissue from the 2008 surgery.

Prior medical care

41. The record contains medical records going back to an appendectomy Claimant had at age 7 in 1982. At age 16, Claimant was treated for right hip pain which persisted after a recurrent hip dislocation. At age 18, Claimant was treated for neck and right shoulder pain following a car accident. In a follow-up visit Claimant also complained about spontaneous hypoesthesia in his posterior right thigh. Other records up to that point were noncontributory.

42. On July 7, 1993 Claimant underwent a lumbar bone scan for low back pain. It showed no abnormality.

43. In 2002 Claimant told a Primary Health physician that he had experienced intermittent neck pain for 10 years following a motor vehicle accident.

44. In 2006 Claimant was treated for a right leg contusion. An X-ray of his pelvis showed no bony abnormality.

45. Claimant visited Primary Health in 2008 and 2009. Except for one mention of generalized swelling and pain in his joints on November 23, 2009, these visits were unrelated to any relevant complaints or condition.

DISCUSSION AND FURTHER FINDINGS OF FACT

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

47. A significant time lapse occurred between the date of the accident and the identification by Employer of the correct Surety. Claimant's sworn testimony trumps the printout of the data stored electronically in Surety's file. This printout does not include the data which Claimant wrote in pen when he originally filled out a Form 1. Oral notice was timely given on the Monday following the Accident, but Employer did not record the claim. Even using Employer's belated date of notice, Claimant gave notice within the statutory time frame.

48. Defendants' suggestion that belated notice complicated Claimant's attempt to seek medical care is not well taken. Claimant gave his supervisor oral notice of injury on July 5, 2010.

49. Claimant's attempt to seek medical care was complicated by Employer's failure to identify Surety and to provide medical benefits promptly.

Causation

50. 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). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). Evidence of a physician's opinion is not limited to oral testimony but may be discerned from medical records. *Jones v. Emmett Manor*, 134 Idaho 160, 997 P. 2d 621 (2000). No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean, supra*.

51. That Claimant suffered an accident of July 2, 2010 is not disputed. Further, it seems likely that he suffered a second accident in early August 2010 while moving a refrigerator up and down the stairs. However, even though Claimant described his complaints following the July 2, 2010 accident as unrelenting, he did not seek medical care until visiting Dr. Michaud on August 20, 2010. Although Claimant was very clear in his testimony that he sought evaluation from Dr. Michaud specifically for groin/pelvic pain and left leg pain, and although he testified that he assuredly advised Dr. Michaud of the occurrence of the accident of July 2, 2010, Dr. Michaud's records from that visit lend no support to Claimant's testimony. The Commission finds that Dr. Michaud's note of August 20, 2010 likely contains a more accurate recitation of Claimant's history and complaints than Claimant's testimony at hearing.

52. One week later, Claimant sought medical treatment, described the Accident and reported groin pain.

53. Drs. Michaud, Martinez, and initially Livingston, treated Claimant for a groin strain which they believed was related to the Accident. As Claimant's treatment progressed and his symptoms partially abated, Dr. Livingston opined Claimant had returned to baseline and that any continuing symptoms were related to nerve entrapment from the 2008 surgery.

54. Claimant established that his initial treatment was likely related to the Accident.

55. Having performed the 2008 surgery and follow-up visits, and having examined Claimant beginning in September 2010—reasonably close to the time of onset of symptoms—and having multiple visits in 2010 with Claimant, Dr. Livingston was in the best position to opine about Claimant's condition. Moreover, Dr. Livingston's diagnosis is given the most weight; he well explained the chronology and basis for believing that some component of Claimant's pain is related to nerve entrapment in scar tissue resulting from the 2008 surgery.

56. Dr. Radnovich first saw Claimant in December 2010, after Dr. Livingston had observed that Claimant had returned to baseline. Thus, Dr. Radnovich observed and treated Claimant after the acute symptoms from the Accident had resolved. Moreover, for Dr. Radnovich's opinions to be accepted, one would have to deem the observations and conclusions of at least three different treating medical doctors to be incorrect. Drs. Michaud, Martinez, and Livingston did not observe sufficient indications to suspect a lumbar or hip problem. Their examinations of Claimant were inconsistent with the degenerative lumbar disc and hip problem shown on MRIs about six months later. Their records do not show that the back and hip conditions were present around the time of the Accident or were

affected in any way by the Accident. The medical records of these treating physicians constitute a preponderance of evidence to show that the problems addressed by Dr. Radnovich were unrelated to the Accident.

