BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFFREY WRIGHT, Claimant, v. MIRAGE ENTERPRISES, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2012-002906** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed December 30, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael Powers, who conducted a hearing in Boise, Idaho, on June 11, 2013. J. Brent Gunnell of Nampa represented Claimant. Michael McPeek, of Boise represented Defendants. Oral and documentary evidence was admitted. One post-hearing deposition was taken. The parties filed post-hearing briefs. The matter came under advisement on October 11, 2013.

ISSUES

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

1. Whether Claimant suffered a compensable industrial accident while working for Employer, Mirage Enterprises, Inc., and

2. Whether and to what extent Claimant is entitled to medical and total temporary disability (TTD) benefits.

CONTENTIONS OF THE PARTIES

The threshold issue in this case is whether Claimant's herniated disc at L4-5 is the result of a work-related accident. Claimant asserts he injured his back in mid-December, 2011, while lifting a metal trailer box frame. He immediately informed his supervisor of the accident, but the supervisor did nothing to document the injury. Subsequently, on January 26, 2012, Employer prepared a Notice of Injury form and selected January 11, 2012, as the date of the accident. While Surety initially accepted the claim, the date of injury selected by Employer caused Surety to withdraw its acceptance when it discovered Claimant sought treatment on January 7, 2012, for low back pain of several weeks' duration. Employer's error does not negate the fact that Claimant had a compensable industrial accident and is entitled to benefits.

Defendants contend this case revolves around Claimant's lack of credibility. He told Employer he hurt his back on January 11, 2012. He told the treating doctors and the Surety he hurt his back on January 11, 2012. Surety accepted the claim. When Claimant's treating physician recommended surgery, Surety did a routine background investigation and discovered Claimant had treated with Correctional Medical Services (CMS) on January 7, 2012, with complaints of back pain of three to four weeks' duration. Therefore, Claimant's painful back condition pre-dated his alleged "accident" of January 11, 2012.

When confronted with this inconsistency, Claimant changed his story and for the first time claimed his accident actually happened on December 14, 2011. He picked this date simply because it correlated with what he told CMS. Nowhere in the record is there

even a single instance of Claimant telling anyone his accident happened in December until after his claim was denied.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Jason Starry, and Brad Street, taken at hearing.

2. Claimant's Exhibits 1-13, admitted at hearing.

3. Defendants' Exhibits 2E, 4, 7, and 8, admitted at hearing.[1]

4. The pre-hearing deposition transcripts of Dustin Perry, William Medley, Erik Perez, Leeroy Strack, and Jason Starry.

5. The post-hearing deposition transcript of Bret Dirks, M.D., taken July 9, 2013.

All objections raised in the depositions are overruled, with the exception of the objections on pages 13 and 14 of Erick Perez's deposition which are sustained.

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

FINDINGS OF FACT

1. At the time of hearing, Claimant was a 39-year-old felon, convicted of forgery, living in Coeur d'Alene, Idaho. He was not married.

2. Claimant has a 12th grade education, graduating from Post Falls High School.

[1] Defendants' other exhibits were identical to Claimant's and were withdrawn at hearing.

3. In December, 2011, Claimant was an inmate at the Nampa Community Work Center, working at Mirage Enterprises, Inc., (Employer) under a work release program. He had been employed with Employer as a welder since May 5, 2011. He worked an average of forty hours per week and was paid $10 per hour.

4. Claimant had prior back surgery in 2002 while living in north Idaho. At that time, Bret Dirks, M.D. performed a laminotomy and microdiscectomy at L5-S1. The last documented records evidencing Claimant's complaints of low back pain after this surgery prior to 2011 are from 2003. Claimant denies any low back issues since that time, until the events in question. The dispute in this case involves two highly divergent scenarios concerning when and why Claimant's back is in its current condition. The two scenarios are set out below.

