BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AGUSTIN ZARAZUA, Claimant, v. CONAGRA FOODS, Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2009-015871** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED: 6/15/2012

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 Twin Falls, Idaho, on September 29, 2011. R. Jeffrey Stoker of Twin Falls represented Claimant. Eric S. Bailey of Boise represented Defendants. The parties submitted oral and documentary evidence, took two post-hearing depositions, and filed post-hearing briefs. The matter came under advisement on April 2, 2012 and is now ready for decision.

ISSUES

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

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

course of employment;

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

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

A. Medical care; and

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

All other issues, including permanent partial impairment (PPI), permanent partial disability (PPD), and attorney fees were reserved pending determination of compensability.

In their briefing, Defendants conceded that Claimant had suffered an injury from an accident arising out of and in the course of his employment; thus, issue one is no longer in dispute. In his briefing, Claimant asked that the matter of Claimant's entitlement to TPD/TTD be reserved pending findings on compensability of the claim. Claimant's request is granted, and the matter of TTD/TPD entitlement is reserved for future consideration.

CONTENTIONS OF THE PARTIES

Claimant asserts that on June 10, 2009, he injured his low back while lifting a barrel of potatoes while at work. He reported the accident to the company nurse on the following morning. Claimant was receiving conservative medical and chiropractic care until June 26, 2009, when Surety advised him that it was denying his workers' compensation claim. Claimant attended three additional medical appointments relating to his accident and injury following the denial. Claimant's occupational medicine doctor released him from care and without restrictions on July 2, 2009, but Claimant's back pain reappeared shortly after he returned to work. Claimant needs additional care for his back, but the improper denial of his claim prevented his access to medical services. Further, Claimant seeks recovery for medical services ordered by his treating

physician that Defendants refuse to pay.

Defendants now concede that Claimant sustained a low back injury as a result of an industrial accident. However, they contend that they have paid for Claimant's visits to the occupational medicine clinic for treatment. Further, Claimant's treating physician determined that Claimant was at maximum medical improvement by July 2, 2009, and released him without restrictions. Defendants fulfilled their obligation to provide medical care pursuant to Idaho Code § 72-432, and Claimant has failed to establish that he needs additional care as a result of his industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;

2. Joint exhibits A through I, admitted at hearing; and

3. Post-hearing depositions of Mary Beth Curtis, M.D., taken December 1, 2011, and Brian Johns, M.D., taken January 9, 2012.

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

FINDINGS OF FACT

BACKGROUND

1. Claimant was twenty-eight years of age at the time of hearing. He lived in Twin Falls with his mother and his brother.

2. Claimant graduated from high school with a "modified" diploma, which, he explained, reflected that his schooling included some special education classes.

3. Due to the posture of this proceeding, there was little discussion of Claimant's

prior work history; the limited discussion suggests that the jobs he held prior to going to work for Employer were all unskilled agricultural or labor types of jobs.

4. Claimant went to work for Employer on the sanitation crew in 2005. At some point he advanced to the position of "batter operator," and then "area operator." After six months as an area operator, Claimant returned to the sanitation crew because "it was too much to remember" being an area operator. Tr., p. 19. Claimant's counsel asked him to explain the jobs of batter operator and area operator, but Claimant was unable to describe the general nature of the jobs. He provided a literal description of steps in the process, but could not describe in general terms what work the plant did or his place in the process.

PRIOR MEDICAL HISTORY

5. Claimant told several of his treating physicians that as a child he suffered from a neurological disorder that involved his left side. There is nothing in the record to document or explicate the etiology or effect of the neurological disorder. Claimant also reported a history of a learning disorder. Again, there is nothing in the records other than Claimant's own statements regarding the learning disability. However, it is clear from observing Claimant at hearing and reading his deposition testimony that he exhibits some cognitive deficits.

6. On June 9, 2009, the day before his industrial injury, Claimant presented to the company nurse complaining of pain in both his wrists, across his knuckles and on the bottom of his right hindfoot. He stated he had been experiencing the pain for two days. The company nurse found no evidence of swelling, deformity, or discoloration involving Claimant's hands, wrists, or foot. Claimant denied traumatic injury. The nurse provided no treatment and made no referral.

THE INJURY

7. On June 10, 2009, Claimant and another worker were lifting a barrel of potatoes. They intended to lift in unison, but when Claimant lifted his side of the barrel the other worker did not, and Claimant felt a strain in his low back. At hearing Claimant stated that he "felt like a little pull" in his low back on the left side. *Id.,* at p. 22. Claimant testified that his level of pain at the time of the incident was one on a scale of ten and then the pain receded. Claimant did not report the incident and worked the remainder of his shift.

