BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHEN ARTHUR LOWERY, Claimant, v. GALEN KUYKENDALL LOGGING, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2019-022568** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Boise on March 23, 2022. Claimant appeared *pro se*. Susan Veltman represented Employer and Surety. The parties presented oral and documentary evidence. Claimant declined the opportunity to file an opening brief, but did respond to Defendants' brief with an email. Although not meeting the requirements of JRP, this email is deemed a reply brief. It is accepted to the extent it addresses issues raised at hearing or in Defendants' brief, but Defendants' objection to the presentation of new arguments or matters not previously asserted is sustained. The case came under advisement on July 11, 2022. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as modified by agreement by the parties at hearing are:

1. On what date did the accident occur or the occupational disease become manifest;

2. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

3. Whether Claimant suffers from a compensable occupational disease;

4. Whether Claimant suffered an accident arising out of and in the course of employment;

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

6. Whether and to what extent Claimant is entitled to:

   a) Temporary disability,
   b) Permanent partial impairment,
   c) Permanent disability in excess of impairment, and
   d) Medical care; and

7. Whether apportionment is appropriate under Idaho Code § 72-406;

CONTENTIONS OF THE PARTIES

Claimant acknowledges prior low back injuries in 1992 and 2002 along with multiple prior surgeries at L5-S1, culminating with a fusion at that level. He contends that he continued in his customary logging work following his 2005 fusion surgery. His back pain worsened over time, and for many years, he simply believed that this pain was related to the L5-S1 lesion. Claimant contends that it was not until June of 2019 that he learned that his current low back complaints are actually the result of a new disease process at L3-4. This condition, he relates to his employment with Employer.

Defendants allege Claimant did not suffer a compensable accident/injury since he has not identified a discrete mishap/event causing injury to his low back. To the extent Claimant alleges that his low back condition constitutes an occupational disease, Defendants contend that the medical evidence does not establish that the physical demands of Claimant's employment are causally related to the development of his low back condition. Further, even if it be accepted that the demands of Claimant's work did contribute to the development of his low back condition, his

occupational disease claim is nonetheless precluded by the rule of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). Defendants argue that Claimant suffered from a work-related low back condition which pre-dated his employment with Employer, and which was "manifest" prior to his claimed occupational exposure. Therefore, pursuant to *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005), the rule of *Nelson* applies to deny benefits to Claimant under an occupational disease theory.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Damon Popovics, D.C., and Claimant;
2. Claimant's Exhibits ("CE") 1 through 5; and
3. Defendants' Exhibits ("DE") 1 through 11.

Pursuant to Idaho Code §§ 72-506 and 72-717, the Commission has reviewed the record and the proposed decision authored by the Referee to whom the case was assigned. The Commission declines to adopt the Referee's decision and hereby issues its own findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant was born on July 16, 1961 and was 60 years old as of the date of hearing. For most of his work life he has been employed in the logging industry as a heavy equipment operator, specifically, as the operator of a type of heavy equipment known as a "shovel loader."

2. In 1991 or 1992 Claimant suffered an injury to his low back which he related to his employment. He filed an Alaska workers' compensation claim against Zeman Logging North, Inc., on or about September 28, 1992. Claimant was diagnosed as suffering from an L5-S1 disk herniation and a bulging disk at L4-5. On October 15, 1992, Claimant underwent a diskectomy at

L5-S1. However, exploration of the L4-5 space failed to demonstrate either nerve compression or evidence of a disk herniation at that level. No diskectomy was performed at that level. *See* DE 2.

3. In June of 1993 Claimant was given a 10% whole person rating by his treating surgeon. DE 2.

4. On January 11, 2002 Claimant suffered another injury to his low back while employed by Shaan Seet Inc. The back injury was described as follows: "Pain started shortly after operating shovel, and chasing under swing yarder." Claimant filed an Alaska workers' compensation claim on or about January 14, 2002. *See* DE 2.

5. An MRI study of May 7, 2003 evidently demonstrated degenerative disk disease at L5-S1 with associated left-sided foraminal stenosis. Mild disk bulging was identified at L4-5 along with disk dehydration at L3-4. The abnormalities seen at L3-4 and L4-5 were not thought to be pathological. DE 2 p. 48.

6. On or about September 15, 2003, Claimant underwent an L5-S1 decompression and interbody fusion. DE 2 pp. 50-51.

7. A CT myelogram of July 20, 2004 demonstrated failed fusion at L5-S1, minimal disk bulging at L3-4 and L4-5, and signs of probable arachnoiditis below the L4 level. DE pp. 65-66.

8. A repeat CT myelogram of February 15, 2005 demonstrated a possible slight left-sided bulge at L2-3. At L3-4 no sign of herniation was seen nor any sign of neuroforaminal compromise. Ligaments at this level appeared to be "slightly hypertrophied" posterolaterally. At L4-5 a mild broad-based disk bulge was seen but without evidence of neural compromise. At L5-S1 nonunion of the previous fusion was again suspected. DE 2 p. 97.