CLAIMANT'S CONTESTED CAUSATION ALLEGATIONS

5. Claimant worked for Employer from early May through mid-December 2011 with no low back pain, complaints, or limitations. In mid-December,[2] Claimant injured his low back as he reached down with his left hand to lift a metal trailer box frame in order to insert a shim between the frame and the sub-frame. The injury produced sudden, sharp pain which took his breath away. He immediately told his co-worker, Leeroy Strack, that he was hurt. He and Mr. Strack then sought out their supervisor, Dustin Perry, to inform him of the accident. Mr. Perry told Claimant to take it easy and not lift anything heavy. Contrary to company protocol, Perry did not relay the information of the accident to the safety manager, Jason Starry, nor did he prepare any type of written report.

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[2] Claimant is not positive of the exact date of injury, but deduced it to be on or about December 14, 2011.

6. Assuming he had simply strained a muscle, Claimant continued to work thereafter. Several days after this incident, the shop went on its Christmas break. While the business was not completely closed, the workers had some days off, unless there were odd jobs to do during the break. Claimant's time slips show the days he did not work during the holidays. (Defendants' Exhibit 4). Claimant testified the accident in question took place before the Christmas break.

7. Claimant asserts that after the holiday break his back condition did not improve; if anything it got worse, with pain now radiating into his buttock and left leg. In January, he sought treatment through CMS, the details of which are discussed subsequently.

8. After two visits to CMS yielded no positive results, Claimant recalls he and Dustin Perry went to Jason Starry on January 26, 2012, seeking permission for Claimant to see a doctor. Starry reprimanded Perry for not informing him earlier of this accident, and then began filling out a Notice of Injury form. When Starry asked for the date and time of the accident, Claimant responded that he did not remember, but Perry should have the information written down. When it was learned Perry had no notes of the event, Starry and Perry began discussing a likely time frame. Perry thought the accident had happened "a couple of weeks ago." (Hearing Transcript, p. 32). The two managers discussed the issue further and settled on January 11, 2012 as the date to use in the notice. Claimant did not correct them; he testified that he did not care what date was used so long as he got to see a doctor. (Hearing Transcript, pp. 32, 33).

9. Claimant's testimony regarding the events surrounding the timing of his work place injury claim can be summed up thusly:

- Claimant injured his back in December, before the Christmas break.
- He immediately told his supervisor, as per company policy. He was told to take it easy for the day, and avoid heavy lifting.
- He continued to work, but his back condition did not improve.
- On January 26, 2012, he met with his supervisor, Dustin Perry, and the two of them went to see Jason Starry.
- Starry filled out the First Report of Injury.
- When Starry came to the date and time, he asked Claimant for the information; Claimant said he did not know the date, so Starry asked Perry.
- Perry indicated it was a "couple weeks ago or something like that." (Hearing Transcript, p. 32).
- Starry reviewed his calendar and he and Perry decided January 11, 2012 would be used as the date of injury.
- Claimant said nothing to correct the date at that time; all he cared about was getting to see a doctor.

DEFENDANT'S CONTESTED CAUSATION ALLEGATIONS

10. On January 16 or 17, 2012, Dustin Perry notified company safety manager Jason Starry that Claimant claimed he had injured himself in an industrial accident in the middle of the preceding week. Claimant had informed Perry of the event at the time of the accident, but Perry failed to contemporaneously inform Starry or prepare any written notes of the event.

11. Immediately upon learning of the accident, Starry approached Claimant at his work station to get more details of the accident. Perry was present during this conversation. It was during this meeting on January 16th or 17th that Starry admonished Perry for not following proper procedure for reporting an accident. Claimant confirmed the accident had occurred "in the middle of" the preceding week. Claimant declined the offer to go to the doctor, claiming he had just tweaked his back and it should get better soon. (Hearing Transcript, pp. 74-76). Unbeknownst to Defendants, Claimant had already sought medical care through the prison medical services (CMS) on January 7, 2012 for back pain of several weeks' duration. Over the next few days, Starry periodically checked with Claimant to see how he was doing. Claimant never asked to see a doctor during this time frame.

