

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALAN WILLFORD,)
)
 Claimant,)
)
 v.)
)
 THE ROOTER GUYS,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2006-501260

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

Filed: January 29, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Coeur d’Alene, Idaho, on August 19, 2009. Stephen Nemeč of Coeur d’Alene represented Claimant. Paul J. Augustine of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing, took two post-hearing depositions, and filed post-hearing briefs. The matter came under advisement on December 4, 2009, and is now ready for decision.

ISSUES

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

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant’s condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

3. Determination of Claimant's average weekly wage;
4. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care; and
 - b. Attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts that his need for an L5-S1 fusion in May 2009 was a direct result of his admitted industrial accidents of November and December 2005.

Defendants assert that Claimant's medical evidence fails to establish, on a more probable than not basis, a causal relationship between his 2005 industrial accidents and his May 2009 low back fusion.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Jason Conklin, Nancy Ostrum, Cody Broyles, Tim Pearson and Ben Broyles, taken at hearing;
2. Deposition of Virgil Black, taken August 27, 2009, and Paul J. Montalbano, M.D., taken September 25, 2009;¹
3. Claimant's Exhibits 1 through 14, admitted at hearing; and

¹ At the outset of the hearing, an evidentiary matter arose regarding medical causation evidence. Claimant did not disclose Dr. McDonald's causation opinion until the exchange of proposed exhibits ten days prior to hearing. Upon receipt of the opinion, Defendants immediately sought an opinion of their own from Dr. Montalbano. Because of the late disclosure of Dr. McDonald's opinion, it was not possible to obtain a written report from Dr. Montalbano prior to the hearing. Claimant offered to let Defendants depose Dr. McDonald, but objected to Defendants' request to depose Dr. Montalbano as well. The Referee determined that Claimant's disclosure was not timely, but agreed to allow Dr. McDonald's opinion into the record so long as both parties had the opportunity to depose *both* doctors post-hearing. Ultimately, neither party deposed Dr. McDonald, and Defendants took Dr. Montalbano's deposition.

4. Defendants' Exhibits C through E and H through P, admitted at hearing.

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

FINDINGS OF FACT

BACKGROUND

1. Employer, The Rooter Guys, is owned by Ben Broyles and his wife. The business provides a range of plumbing services, including clearing clogged pipes and installation and maintenance of waste disposal systems, including septic tanks and drain fields. The work is medium heavy to heavy, and frequently requires employees to work in less-than-ideal conditions.

2. Claimant started working for Employer in May 2005 as a laborer at an hourly wage. Not long after he started working for Employer, Claimant started working in the septic-pumping side of the business. Claimant earned a commission for his septic-pumping work, but continued to receive an hourly wage for other duties. The commission varied with the nature of the services or products sold, and the hourly wage varied depending upon the type of work Claimant performed.

ACCIDENTS

3. In November 2005, Claimant was working with Ken Dunlap cleaning out a residential sewer line. Claimant stepped on a piece of cardboard obscured by snow, causing him to slip and fall onto his back and buttocks. Claimant reported the accident to Employer in a timely manner and advised Employer that he was stiff and sore as a result of the fall, but that he would be fine and did not need medical care.

4. In December 2005, Claimant drove the pumper truck to Bonners Ferry to the sewage dumpsite. Upon leaving the main road, Claimant had to install chains on the pumper

truck. Claimant removed the chains before returning to the main road, and while he was hanging the chains for storage, he slipped on ice that had accumulated on the truck, falling approximately four feet to the ground and landing on his back and buttocks.

5. Claimant reported the accident to Employer, who sent him to George Miskovic, D.C., for treatment.

MEDICAL CARE—DECEMBER 2005-JANUARY 2006

6. Claimant first saw Dr. Miskovic on December 13, 2005. He described pain in his left SI joint and his left leg and numbness and tingling in his left arm. Claimant reported that he had experienced low back pain previously, but it was unlike his current pain. Claimant also advised that he had a cervical fusion in 1999. Dr. Miskovic identified differential diagnoses of: 1) thoracic/lumbar sprain-strain; 2) compression fracture, and 3) lumbar disc injury. X-rays taken on Claimant's first visit were negative for fracture, but showed degenerative changes in the lumbar spine and mild anterolisthesis at L5.