57. In this case, we know that as of February 24, 2011, Claimant had a significant L5-S1 left-sided disc lesion. There is no testimony of record dating this lesion. We also know that Claimant now has an active L5-S1 radiculopathy, but that he did not have findings that would qualify him for this diagnosis until at least ten months following the subject accident of July 2, 2010. We also know that Claimant's current insistence that he suffered from the immediate onset of groin and left lower extremity pain following the accident of July 2, 2010 is belied by contemporaneous medical records. Finally, we know that Claimant suffered an exacerbating event in early August 2010, which Dr. Radnovich concedes either caused additional injury, or aggravated the injuries from the July 2, 2010 accident. In answering the question of whether Claimant's current complaints are causally related to the July 2, 2010 accident, we find Dr. Frizzell's analysis to be probative as well. The fact that Claimant's radicular complaints did not emerge until many months following the July 2, 2010 accident augers in favor of a conclusion that the L5-S1 lesion seen on the February 24, 2011 MRI is not causally related to the July 2, 2010 accident. As well, there is the matter of the intervening incident of early August 2010, which could just as easily explain Claimant's current symptomatology. Regardless, the evidence before us is insufficient to allow us to conclude that Claimant has met his burden of proving, on a more probable than not basis, that the lumbar spine and hip conditions of which he has complained since December 7, 2010 are causally related to the subject accident of July 2, 2010.

Medical Stability

58. Medical stability occurs when a claimant has recovered to a point at which

significant further improvement is not to be expected. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

59. Claimant suggests he has never become medically stable. Claimant is medically stable. Defendants suggest that Claimant was medically stable on November 23, 2010, when Dr. Livingston released him to return to work without restrictions. A release for work does not automatically equate with medical stability.

60. Dr. Livingston opined Claimant medically stable on December 7, 2010. This opinion is persuasive given Dr. Livingston's advantageous position for observation and his well explained basis for his opinions. December 7, 2010 is accepted as the date of medical stability.

Medical Care

61. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1).

62. Claimant showed he is entitled to medical care from his August 20 visit through December 7, 2010. Claimant failed to show that medical care provided after that date was related to the Accident.

63. Although the medical record of the August 20 visit leaves ambiguity about whether it was related to the Accident, it is deemed to be likely related. This Claimant should not be denied medical care merely because he failed to say the right words when giving a history. Dr. Radnovich described Claimant's lack of perfect articulation and the Referee finds Claimant's demeanor at hearing to be credible, if not especially lucid at times.

64. Similarly, Dr. Rupp's treatment is compensable as a part of the reasonable attempts to diagnose Claimant's condition to determine whether and which complaints were likely related to the Accident.

65. Dr. Livingston's opinion does create one ambiguity: He stated on December 7, 2010, that Claimant "temporarily aggravated a preexisting condition." Although Dr. Livingston was concerned about developing nerve entrapment in 2008, Claimant did not return for follow-up visits as recommended. Claimant testified he had no such symptoms in the almost two years before the Accident. Claimant experienced immediate pain at the time of the Accident. He was still in some pain when Dr. Livingston declared him medically stable.

66. Because it appears that the "preexisting condition" to which Dr. Livingston referred was the nerve entrapment, and because the nerve entrapment likely began to cause pain again, after a two-year hiatus, as a result of the Accident, the Referee deems it an appropriate medical benefit to offer the neurolysis or nerve ablation surgery. Dr. Livingston believes it to be the cause of his groin pain and neurolysis to be the likely treatment to ameliorate that pain. Claimant has previously rejected this procedure. Claimant should be allowed the opportunity to reconsider that decision. Should Claimant elect to undergo that procedure, it should be compensable.

Temporary Disability

67. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. Idaho Code § 72-408, *et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

68. The parties have stipulated the amount of Claimant's average weekly wage. Claimant does not dispute the TTD benefits paid for the periods when physicians took him off work during the recovery period. Claimant's claim for TTD benefits was based upon Dr. Radnovich's opinion that Claimant was not medically stable. The date of medical stability is

December 7, 2010. Therefore, Claimant was not in a period of recovery after that date and TTD benefits do not accrue.