12. On January 26, 2012, Claimant and Perry met with Starry in his office. Claimant said he was not getting better and now wanted to see a doctor. Starry began filling out a First Report of Injury at that time. When he got to the date and time blanks, he discussed the matter with Claimant. Starry testified at hearing about the conversation he had with Claimant:

> "…you know, this was when I found out about it on the 16th or 17th, you [Claimant] said it was the prior week—you know, the prior week, toward the middle of the week, so the 11th; right? I'm looking at my calendar and that would put us about the 11th; correct? Yes. Correct. So, that is how I got 1/11."

(Hearing Transcript, p. 77). Starry explained at hearing it was Claimant who said "correct" when asked if the correct date for the accident should be January 11, 2012. Perry confirmed the date as being correct. Claimant at no point told Starry he had actually been hurt in December, 2011.

13. As will be discussed in greater detail herein, after January 26, 2012, Claimant told his doctors and the Surety the accident happened on January 11, 2012.

14. Eventually Claimant was told he needed surgery for his back condition. He sought authorization for surgery from Surety, who began a pre-surgery authorization investigation. As part of that investigation, Surety found medical records from CMS which showed Claimant was suffering back pain for nearly a month before the date of his claimed injury.

15. Surety revoked acceptance of Claimant's workers' compensation claim based upon this discrepancy. As noted in the March 16, 2012 denial letter from Surety to Claimant, "[t]he medical records clearly indicate that your low back had been bothering you for quite some time prior to 1-11/12 [sic] and there is no mention in the prison medical records of a work accident At [sic] (at) Mirage Enterprises." (Defendants' Exhibit 7).

16. Faced with inconsistent medical records and Surety's denial, Claimant changed the alleged date of injury from January 11, 2012 to December 14, 2011. Moving the injury date allowed Claimant to take the position he had hurt his back at work prior to being seen by CMS.

17. Defendants' position can be summed up as follows:

- Claimant began experiencing back pain sometime in late 2011.
- Claimant sought medical treatment for his back pain through the prison system medical center in early January, 2012.
- On or about January 11, 2012, Claimant told his supervisor, Dustin Perry, that he had that day hurt his back at work.

- On January 16 or 17, 2012, Perry informed the company safety manager, Jason Starry, of Claimant's alleged work injury.
- Starry and Perry met with Claimant on January 16 or 17, 2012, to find out how Claimant was doing and if he needed to see a doctor.
- During the conversation with Starry and Perry on January 16 or 15, 2012, Claimant confirmed the date of the "accident" was January 11, 2012.
- By January 26, 2012, Claimant needed medical care, and Starry filled out an injury report on that date. Claimant again confirmed the date of injury as January 11, 2012.
- Claimant thereafter went to several health care providers for his low back complaints. He told each provider, and the Surety, that he hurt his back at work on January 11, 2012.
- Surety uncovered Claimant's medical records regarding pre-existing low back complaints.
- When confronted with his prison system medical records showing he was having back pain in December, Claimant changed his story as to when he hurt himself at work to correlate with what he told the prison medical personnel.[3]
- Surety determined Claimant's back complaints were not work related and denied the claim.

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[3] Defendants also note Claimant did not mention the fact his back pain was work-related when he was treated at CMS. This assertion is discussed in detail subsequently.

WITNESSES

18. In addition to Claimant, Jason Starry, and Brad Street, who each gave live testimony at hearing,[4] several fact witnesses were deposed. They include William Medley, Erik Perez, Leeroy Strack, and Dustin Perry. Their testimony is necessary to fully analyze the competing and contradictory positions of the parties, and is discussed below.

19. **William Medley** is employed at Mirage Enterprises. He worked with Claimant before and after he injured his back. He saw the limitations in Claimant's ability to perform his work, but has no idea if the injury took place in December or January.

20. **Erik Perez**, at the time of his deposition in May, 2013, was an inmate at the Idaho Correctional Center. Prior, he had been living at the correctional work center at a time when Claimant was there. Perez first became acquainted with Claimant in the fall of 2010. The two lifted weights and worked out together on a regular basis. Perez recalls Claimant injured his back in December, 2011. He understood Claimant hurt his back at work. The injury seriously affected Claimant's ability to lift weights.