7. Claimant continued to treat with Dr. Miskovic through January 9, 2006. Over the course of ten treatments with Dr. Miskovic, Claimant continued to complain of numbness in his left leg and pain and numbness in his left arm, though his low back complaints seemed to improve marginally. By December 23, Dr. Miskovic considered the possibility of SI joint instability as a cause of Claimant's pain. Dr. Miskovic ordered additional x-rays in late December, which revealed a potential pars defect at L5-S1 that was visible with extension and more pronounced with flexion, together with disc space narrowing and end plate spurring throughout the lumbar spine, evidence of calcification of anterior longitudinal ligament at L2, and grade one anterolisthesis throughout the lumbar spine. Additional neurological testing performed by Dr. Miskovic on December 30 showed good muscle response with lower

extremities testing slightly less than 5/5 with the left side being slightly weaker.

8. During the course of his treatment, Dr. Miskovic referred Claimant to Richard Samuel, M.D., for a second opinion. Claimant saw Dr. Samuel on December 21 with presenting complaints of thoracic and lumbar pain with left arm and left leg numbness and pain. Dr. Samuels noted the possibility of a herniated disc at L5, wrote some prescriptions, and advised Claimant to continue seeing Dr. Miskovic.

9. On December 30, Claimant returned to Dr. Samuels for a re-check. Claimant reported that his leg pain and numbness was somewhat better, but he was still experiencing numbness in his left arm. Dr. Samuel was concerned about Claimant's upper extremity and neck complaints, especially in light of Claimant's history of cervical fusion, and sent him to North Idaho Imaging Center for *cervical* spine x-rays including flexion and extension views.²

10. On January 10, 2006, Claimant presented at North Idaho Medical Care Center (NIMCC), complaining of pain in his mid and low back and left side arm and leg numbness after falling on his back in December. Thoracic and lumbar x-rays showed diffuse degenerative changes and a grade one anterolisthesis of L5 on S1 with questionable lucency through the pars. Claimant was diagnosed with a low back strain and placed on modified duty (maximum twenty pounds occasional lifting and limited bending, stooping and squatting) and referred to physical therapy. Claimant participated in three physical therapy treatments from January 11, 2006 through January 17, 2006. He returned to NIMCC for a re-check on January 17, 2006, and

² Until Dr. Samuels ordered the cervical films, Employer had been paying for Claimant's care out-of-pocket. When Employer learned that Claimant needed additional imaging, he contacted Claimant and advised him to hold off, as Employer would need to submit the claim under his workers' compensation policy.

reported slight improvement. Modified duty and physical therapy were continued. Claimant attended two more sessions of physical therapy January 18 and January 20.

11. Throughout his treatment by NIMCC, and Drs. Miskovic and Samuel, Claimant continued to work for Employer, who provided Claimant with modified duty. On January 26, 2006, Claimant was arrested and jailed on charges of harassing a former girlfriend. He served forty-one days before bonding out in March 2006. Claimant received no treatment for his low back and left side extremity complaints during his incarceration. Following his release, Claimant did not return to NIMCC, or Drs. Miskovic or Samuel for further care.

RETURN TO WORK

12. Immediately upon his release from jail, Claimant contacted Employer and stated that he was ready to go back to work. Mr. Broyles recalled mentioning or inquiring about Claimant's back injuries, and Claimant responding that he had recovered. Employer put Claimant back to work at his pre-injury job. Claimant continued to work for Employer for the next eighteen months. During that time, Employer did not provide any special accommodation for Claimant. Like other employees, he had a helper when the job required two people. Otherwise, he worked on his own. Mr. Broyles testified that in the months that Claimant remained in his employ, Claimant never complained to him about back pain or leg pain. In fact, Mr. Broyles described Claimant as a workhorse, noting that Claimant was his hardest worker and also his biggest earner. Mr. Broyles described a job The Rooter Guys did for Hecla Mining Co. in August 2007 that required Claimant, Broyles, and another employee to work around the clock for seven days. Mr. Broyles stated that he included Claimant on that particular job because he always worked hard, worked smart, and never complained.