9. A decision was made to redo the L5-S1 fusion. This procedure was performed on March 14, 2005. DE 2 p. 101. Claimant was eventually given an impairment rating of 27% of the whole person, 10% referable to the 1992 claim, and 17% referable to the 2002 claim. DE 2 p. 120.

10. Between January of 2003 and September of 2006, Claimant was found to be disabled for purposes of Social Security Disability. However, Claimant's disability ended on September 13, 2006 and he was then determined to be employable per Social Security criteria. DE 3. The Social Security file contains the May 6, 2009 report of Matthew Dinon, D.O., which references Claimant's ongoing low back pain without any elaboration on the level or levels involved that might be responsible for Claimant's complaints. *See* DE 3 pp. 173-174.

11. Claimant commenced his employment with Employer sometime in 2010. His employment with Employer came to an end on May 25, 2019. *See* Tr. 32. He quit because Employer failed to follow through with a promise to replace the machine that was "beating up" Claimant's back. Tr. 32-34. Since then, and through the date of hearing, Claimant has been employed by Evergreen Timber in Alaska. Tr. 34-36.

12. During the time that he worked for Employer between 2010 and 2019, Claimant also periodically worked in Alaska during shutdowns in Idaho. For example, Dr. Popovics' note of May 18, 2017 reflects that Claimant had recently returned to Idaho following several weeks of work in Alaska. *See* DE 5 p. 1149. Dr. Popovics' records also reflect that Claimant spent approximately eight weeks logging in Alaska between March 9, 2018 and June 28, 2018. *See* DE 5 pp. 1179-1184. Claimant also appears to have worked for a period of time in Alaska immediately before he quit working for Employer in May of 2019. Tr. 33.

13. Between August 1, 2014 and November 21, 2019, Claimant treated extensively

with Damon J. Popovics, D.C. Claimant's low back figures prominently in Dr. Popovics' notes, with waxing and waning symptoms and several exacerbating/aggravating episodes of note. Dr. Popovics' notes are confusing because the earlier treatment notes reference events that occurred much later than the date of the treatment note. For example, the first treatment note of August 1, 2014, references complaints arising in 2016 and 2017. *See* DE 5 pp. 1046-1047. Dr. Popovics was not asked to clarify or explain these entries at the time of his testimony at the hearing.

14. On the occasion of his visit of August 1, 2014, Claimant presented with complaints of low back and left and right buttock pain. *See* DE 5 p. 1046. On August 21, 2014, Claimant presented with increased complaints following a twisting episode in the cab of his machine. DE 5 p. 1052. This episode is referenced in notes through September 4, 2014. DE 5 pp. 1056-1058.

15. After several follow-up visits the next significant note records a visit of January 22, 2015 which references low back pain beginning January 2, 2015. No event is identified as the trigger. *See* DE 5 p. 1082.

16. A February 26, 2015 note attributes a flare-up of low back pain to yard work. DE 5 p. 1088. In subsequent notes the onset of symptoms is attributed to various progressively recent dates without identifying any inciting incident. *See* DE 5 pp. 1090-1093.

17. A September 17, 2015 note records a flare-up of low back pain which Dr. Popovics stated "has been aggravated for an unknown reason." DE 5 pp. 1106-1107.

18. A November 19, 2015 note states Claimant's low back pain "has been aggravated because of driving heavy equipment" without any mention of an inciting incident or event. *See* DE 5 p. 1113. Thereafter, this opinion is copied and recopied into subsequent notes until September 2016 when it drops off the records for a time. Similarly, low back pain complaints drop out of the

records in favor of neck and thoracic pain for a time. *See* DE 5.

19. Low back complaints resume on November 15, 2016, with an added complaint that his right middle toe was curling. Dr. Popovics called this "a new condition." DE 5 pp. 1136-1137. At the next visit Dr. Popovics noted that Claimant's condition "has been aggravated for an unknown reason." DE 5 p. 1140.

20. At a later follow-up visit on February 23, 2017 Dr. Popovics stated that Claimant's condition "has been aggravated because of working." DE 5 p. 1147. His note offers no indicia of a basis for this opinion.

21. On May 18, 2017 Dr. Popovics stated the Claimant's condition "has been aggravated because of working in Alaska and traveling on a plane." DE 5 p. 1150.

22. On an August 3, 2017 visit Claimant described an event in which he "felt a loud pop" in his lower left lumbar spine. Symptoms were worse with twisting. DE 5 pp. 1161-1162.

23. On December 11, 2017, Claimant presented with new complaints related to an onset of December 1, 2017. DE 5 p. 1170. Though the onset of increased symptomatology is identified as December 1, 2017, Dr. Popovics' notes do not reflect that Claimant associated the onset of these increased symptoms with something that happened at work. *See* DE 5 pp. 1170-1172. The December 1, 2017 date of onset of more severe symptoms is reflected in multiple subsequent records through the date of last visit of November 21, 2019. *See* DE 5.

24. Dr. Popovics' notes memorialize Claimant's eight-week employment in Alaska in the spring of 2018. Following his return from Alaska, Claimant first saw Dr. Popovics on June 28, 2018. Claimant reported that after returning from Alaska he was experiencing severe pain in his low back around the site of his L5-S1 fusion with pain radiating into the right lower extremity

down into the right foot. DE 5 pp. 1182-1184.