21. **Leeroy Strack** was Claimant's co-worker at Mirage Enterprises in 2011. The two were welders at the same station, where they constructed dump bed utility trailers. They worked together four to five days a week, up to ten hours a day. Strack considered Claimant to be his friend. Strack also felt Claimant was the best worker he had the opportunity to work with at Mirage. Strack testified in detail to the events surrounding Claimant's injury, as set forth in the following passage from his deposition.

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[4] In addition to his live testimony at hearing, Jason Starry was also deposed. His testimony at hearing was consistent with his deposition testimony, therefore his deposition testimony will not be discussed separately.

Q. (GUNNELL) **While you worked together, was there ever a time when you became aware of him having a low back complaint?**

A. (STRACK) Yeah. In December.

Q. In December of what year?

A. Last year.

Q. 2011?

A. Yeah, 2011.

Q. And how did you become aware of that?

A. We were lifting the back of the box frame up, and he ended up bent over when I looked over, saying he hurt himself. And I went with him to Dustin and let Dustin know that he hurt himself.

I left, and he came back and said he's taking it easy the rest of the day. He was told to take it easy. And from then on is when I was lifting trailers up for him because he couldn't lift his half. So I just picked them up.

Q. When you say "from then on" do you mean until he no longer worked there?

A. Yes. And then they put another guy with us to lift.

(Strack Deposition, pp. 10, 11).

22. Strack also recalled the injury took place about a week before Christmas break. Typically the employees have a two-week break over Christmas, but in 2011, they only got one week because it was busy at work. He remembers he and Claimant built tables and jigs for the trailers over the break, and Claimant was having back issues by then. Claimant also took off time over the break from his weight lifting routine. (Strack Deposition, pp. 18, 19).

23. **Dustin Perry** was Claimant's direct supervisor, and a central figure in this dispute. He has surprisingly little recall of the events in question. As he stated in his deposition:

> **Q.** (Gunnell) **You're aware of his** [Claimant's] **low back injury?**
>
> A. (Perry) I am.
>
> **Q. Do you remember when you first became aware of it?**
>
> A. I don't remember when or how long ago that was all brought up. It's just been so long.

(Perry Deposition, p. 8).

24. During his deposition, Perry also testified he did not recall talking with Claimant before Jason Starry was notified of the accident. He recalls Claimant went to Jason Starry and only after that was Perry brought into the discussion. He testified to the events as he recalls them:

> **Q.** (Gunnell) **Now, do you recall a time in January of this year when you had a conversation with Mr. Starry, Jason Starry, about you failing to report to him that** [Claimant] **had been injured or was claiming a back injury?**
>
> A. (Perry) I remember talking with Jason about the situation. I don't remember what all was said or discussed, though. Like I said, it's just been so long, I just don't remember, you know.
>
> **Q. But there was a conversation like that?**
>
> A. Yes.
>
> **Q. Had you, before that, talked to** [Claimant] **about his low back?**
>
> A. Not that I recall. (Perry Deposition, p. 12).

Later in his deposition, Perry elaborated on his memory of what took place at the time Claimant first injured his back:

> **Q. There was a time last year – I know you can't remember when, but you approached Jason to inform him about** [Claimant's] **low back; is that right?**
>
> A. That's not the way I remember it.
>
> **Q. Well, tell me what you remember.**
>
> A. What I remember is – initially, the way it got brought up to me was, I believe [Claimant] went to Jason himself about it, and then that's where that discussion about Jason coming to me and yelling at me about not telling him. As far as I remember, that's how it happened. And that's where I got involved with it.

(Perry Deposition, pp. 15, 16). Perry recalls his first conversation about Claimant's low back injury was in January 2012, when Claimant, Starry, and Perry all discussed the matter.

MEDICAL TREATMENT AND RELATED ISSUES

25. By early January, 2012, Claimant had such low back pain that on January 7, 2012, he submitted through the Nampa work center a medical request form to see a prison P.A. On the request form, under the heading "Nature of Complaint/Problem:" he wrote "Back problems. It's been hurting for 4 weeks stright [sic]." (Claimant's Exhibit 4, p. 1).