13. On May 31, 2007, Claimant was using a pry bar at work when it slipped and the bar hit Claimant on the nose. Claimant sought care at NIMCC and received treatment for a nasal fracture and a mild concussion. Claimant treated with NIMCC and an ear, nose and throat specialist until released from care in mid-June 2007. The accident and injury were determined to be compensable and Claimant received all benefits to which he was entitled.

14. Claimant quit working for Employer in September 2007 as the result of a wage dispute. Shortly thereafter, Claimant went to work for Cenex, a farm supply store. At Cenex, Claimant cashiered, loaded feed and fertilizer, pumped propane, ran a forklift, and provided customer service. The work required that Claimant load filled propane tanks and fifty-pound sacks of feed and fertilizer into customers' vehicles.

15. Claimant sought no medical care related to his low back and left-side extremity complaints from January 9, 2006 until April 20, 2009, a period of three years and four months. Neither did he mention anything about his low back or left side extremity complaints when he was treating at NIMCC for his nose. Claimant asserted that he had tried to obtain medical care, but had been told that his claim was closed. He further testified that he had contacted Surety on several occasions regarding his claim, but nothing had been done. Defendants introduced competent evidence (the testimony of Nancy Ostrum, claims examiner, together with the notepad entries concerning Claimant's claim) that the claim had never been closed and Claimant had made no attempt to contact Surety. In fact, Surety documented that it had attempted to contact Claimant on at least two occasions, but without success, when he stopped attending physical therapy in January 2006.

RETURN TO DR. SAMUEL

16. On April 20, 2009, Claimant returned to Dr. Samuel for treatment of back pain with radiculopathy. Claimant reported that since the industrial accidents in 2005, “he has had persistent low back discomfort, previously was felt bilaterally, and more recently has ‘centered’ in his right lower back/buttock.” Claimant’s Exhibit 4, p. 6. Dr. Samuel’s assessment was “chronic low back pain with right lower extremity radiculopathy, L5, S1.” *Id.* He ordered lumbosacral x-rays and an MRI of the lumbosacral spine.

17. Lumbosacral x-rays showed bilateral pars defects at L5 with a grade one spondylolisthesis of L5 on S1 and moderate intervertebral spondylosis throughout the lumbar spine. *Id.*, at p. 8. These findings were virtually the same as the x-ray findings from December 2005 and January 2006. Claimant’s Exhibit 5, pp 23-24, Claimant’s Exhibit 2, pp.5-6. The MRI showed:

1. L5-S1 spondylolytic spondylolisthesis with broad-based disc bulge, lateral right protrusion impinging the neuroforamina bilaterally (greater on right). Reactive marrow end plate alterations.
2. Spondylosis with mild narrowing edema along the ventral osteophytes.
3. Mild degenerative changes at other levels without impinging lesions.

Claimant’s Exhibit 4, p 12. Based on the MRI, Dr. Samuel referred Claimant to Jeffrey D. McDonald, M.D., a neurosurgeon, for a surgical consult.

DR. MCDONALD

18. Claimant saw Dr. McDonald on May 4, 2009. Dr. McDonald was familiar with Claimant because he had performed Claimant’s cervical fusion in October of 1999. Claimant’s presenting complaints were low back pain and right lower extremity symptoms, more particularly:

. . . right-sided low back pain radiating into the right sacroiliac region, right buttock, and posterior thigh with numbness and tingling in the right lateral ankle and occasionally in toes three through five.