8. Claimant awoke at 5:00 a.m. on June 11 with pain in his left low back:

> I started feeling pain. And it got worser and worser. And then I got up and I took some Aleve and I start – and I couldn't go back to sleep because my back started hurting really bad.

Id., at p. 24.

9. Around 8:00 a.m., Claimant had his brother drive him to Employer's plant to see the company nurse. Claimant told her that he thought it was just a pulled muscle. She examined Claimant and told him to use ice and heat for a couple of days and it should resolve.[1]

10. On the afternoon of June 11, Claimant telephoned his shift manager to get authorization to seek medical care. After talking with the shift manager, Claimant decided to wait until the next morning. Claimant changed his mind and telephoned the shift manager again. The shift manager offered to have the safety officer meet Claimant at the hospital. Claimant agreed but changed his mind again and decided to wait until morning to seek medical attention.

11. On the morning of June 12, Claimant went to Employer's plant and saw the nurse, who gave him the paperwork to take to the occupational medicine clinic at St Luke's in Twin Falls.

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[1] It appears that June 11 and 12 were Claimant's regularly scheduled days off.

MEDICAL CARE

12. At the St. Luke's occupational medicine clinic, Claimant saw Dr. Johns. Claimant described the accident, and told Dr. Johns that it was not until the following morning that his back felt "tight." He used ice and Aleve, but the pain persisted, and he was unable to sleep the previous night because of the "throbbing and pain in his back." JE B p. 01. Claimant told Dr. Johns that his pain was about six on a scale of ten.

13. On exam, Claimant exhibited full range of motion with pain on flexion and extension. He was diffusely tender to palpation in the lumbar region. Straight-leg raise and figure four tests were negative bilaterally. Dr. Johns explained the nature and typical course of such injuries and offered assurance. He prescribed anti-inflammatories, muscle relaxers, and pain medication. He released Claimant to modified work with no lifting, pushing, or pulling over ten pounds and no repetitive bending, stooping, or twisting. Dr. Johns directed Claimant to return for follow up on June 19.

14. Claimant returned to the clinic on June 19, and saw Dr. Stagg, Dr. Johns' practice partner. Claimant reported that his back continued to be painful and was interfering with his sleep. Claimant's history and exam were essentially unchanged from the previous week. Claimant had used all the Vicodin and Flexeril that Dr. Johns had prescribed. Dr. Stagg did not refill those prescriptions, instead recommending Motrin and extra strength Tylenol for Claimant's symptoms. Dr. Stagg continued Claimant's modified duty restrictions and directed Claimant to return for a recheck on June 22.

15. On June 22, Claimant saw Dr. Stagg again. Claimant reported that his condition was unchanged, but on exam he appeared comfortable and moved easily with nearly full range of motion and minimal discomfort. Claimant requested to see a chiropractor and Dr. Stagg

provided a referral to Dr. Sirucek for three chiropractic treatments. Dr. Stagg continued Claimant's work restrictions and directed him to return to see Dr. Johns on June 26.

16. Claimant went directly from Dr. Stagg's office to see Dr. Sirucek where he received a chiropractic treatment. After Claimant's visit, Defendants informed Claimant that Dr. Sirucek was not an approved provider and told him that he could see David R. Long, D.C., for the remainder of his chiropractic visits.

17. Claimant saw Dr. Long on June 24. Treatment included electronic muscle stimulation and chiropractic manipulation. He returned for a second visit on June 25 and received similar treatment.

18. Claimant returned to see Dr. Johns on June 26. Claimant reported that his symptoms were improving, noting in particular that he had not used the Motrin or Tylenol the previous day and experienced no increase in pain without the analgesic/anti-inflammatory medication. Claimant's exam was normal in all respects. Dr. Johns authorized one more visit with Dr. Long and kept Claimant on restricted duty. He discontinued the Motrin, and recommended Claimant use Tylenol PM to help with sleep.

19. On June 26, 2009, Surety issued its denial of Claimant's workers' compensation claim.

20. Claimant returned to Dr. Long for his previously scheduled chiropractic treatment on June 29.

21. On July 2, 2009, Claimant returned to Dr. Johns for scheduled follow up for his low back injury. Claimant reported that his symptoms had resolved, he had no complaints, and no longer required the analgesic/anti-inflammatory medications. Claimant's exam was unremarkable and Dr. Johns opined there was no need for further work up or treatment. He

released Claimant to return to work without restrictions and without impairment.