26. On January 10, 2012, Steve Stedfeld, P.A. with CMS, examined Claimant. Under Claimant's subjective complaints, the clinical notes from that visit list "Low back pain – x 3wk-hx of surgery 2000." (Claimant's Exhibit 4, p. 2). While those office notes do not detail any history beyond listing his past surgery, Claimant testified at hearing he told the P.A. of the job-related origin of his current back condition.

27. Claimant continued to work, but the pain in his low back did not subside. He returned to P.A. Stedfeld on January 20, 2012. At that time he was prescribed a Prednisone taper prescription. Under "subjective complaints" P.A. Stedfeld merely mentioned Claimant's back issue continued with unchanged symptoms. Again, there is no mention of Claimant's back pain being related to a work injury.

28. All parties agree that on January 26, 2012, Employer completed a First Report of Injury for the claim in question. That same day, Employer sent Claimant to Saltzer Medical Group in Nampa, where he was seen by Victoria Rogers, P.A. While Claimant described the mechanism of his injury consistently with how he had steadfastly maintained the accident happened, he now adopted January 11, 2012 as the date of injury. P.A. Rogers placed Claimant on work restrictions and started him on a course of conservative treatment.

29. Claimant's employment continued, with restrictions, but his symptoms persisted. On February 1, 2012, Claimant returned to Saltzer Group and was examined by Howard Shoemaker, M.D. Again he listed his injury date as January 11, 2012. He was continued on conservative care, with the same work restrictions. On February 1, 2012, Surety accepted the claim and began paying medicals.

30. Two weeks later, on February 15, 2012, Claimant again presented to Dr. Shoemaker with continuing low back complaints. Dr. Shoemaker referred Claimant to a local neurosurgeon, Paul Montalbano, M.D., after an MRI was taken which revealed a disc herniation at L4-5.

31. On February 29, 2012, Claimant saw Dr. Montalbano. Claimant again listed January 11, 2012 as the date of his injury. Dr. Montalbano recommended a left L4-5 microdiscectomy due to Claimant's MRI findings and failure to respond to conservative treatment. Dr. Montalbano related the injury and need for surgery to Claimant's work activities. He sought Surety's approval for the surgery. He allowed Claimant to continue working with restrictions.

32. Once surgery was suggested, Surety assigned the matter to Senior Claims Examiner Brad Street. As part of his surgery pre-authorization investigation, Street interviewed Claimant, who confirmed January 11, 2012 as the date of his injury. Claimant also told Street that he had been seen in the prison medical center, but those visits were not until after his injury.

33. Street obtained medical records from the prison health system. Those records conflicted with Claimant's version that he originally injured his back on January 11, 2012. Surety denied Claimant's request for surgery and revoked acceptance of his claim due to the fact Claimant was having back issues prior to January 11, 2012, and did not relate those prior back issues to a work-related accident. (Defendants' Exhibit 7).

DISCUSSION AND FURTHER FINDINGS

34. In order for Claimant to recover worker's compensation benefits, he must prove not only that he was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Whether an accident arises out of and in the course of employment is a question of fact to be determined by the Commission in the context of each particular case. *Seamans v. Maaco Auto Painting,* 128 Idaho 747, 918 P.2d 1192 (1996). In the present case, Defendants dispute that Claimant suffered an injury to his low back in an accident arising out of and in the course of his employment with Defendant.

35. All parties agree Claimant has a herniated disc at L4-5. The disagreement arises over whether Claimant suffered this herniated disc due to "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it

occurred, causing an injury," as Idaho Code § 72-102(18)(b) defines an accident.

36. Clearly, if the facts are as Claimant asserts - that he suddenly injured his back while lifting and twisting at work - then he suffered an accident under the Idaho Code definition above. Defendants dispute Claimant's version of events. Instead, they argue Claimant hurt his back much earlier than he claims to have, and not while at work.