Claimant's Exhibit 1, p. 4. Claimant attributed the low back and right side extremity pain to his 2005 industrial injuries. Dr. McDonald recommended surgical intervention consisting of lumbar decompression and fusion at L5-S1 with allograft and internal fixation with pedicle screws and rods. Dr. McDonald performed the surgery on May 27, 2009. During the course of the surgery, Dr. McDonald visually confirmed the existence of the pars defect seen on imaging dating back to 2006. Claimant had a normal recovery, and returned to light duty work in July 2009. At the time of the hearing, Claimant had not yet returned to full duty.

19. Counsel for Claimant contacted Dr. McDonald by letter in mid-July 2009 seeking Dr. McDonald's opinion as to whether Claimant's 2005 work injuries led to the need for Claimant's 2009 surgery. The letter briefly restated the nature of the injuries and then stated:

Since that time, [Claimant] has complained of pain and radicular symptoms in *both lower extremities, with these symptoms alternately presenting in both legs*. His initial medical records in December of 2005 and January 2006 detail bilateral pain in the low back with left lower extremity radiculopathy at that time. *An x-ray taken at NIMCC on 1/10/06 revealed injury at the L5-S1 level* as well as multiple x-rays by Dr. Miskovic in December 2005 [sic].

Claimant's Exhibit 1, p. 1. (emphasis added). The letter goes on to pose the following question:

. . . assuming the facts in the above paragraph regarding the presentation and duration of symptoms, your examination of the medical records to date, and your examination and treatment of [Claimant], are you able to state on a more likely than not basis whether the need for [Claimant's] fusion at L5-S1 is related to his industrial accidents and injury at that level in November and December of 2005?

Id., at p. 2. Attached to the two-page letter was a one-page check box form. The box labeled "yes, on a more probable than not basis . . ." was marked and a hand-written notation appears in the space provided for explanation: "If the medical record and corroborative [sic] testimony verify

the account you have provided above, then this conclusion is appropriate.” *Id.*, at p. 3. Dr. McDonald signed and dated the page August 6, 2009.

DR. MONTALBANO

20. Defendants first became aware of Dr. McDonald’s check box causation opinion when they received Claimant’s proposed exhibits ten days before the hearing. Because this was the first time that Defendants had seen any evidence regarding causation, they put together the medical records and some deposition transcripts and forwarded them to Dr. Montalbano for his review and his opinion on causation. As discussed elsewhere in this recommendation, Dr. Montalbano was deposed post-hearing. Dr. Montalbano did not have an opportunity to examine Claimant. He did review Claimant’s medical history from 2003 to September 25, 2009, including the records of NIMCC, Dr. Samuel, Dr. Miskovic, Dr. McDonald, and the physical therapy notes. In addition, Dr. Montalbano reviewed MRI reports, x-ray reports, the operative report Dr. McDonald prepared following Claimant’s lumbar fusion, and deposition testimony. Dr. Montalbano noted that he not only reviewed the imaging *reports* but the actual MRI and x-ray films.

21. Dr. Montalbano opined that based on his review of the medical records, it was more likely than not that Claimant’s May 2009 lumbar fusion was *not* causally related to Claimant’s 2005 industrial accidents. Dr. Montalbano provided a number of reasons for his conclusion:

- Claimant had a developmental defect (pars defect), characterized by an incomplete section of bone connecting his facet joints at L5 that pre-existed his 2005 industrial injuries;

- Claimant's co-workers testified that Claimant complained of back pain prior to his 2005 accidents;
- Claimant sought no medical care for his low back for more than three years; and
- Claimant initially complained of low back pain with pain and numbness of his left extremities. When Claimant presented to Dr. Samuel in 2009, he complained of right sided leg pain.

CREDIBILITY

22. Though this case centers on the issue of medical causation, some elements of proof rely upon the "truthiness" of Claimant, Employer, and Claimant's co-workers, few of whom are paragons of virtue.