SUBSEQUENT EVENTS

22. On July 24, 2009, just a few weeks after Dr. Johns released him, Claimant presented at the St. Luke's medical clinic in Twin Falls where he saw Dr. Curtis. He reported that he had awakened with numbness in his left forearm. Claimant rated his pain as seven on a ten scale, but Dr. Curtis noted that he was in no apparent distress. Dr. Curtis performed an exam, which she described as "unremarkable." In the course of his visit, Claimant told Dr. Curtis about his recent back injury and inquired whether the left arm symptoms were a result of his back injury. Dr. Curtis assured him that arm and hand paraesthesias were common, and that there was no connection between the two complaints. Dr. Curtis ordered EMG studies before making any treatment recommendations.

23. Claimant continued to work at his regular job until the plant had a scheduled shut down in mid-August. While the plant was in shut down, Claimant tendered his resignation, effective August 31, 2009, for reasons unrelated to his injury.[2]

24. Sometime between the date of his industrial injury and his voluntary resignation from his work with Employer, Claimant filed an application for social security disability benefits. Following his resignation, while he awaited a determination on his social security benefits, Claimant made no attempt to seek work. He continued to live with his mother and brother, who, along with his aunt, cared for him as though he was an invalid. At the time of hearing, Claimant remained entirely dependent upon his family for activities of daily living.

25. Claimant did not return to see Dr. Curtis until November 10, 2010. At that time

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[2] Claimant testified that he was considering attending a school in Florida where he could learn to be a music producer, but decided not to go because of his back condition.

he presented with complaints of low back pain. He told Dr. Curtis that his back had been hurting intermittently since his industrial accident in June 2009, but that Surety had denied his industrial claim. He reported pain of nine on a ten scale, but Dr. Curtis noted that Claimant did not appear to be in any distress, though she noted that he exhibited mild anxiety. An exam showed no evidence of neurologic or discogenic problems; Claimant exhibited normal range of motion without pain, and normal and symmetrical reflexes. Dr. Curtis ordered lumbar x-rays and asked Claimant to return to the clinic in ten days or two weeks.

26. Claimant's lumbar x-rays were normal, but for small Schmorl's node formations at L1-2 and L2-3. The radiological report advised that if Claimant was experiencing radicular symptoms, an MRI might help characterize Claimant's condition.

27. Claimant returned to Dr. Curtis on November 24, 2010. He continued to report intermittent back pain and muscle spasms, with pain sometimes as high as seven on a ten scale. Dr. Curtis recommended physical therapy before pursuing additional diagnostic testing, but noted that the cost would be borne by Claimant since Surety denied his workers' compensation claim.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

28. The burden of proof in an industrial accident case is on the claimant, who must prove: (1) that he suffered an injury as a result of an accident; (2) that the accident occurred within the course of his employment; and (3) that the industrial injury caused the condition for which he seeks benefits. In this proceeding, Defendants have belatedly conceded that Claimant did suffer a relatively minor back injury as a result of a lifting accident at work on June 10, 2009. However, Claimant must still establish that the June 2009 industrial injury was the cause of the

back condition for which he sought medical care in November 2010, some eighteen months after the accident.

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

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

29. On the facts of this case, Claimant's burden of proof is nearly insurmountable, due to the early, and evidently unjustifiable, denial of his claim. It is unclear what evidence prompted Surety to deny this claim; Claimant's explanation was simple and never changed. The record does not include sufficient evidence to determine whether any meaningful investigation occurred. There is no evidence to indicate that Employer or Surety spoke with the co-worker that was involved in lifting the barrel of potatoes when the injury occurred. The Notice of Claim Status (JE E, p. 21), issued June 26, 2009, states that after a "thorough review" of the claim:

> Available information does not support the injury as you described it as occurring; therefore we are denying your claim. Also, there is a lack of medical evidence to support the industrial injury.

Id. Claimant's medical records from Drs. Johns, Stagg, and Long adequately document that Claimant suffered a soft-tissue injury to his low back as a result of the lifting incident. As Dr. Johns' noted in his deposition, whether the diagnosis is "low back pain" or low back "strain" or

low back "sprain" is merely semantics—all three describe a minor soft-tissue injury in the area of the low back.

30. Once Surety denied Claimant's claim, Employer would no longer accommodate any work restrictions, and Claimant could not return to work without a full release, which he obtained from Dr. Johns on July 2. Under the circumstances, it is unclear whether Claimant was actually pain free on his last visit to Dr. Johns, or merely stated that he was so he could get a release to return to work.