37. Defendants argue Claimant lacks credibility and his story must be discounted when deciding this case. They point to him naming January 11, 2012 as the date the alleged accident which precipitated his low back pain occurred, when in fact he had back problems for which he sought treatment as early as mid-December, 2011. Finally, when confronted with the damning evidence, Claimant changed his story to match the evidence.

38. Claimant told several doctors and the Surety his accident happened on January 11, 2012, and later changed his story to move the accident date back nearly a month, to December 14, 2011. Claimant admitted he changed the date after reviewing his previous medical records. Defendants assert that Claimant has shown a willingness, even an ease, to say whatever is expeditious for him. As such his credibility is damaged. He is not a person who has shown the integrity to be trusted. Even so, his version of events still must be considered when it can be corroborated with facts beyond his own testimony.

39. Neither Claimant's nor Jason Starry's testimony surrounding the events in question are inherently improbable. Read in isolation, Starry's version sounds more credible, is more straightforward, and is easier to accept than is Claimant's. Unfortunately, Starry's story is not corroborated by any other witness, including his own manager, Dustin Perry. While lack of corroboration is not fatal to Defendants' position, it does affect the weight to be given it.

40. According to Jason Starry's testimony, Dustin Perry informed Starry on January 16 or 17, 2012, that Claimant had hurt himself at work "the prior week before" (Hearing Transcript p. 74), or on "the 11th (of January, 2012), or "the week prior on Wednesday." (Starry Deposition p. 12). Each of those statements is roughly approximate. Starry and Perry then supposedly went to Claimant's work station so Starry could find out more details. At that time Claimant assured Starry he did not need to see a doctor. Starry claimed he touched bases with Claimant "probably once a week" between January 17 and January 26 to see how he was doing.[5] (Starry Deposition p. 18).

41. On January 26, 2012, Claimant and Perry approached Starry in his office. Claimant requested to go to a doctor, so Starry began filling out a First Report of Injury. As Starry testified at hearing:

> So, I filled out the First Report of Injury and – you know, and so I'm like, okay, as I got to the date and time I'm like, okay, well, as I recall this was – you know, this was when I found out about it on the 16th or 17th, you said it was the prior week- you know, the prior week, towards the middle of the week, so the 11th; right? I'm looking at calendar and that would put us about the 11th; correct?

(Hearing Transcript, p. 77). Supposedly, both Claimant and Perry agreed with Starry's calculation. Starry filled out the report using January 11, 2012 as the date of injury. Claimant did not disagree with using this date as the date of accident, and he used it from then moving forward until his claim was denied.

42. Dustin Perry does not recall meeting with Claimant about his accident prior to the January meeting between Claimant, Perry and Starry. Perry's memory on this point contradicts Starry's claim that it was Perry who told him of the accident, which supposedly

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[5] By the time Starry testified at hearing, he changed "once a week" to a frequency of almost daily, perhaps in recognition that between January 17 and January 26 is only a span of nine days.

had taken place the week prior. Perry's memory on this point is inaccurate, but nevertheless it does not buttress Starry's story. No one else remembers the facts consistently with Starry. Certainly, Claimant's version is much different, and Perry basically pleaded lack of memory on the key points. This leaves Starry's story standing in contrast with Claimant's. However, Claimant is not credible on points for which there is no corroboration. Therefore, Claimant cannot meet his burden of proof simply upon his own testimony.

43. Claimant cannot corroborate his testimony regarding the discussion which took place in Starry's office on January 26, 2012. However, what was or was not said in that meeting is not the issue for resolution. The issue is whether Claimant hurt his back at work as the result of an industrial accident. On that point Claimant does have corroboration.

44. Leeroy Strack did not testify live at hearing, but he did give a deposition. During the deposition his testimony was consistent, persuasive, and logical. He had good recall of nearly all aspects of the questioning, including things not directly related to this claim. The Referee finds his testimony to be credible. His testimony was consistent with Claimant regarding the day of the accident. He was present when Claimant hurt his back at work. He accompanied Claimant when he met with Perry. He remembers the accident took place before Christmas, 2011. His testimony is unrebutted by any other direct evidence. Dustin Perry does not rebut it; rather he claims he cannot remember talking to Claimant and Strack. Lack of memory does not rebut positive testimony. Whether it was Claimant or others who came up with January 11, 2012 as the accident date, the unrebutted testimony is that Claimant injured his back when he was twisting and lifting a box frame to

insert a shim. Claimant has consistently described this mechanism of injury to everyone who has asked.