23. Claimant has a history of alcohol abuse. Claimant had a habit of getting intoxicated, and calling co-workers at odd hours to complain about his wages, his working conditions, and Employer. Employer would hear about the calls from his employees, but when he pursued the complaints with Claimant, Claimant would deny any problems. Claimant did not miss work because of his drinking, but his after-hours behavior did affect his relationship with Employer and his co-workers. It was Claimant's alcohol abuse that contributed to his arrest in January 2006, and was the cause of a much longer incarceration for felony DUI some years prior. In addition, Employer documented several instances where Claimant overcharged customers and pocketed the money, or offered to provide services to customers off the books and on his own time at reduced rates.

24. Employer, while generally credible, was accused by several employees, including Claimant, of shorting them on their pay. One employee testified that he left The Rooter Guys because of the company's deceptive business practices.

25. Co-workers also had some credibility issues in that some had axes to grind with Employer, some had axes to grind with Claimant, and one of the co-workers was Employer's son, whose self-interest could put a particular twist on his testimony.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

26. The burden of proof in an industrial accident case is on the claimant. The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proven by expert medical testimony. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

27. The Referee finds that Claimant has failed to carry his burden of proving that his need for lumbar surgery in May 2009 was more likely than not caused by his industrial injuries in 2005.

Symptoms

28. From the time of Claimant's second injury in December 2005 through January 20, 2006, Claimant attended twenty medical appointments with Dr. Miskovic, Dr. Samuel, NIMCC, and Hayden Lake Physical Therapy. Not once in any of the medical records documenting those twenty visits is there mention of bilateral extremity pain or any right-side radicular symptoms. The first time that right-side symptoms appear in the medical record is Dr. Samuel's chart note of April 20, 2009, wherein he records Claimant's *subjective report of the history of the injury*.

29. Claimant testified during his deposition and at hearing that his back and lower extremity pain had affected both legs since the time of the accident. The Referee finds such testimony incredible in light of the number of times that Claimant's *low back pain and left leg and arm numbness and pain* are noted in the medical records. If, indeed, Claimant reported bilateral symptomology or mentioned right extremity pain over the course of twenty medical visits in a thirty-day period, it defies reason that there is no mention of such symptoms in any medical or other contemporaneous record.

Work History

30. Upon his release from jail in March 2006, some three to four months following his injuries, Claimant returned to work for Employer performing the physically demanding labor that he had done prior to his injuries. Claimant told Employer that he was ready to work. He did not ask for accommodations or modified duty. In fact, upon his return, he worked so many hours over the rest of the year that his earnings (commission plus hourly) exceeded \$56,000.00. Similarly, in 2007, Claimant earned in excess of \$50,000.00 from Employer, even though he only worked approximately eight months. Thereafter Claimant worked another eighteen months or so for Cenex, loading fifty-pound bags of feed and fertilizer, before presenting to Dr. Samuel in April 2009.

31. During the eighteen months or so that Claimant worked for Employer after his 2006 incarceration, Claimant never once complained to Employer about his back or about pain in his legs. Employer was aware that Claimant was complaining to co-workers about a number of things, including his back. Despite having advised Claimant on several occasions that the only person worth complaining to was Employer, Claimant continued to complain to his co-workers in late-night phone calls, but denied problems when confronted by Employer.

32. Most of the lay evidence at hearing was from Claimant's co-workers. In fact, seven of Claimant's co-workers either testified at hearing or by deposition. The primary focus of the co-workers' testimony related to whether and when Claimant complained about his back and legs, and whether and when he required accommodations because he could not perform the more physically demanding parts of his job.

33. Claimant's co-workers were generally aware that Claimant had sustained work injuries during the course of his employment, but not necessarily the nature of those injuries. Most reported that there were times when Claimant needed a helper. Upon further questioning, those co-workers generally conceded that Claimant sometimes needed a helper because the job required two people. Some co-workers recalled that Claimant needed a helper because of his back. Of those who recalled Claimant needed helpers because of his back, none could state with certainty whether Claimant's need for assistance existed before his work accidents, occurred while he was on modified duty, or took place after he returned to work in March 2006. Some who testified stated that they never heard Claimant complain, while others stated that Claimant complained about everything—the weather, the job, the equipment, and the pay—all the time. Among the co-workers who heard Claimant complain, it was unclear whether the complaints were the everyday aches and pains of heavy physical labor they all experienced, or whether Claimant's complaints were specific to an injury. Neither could most co-workers testify with certainty how the complaints related temporally with Claimant's work injuries. Overall, Claimant's co-workers provided little, if any, probative evidence on the causation issue.