31. Claimant testified that his back started hurting again when he returned to his regular job, but he could not return to Dr. Johns or Dr. Long because he had no medical insurance and could not afford to pay the providers out-of-pocket.[3]

32. Both Drs. Johns and Curtis testified in their post-hearing depositions that if they had been treating Claimant for the industrial low back injury, had released him, and he returned within weeks with similar complaints, further work up would have been appropriate, potentially including an MRI at some point. However, both physicians were equally firm that early in the course of treatment and in the absence of any symptoms indicating neurologic or discogenic problems, they would not have ordered an MRI. Both physicians were firm in their testimony that Claimant neither complained of, nor evidenced, any symptoms that suggested neurologic or discogenic involvement. Claimant was still not evidencing or complaining of any neurologic or discogenic symptoms when he saw Dr. Curtis eighteen months later in November 2010.

33. Neither physician was aware that Claimant had stopped working in August 2009, or that he was essentially living as an invalid. Dr. Curtis could not say how frequently Claimant

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[3] Which begs the question of why Claimant saw Dr. Curtis just two weeks later about a relatively minor and unrelated problem.

experienced his low back pain (he said it was intermittent, but not how frequently it recurred), or how severe the pain was when it recurred. Dr. Curtis was concerned that Claimant's pain assessments were not consistent with his behavior on exam; in fact the medical records show that at least in that regard Claimant's reportage was unreliable, and perhaps self-serving.

34. All of these issues lead to the real point of concern in this proceeding: Even if Claimant were entitled to an MRI at Surety's expense, and even if the MRI showed some injury to a disc, it is extremely difficult to establish a causal relationship given the lapse of time and Claimant's documented medical history.

35. The Referee finds that Claimant has failed to establish that he is in need of additional medical care as a result of his June 2009 industrial injury. The Referee is acutely aware that Claimant's failure to carry his burden is due in large part to Surety's handling of this claim initially. However, several factors led the Referee to her conclusion. First, there was no indication that Claimant's industrial injury included symptoms of radiculopathy or neurologic involvement at the outset, nor were such symptoms evident in November 2010. Second, Claimant presents as an individual of limited intelligence, and his educational history strongly suggests some type of learning or cognitive disability. It does not appear that Claimant has the ability to formulate or carry out a scheme of misrepresentation. He does, however, appear to be highly suggestible, and he is clearly content to live the dependent lifestyle that his family provides. Toward that end Claimant quit his job, applied for social security disability benefits, and sought additional workers' compensation benefits.

MEDICAL CARE

36. The Referee has determined that Claimant is not entitled to further medical care for his industrial injury of June 2009. This includes the visit to Dr. Curtis in November 2010 and

the x-rays she ordered. However, since Defendants have now determined that Claimant's claim was compensable, all of his medical care that was related to the June industrial injury, including occupational medicine and chiropractic care through July 2, 2009, is compensable pursuant to Idaho Code § 72-432. Defendants eventually paid the medical bills of Drs. Johns and Stagg, but as of the time of briefing had declined to pay for the medical care provided by Drs. Long and Sirucek that Dr. Stagg ordered.

CONCLUSIONS OF LAW

1. Claimant is entitled to payment of or reimbursement for all medical care related to his June 2009 industrial accident, including chiropractic care ordered by his treating physicians, from June 10 through July 2, 2009.

2. Claimant has failed to carry his burden of proof that the back pain for which he sought care in November 2010 is more likely than not caused by his June 2009 industrial accident.

3. All other issues are reserved.

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 6 day of June 2012.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AGUSTIN ZARAZUA, Claimant, v. CONAGRA FOODS, Employer, and OLD REPUBLIC INSURANCE CO., Surety, Defendants.	**IC 2009-015871** **ORDER** FILED: 6/15/12

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

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

1. Claimant is entitled to payment of or reimbursement for all medical care related to his June 2009 industrial accident, including chiropractic care ordered by his treating physicians, from June 10 through July 2, 2009.

2. Claimant has failed to carry his burden of proof that the back pain for which he sought care in November 2010 is more likely than not caused by his June 2009 industrial accident.

3. All other issues are reserved.

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

DATED this 15 day of June, 2012.

INDUSTRIAL COMMISSION

/s/_____
Thomas E. Limbaugh, Chairman

/s/_____
Thomas P. Baskin, Commissioner

_____
R.D. Maynard, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of June, 2012, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

JEFF STOKER
PO BOX 1597
TWIN FALLS ID 83303-1597

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

kla /s/_____