69. Although TTD benefits certainly do not accrue subsequent to Claimant's date of medical stability, it does not necessarily follow, under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), that claimant is always entitled to TTD benefits to the date of medical stability. In *Malueg, supra*, claimant suffered an industrial accident on August 15, 1983, as the result of which he suffered injuries to his right knee. Claimant underwent surgical repair of this injury and then began physical therapy, which continued through December 1983. *Id.* at 790. In the interim, claimant returned to the University of Idaho as a full-time student on August 28, 1983. *Id.* On or about December 12, 1983, claimant was released to return to "light duty work" by his treating physician. *Id.* Thereafter, claimant's employer offered him a job consistent with these restrictions, which Malueg refused in view of the fact that he was in the middle of final exams. *Id.* Claimant underwent a second knee surgery on May 21, 1984. *Id.* Thereafter, he was released to light duty work beginning June 18, 1984. *Id.* Malueg again refused employer's offer of work consistent with these restrictions in view of the fact that he enrolled in summer school. *Id.* Employer discontinued the payment of TTD benefits. *Id.* Following hearing, the Industrial Commission concluded that Malueg was entitled to TTD benefits from the date of accident to June 18, 1984. *Id.* On appeal, employer/surety argued that disability benefits should have been terminated when claimant was able to return to light duty office work and employer offered him an opportunity to do so. *Id.* at 790-791. The Court articulated the question before it as follows:

A "light duty release" can vary in meaning, dependent upon the original work. In the instant case, however, such would not contemplate work involving heavy lifting or strenuous physical activity. Since in this case the Commission found that Malueg was unable to perform light duty work as of November 22, the issue

becomes whether the release for light duty work in the absence of evidence of available light duty work is sufficient basis for automatic termination of benefits.

Malueg, 111 Idaho at 791.

In addressing this issue, the Court stated its agreement with the test devised by the Industrial Commission:

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

Malueg, 111 Idaho at 791-792.

The *Malueg* test is clearly intended to apply to the situation in which an injured worker who is within a period of recovery has been released to light or modified duty work. There is no indication that the Court intended the test to apply to the instant situation, i.e. where the injured worker who is still technically within a period of recovery has been released to return to work with no restrictions whatsoever. Indeed, to award TTD benefits in such a case would be inconsistent with the principles underlying the provisions of Idaho Code § 72-408: An injured worker is entitled to TTD benefits during his period of recovery where he is totally or partially disabled during that period of recovery. Simply, an injured worker who is released to return to work without restriction is not totally or partially disabled, even though he may still technically be within a period of recovery, i.e. not yet declared stable and ratable.

70. In view of the foregoing, Claimant is entitled to recover TTD benefits through November 23, 2010, the date on which he released to return to work without restriction by Dr. Livingston.

PPI and PPD

71. Permanent impairment is defined and evaluated by statute. Idaho Code § 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

72. “Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

73. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

74. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory

opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

75. Here, Dr. Livingston imposed no permanent restrictions related to the Accident. No doctor has opined that Claimant should be rated as having permanent impairment as a result of this Accident. Claimant failed to show he is entitled to PPI.

76. In the absence of PPI, permanent disability does not accrue.

77. Dr. Livingston's deposition indicates that the neurolysis or ablation of the entrapped nerves would not be expected to result in any PPI. The nerves are purely sensory and should not affect any activities as required by statute for consideration of PPI. Nevertheless, it would be appropriate to retain jurisdiction in the event Claimant elects this procedure.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant suffered an aggravation of a preexisting asymptomatic condition as a result of the July 2, 2010 Accident;

2. Claimant was in a period of recovery until December 7, 2010. Claimant is entitled to medical care benefits for all medical treatment from August 20 through December 7, 2010;

3. Claimant is entitled to additional temporary disability benefits through November 23, 2010, the date on which he released to return to work without restriction by Dr. Livingston;

4. Claimant may elect, within 30 days from the date of this decision, to schedule the neurolysis or nerve ablation procedure recommended by Dr. Livingston. If Claimant elects to

undergo this procedure, he is entitled to medical benefits for that procedure and for appropriate temporary disability related to recovery from it;

5. Claimant failed to show he is entitled to PPI or permanent disability as a result of this Accident;

6. The Commission will retain jurisdiction for 30 days to allow Claimant to elect to undergo the procedure. If Claimant so elects, the Commission will retain jurisdiction for an additional period to allow the procedure to be performed and to consider possible compensable consequences of the procedure, if any;

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

IT IS SO ORDERED.

DATED this 29th day of October, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

Participated but did not sign
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2012, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

DANIEL J. LUKER
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/s/ _____