45. Defendants argue Claimant did not describe this mechanism of injury to the P.A. at the prison medical center. A careful reading of the CMS request for treatment shows the patient is asked to list the nature of his complaint, not the history of how the complaint originated. Clearly, Claimant was suffering back problems on January 7, 2012. He accurately described the nature of his problem. Had there been instructions on the form such as "tell us how/when your complaint started" or something along those lines, and Claimant failed to mention a work accident, Defendants would have a better argument against compensability. Not describing the history of the complaint when not asked to does not prove or disprove anything.

46. Defendants next point out the P.A. did not list a work injury in his office notes. Again, a close review of those notes makes it clear the P.A. did not list any detailed history, and certainly listed nothing to contradict Claimant's story. Had the P.A. included notes to the effect of how Claimant's pain originated, *e.g.* "Claimant strained back while lifting weights" or "Claimant awoke one morning with back pain, unknown origin" or something such as that, Defendants would have a substantive argument against compensability. As it is, the medical records prove or disprove nothing.

47. At most, Defendants call into question the timing of the accident. Nothing they produced in discovery or at hearing affirmatively rebuts the fact that Claimant injured himself at work. Their argument that "because Claimant is not credible, he can not prove causation" ignores the testimony of witnesses *other than* Claimant. In fact, Defendants did

not even address the witnesses in their briefing. Simply because Defendants chose to ignore the testimony of Claimant's witnesses does not mean the Referee is free to do so.

48. As noted previously, Idaho Code § 72-102(18)(b) defines an accident in part, to an event which can be "reasonably located as to time when and place where it occurred." The place where the accident occurred is not seriously in dispute, if indeed the events described by Claimant occurred. The bigger issue is locating the time when it occurred. Claimant admittedly picked a somewhat arbitrary date close to, and before, Christmas. He also chose a Wednesday, presumably for the same reason Starry chose a Wednesday for the date – because Claimant said the accident happened "mid week." The chosen date also correlates with his complaints of pain of approximately four-week duration from when he sought treatment at CMS. Whether the accident took place on December 14, 2011, or the day before or after, the fact remains that but for the action or lack of action of Claimant's supervisor, Dustin Perry, the date would be documented. It would not be fair to penalize Claimant, who followed company protocol, by disallowing his claim because he cannot pinpoint the exact date after the fact, when the reason the date is lost forever is due to Employer's action or lack of action. The Referee finds Claimant has reasonably located the time and place of his accident to December 14, 2011 during his work hours. When the facts of the case are examined in light of witness testimony, it is clear Claimant suffered an industrial accident in mid-December 2011, and the Referee so finds.

MEDICAL BENEFITS

49. Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident

arising out of and in the course of employment. *Wichterman v. J.H. Kelley, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007). To establish this proof there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. *See, e.g. Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997).

50. Idaho Code § 72-432 requires Employer to provide Claimant reasonable medical treatment, services and medicine as may be reasonably required by his physician for a reasonable time after a compensable industrial injury. It is up to the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment is reasonable. *See, Sprague v. Caldwell Transportation, Inc.,* 116 Idaho 720, 779 P.2d 395 (1989). Both Dr. Montalbano and Dr. Dirks related Claimant's current low back condition to a work-related accident. Defendants have not contested this point. Claimant has not sought any unreasonable treatment.

51. Claimant seeks reimbursement of all charges for medical treatment he incurred after Surety withdrew its acceptance of the claim in March, 2012, and those reasonable charges moving forward. Claimant is entitled to reimbursement of charges at the invoiced amount for his medical treatment, services and medicine from the time Surety withdrew its claim acceptance to the date of this decision, in accordance with *Neal v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009), as well as such treatment, services and medicine as may be reasonably required by his physician.[6]

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[6] In his briefing, Claimant asks the Commission to declare Dr. Dirks to be his primary physician. This issue was not before the Commission at hearing, and will not be addressed herein.