Medical Opinions

34. When Claimant presented to Dr. Samuel in April 2009, more than three years after he last received medical care for his low back, he presented with entirely new radicular

symptoms. Had Dr. Samuel reviewed his prior records, he would have known that the history Claimant provided on April 20, 2009 was not accurate. When Dr. Samuel referred Claimant to Dr. McDonald, this inaccurate history was perpetuated by Claimant and accepted as accurate by Dr. McDonald.

35. There is nothing in Dr. McDonald's treatment records that even approaches a causation opinion. Dr. McDonald focused on treating Claimant's condition as it existed in the spring of 2009, not on the forensic exercise of figuring out how Claimant came to be in that condition. When Dr. McDonald provided a forensic opinion on causation, at the behest of Claimant, and just days before hearing, his opinion was: 1) based on assumed facts that were demonstrably incorrect; 2) without any independent review or analysis of Claimant's medical history; 3) unsupported by the evidence; and 4) completely inadequate to establish medical causation on a more likely than not basis. Because Dr. McDonald was not deposed, the glaring inadequacies of his causation opinion were unremediated.

36. Dr. Montalbano, on the other hand, provided a persuasive opinion regarding what necessitated Claimant's low back surgery. First, he actually reviewed all of the relevant medical records, avoiding the errors of fact that led Dr. McDonald astray. Second, he identified the particular information in the records that led him to his opinion. Finally, he clearly explained his analysis and the medical basis on which his causation opinion rested. Dr. Montalbano's testimony set out with specificity why Claimant's need for the lumbar fusion could not be related back to the 2005 industrial injuries on a more likely than not basis. Among the factors he considered important was the evidence of the pre-existing pars defect, that Claimant sought no care for his condition for over three years, and that when he became symptomatic in the spring of 2009, the symptoms were completely different than those he complained of at the time of the

injuries.

37. It has been the practice of the Idaho Industrial Commission for some time to allow the admission of medical check box forms as a medical record, noting that the issue is not one of admissibility so much as it is a matter of the weight to be given to the form. A check box letter, as in this instance, is generally lacking in several respects: First, it is couched in the language of the attorney, not the physician; second, it comes as a bald assertion—without explanation of how the physician reached the conclusion; and finally, the fact finder has no way of knowing what facts the doctor relied upon in forming his or her opinion, and the medical relevance of those facts.

38. Ultimately, Claimant's medical causation opinion rests solely on Dr. McDonald's check box opinion. For the reasons outlined above, the Referee gives little weight to such an opinion. As against Dr. Montalbano's opinion that was based on accurate facts and a complete history, and was clearly explicated, Claimant's medical causation opinion is wholly inadequate to meet his burden of proof.

39. Because Claimant has failed to prove that his lumbar surgery was more likely than not necessitated by his 2005 industrial accidents, all remaining issues are moot.

CONCLUSION OF LAW

1. Claimant failed to carry his burden of proving that the lumbar surgery for which Claimant seeks benefits was caused by the 2005 industrial accidents.

RECOMMENDATION

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

DATED this __14__ day of January, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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IC 2006-501260

ORDER

Filed: January 29, 2010

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to carry his burden of proving that the lumbar surgery for which Claimant seeks benefits was caused by the 2005 industrial accidents.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 29 day of January, 2010.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of January, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSION,** and **ORDER** were served by regular United States Mail upon each of the following persons:

STEPHEN NEMEC
1626 LINCOLN WAY
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PAUL J AUGUSTINE
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djb

/s/ _____