TEMPORARY DISABILITY BENEFITS

52. Pursuant to Idaho Code § 72-408, Claimant is entitled to income benefits for total and partial temporary disability during his period of recovery. Once he reaches a point of medical stability, Claimant is no longer in a period of recovery and his entitlement to temporary total or temporary partial disability benefits comes to an end. *Accord., Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Claimant contends he is entitled to total temporary disability benefits (TTD) from the time he was fired on May 5, 2012, until he no longer qualifies for such benefit.

53. On June 13, 2012, at Claimant's request, Dr. Montalbano released Claimant from his care. The letter of that date states "[Claimant] is no longer under my care. From a neurosurgical standpoint he is clear to work without restrictions." (Claimant's Exhibit 6, p. 4). While Claimant now protests the language Dr. Montalbano used to release him, at the time Claimant asked for the release it was in his best interest to have such a letter. Claimant needed the release to attempt to regain his job with Employer in order not to be ejected from the work release program and sent back to prison. Dr. Montalbano used language Claimant now finds objectionable, but that was the risk he ran when asking for the letter. More importantly, there is nothing in the record to rebut Dr. Montalbano's opinion as of June, 2013. Claimant is not entitled to TTD benefits from the time he was released by Dr. Montalbano on June 13, 2012, until he was put under light duty restrictions by Dr. Dirks on February 19, 2013. Claimant is entitled to TTD benefits from the day his employment was terminated on May 5, 2012 through June 12, 2012, excluding the time he worked at a call center in June, 2012, and from February 19, 2013 until such time as he is offered employment within his work restrictions, or Employer establishes such employment

exists in Claimant's general labor market which he has a reasonable opportunity of securing, or Claimant reaches medical stability. *See, Malueg v. Pierson Enterprises,* 111 Idaho 789, 727 P.2d 1219 (1986).

CONCLUSIONS OF LAW

1. Claimant suffered a compensable industrial accident while working for Employer Mirage Enterprises, Inc.

2. Claimant is entitled to reimbursement of charges for his medical treatment, services and medicine from the time Surety withdrew its claim acceptance to the present, and such treatment, services and medicine as may be reasonably required by his physician for a reasonable time moving forward.

3. Claimant is entitled to TTD benefits from the day his employment was terminated on May 5, 2012, through June 12, 2012, excluding the time he worked at a call center in June, 2012, and from February 19, 2013 until such time as he is offered employment within his work restrictions, or Employer establishes such employment exists in Claimant's general labor market which he has a reasonable opportunity of securing, or Claimant reaches medical stability.

RECOMMENDATION

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

DATED this __13th__ day of December, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __30th___ day of __December__, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

J BRENT GUNNELL
1226 E KARCHER RD
NAMPA ID 83687

MICHAEL G MCPEEK
PO BOX 2528
BOISE ID 83701

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFFREY WRIGHT, Claimant, v. MIRAGE ENTERPRISES, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.	**IC 2012-002906** **ORDER** **Filed December 30, 2013**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant suffered a compensable industrial accident while working for Employer Mirage Enterprises, Inc.

2. Claimant is entitled to reimbursement of charges at the invoiced amount for

his medical treatment, services and medicine from the time Surety withdrew its claim acceptance to the date of this decision, in accordance with *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009), as well as such treatment, services and medicine as may be reasonably required by his physician.

3. Claimant is entitled to TTD benefits from the day his employment was terminated on May 5, 2012, through June 12, 2012, excluding the time he worked at a call center in June, 2012, and from February 19, 2013 until such time as he is offered employment within his work restrictions, or Employer establishes such employment exists in Claimant's general labor market which he has a reasonable opportunity of securing, or Claimant reaches medical stability.

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

DATED this _30th_ day of __December__, 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 _30th__ day of __December__ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

J BRENT GUNNELL
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