25. Dr. Popovics testified at hearing. In his questioning of Dr. Popovics, Claimant first asked Dr. Popovics to confirm that Claimant's problems began on December 1, 2017 with the lifting of a 150-pound weight. Tr. 13:16-14:4. Dr. Popovics did not endorse being told about a specific work-related onset of December 1, 2017. Rather, he testified that during the course of his treatment of Claimant, Claimant's lumbar spine, at levels above the previous L5-S1 fusion, had been relatively quiescent and stable, only to suffer a very quick degeneration over the course of a year:

> A. I'd have to review all that, but I can tell you that from my perspective we did have images on those disks, some of which I took, some of which Dr. Larson took. I know you had lots of MRIs and x-rays over the course of time, but I do know when I first met you probably 2012-'13, somewhere in there, I do recall that you had previous fusions from previous work injury and having a consultation with you and your wife about it. And then we did have serial x-rays as your symptoms were getting progressively worse, and that's what eventually led to another surgical consultation and a surgery with Dr. Larson, I believe. In between there from what I could see in the images that I took and the other doctors had taken was that there was – there wasn't continued degeneration of the area previous fusion, but there was what appeared to be relatively good disk spacing between, I believe, L4 and 5, the area above the fusion. That over time appeared to stay relatively stable and then degenerated very quickly over the course of about a year. And I don't know the specific dates. We have x-rays on both sides of that, but there was evidence of further deterioration damage that was not previously addressed by the Alaska Work Comp. And the only – my conclusion from that is that the only potential cause of that is continued wear and tear and kind of abuse of that area above that previous fusion.
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> ...
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> And I can't say exactly what caused it, but the only thing that would create that much wear and tear and abuse on a disk to that degree, after especially seeing the videos of what you do in your job, would be that. And we've had continued conversations about this over time. And there was a rapid failure of that disk in very short period of time, in less than a year, and I believe it was probably around that time we started seeing exhibited radicular symptoms, or numbness, tingling, and weakness and stuff in your legs that did not exist when I met you far after you left

working in Alaska. So I think that answers your question.

Tr. 14:5-15:4; 15:17-16:3.

26. On cross-examination, Dr. Popovics testified that even as early as his initial visit with Claimant, he advised Claimant that his low back problems were associated with the type of work Claimant performed in his job. Tr. 18:14-18.

27. Concerning Claimant's Alaska work in the spring of 2018, Dr. Popovics acknowledged that Claimant presented with symptoms of severe low back pain with radiation into the right lower extremity after his return from Alaska. Dr. Popovics reiterated his belief that Claimant's low back injury was gradual in onset but that he could not identify a specific day and job or machine which may have contributed to that injury. Tr. 20.

28. As noted above, radiological studies performed up to the time of Claimant's redo fusion surgery in 2005 show minimal to no pathology at levels above L5-S1.

29. Though Claimant may have had other interval studies, the next one noted in the record was performed on November 1, 2015. Per Dr. Bauer, that study, a CT of the lumbar spine, showed multilevel degenerative changes, with disk space narrowing, and vacuum disk disease most significant at the thoraco-lumbar junction at T12-L1 and L1-L2. CE 2 p. 30. November 1, 2015, X-rays showed no significant degenerative changes at L3-L4 or L4-L5. Significant changes at the thoraco-lumbar level were noted, consistent with the CT of the same date. CE 2 p. 30.

30. Next, on October 17, 2016, an MRI was performed at St. Joseph Regional Medical Center at Lewiston. The partial radiologist's report reflects significant changes at the levels above the previous L5-S1 fusion, notably at L3-L4:

> L2-L3: Annular disc bulging and endplate osteophyte formation. Significant facet and ligamentum flavum hypertrophy. There is severe spinal canal stenosis.

Crowding of the nerve roots within the thecal sac is noted. Moderate to severe bilateral neural foraminal stenosis.

L3-L4: Disc bulging and small endplate osteophyte formation. Hypertrophy of the facets and ligamentum flavum. Mild to moderate spinal canal stenosis. Moderate left and moderate to severe right neural foraminal stenosis.

L4-L5: Mild ventral spinal canal narrowing. Neural foramina are obscured by susceptibility artifact.

L5-S1: No appreciable spinal canal stenosis. Neural foramina are not well seen.

DE 6 p. 1224. A CT of November 30, 2017 was read as follows:

T12-L1: Annular bulging is effacing the thecal sac.

L1-2: Severe desiccation of the disc with annular bulging and facet arthrosis is causing moderately severe spinal canal stenosis with moderate bilateral neural foraminal narrowing.

L2-3: Annular bulging and facet arthrosis is causing severe spinal canal stenosis and mild bilateral neural foraminal narrowing.

L3-4: Annular bulging and facet arthrosis is causing moderately severe spinal canal stenosis with moderate bilateral neural foraminal narrowing.

L4-5: There is annular bulging seen with facet arthrosis causing mild spinal canal stenosis and there is mild bilateral neural foraminal narrowing.

L5-S1: Decompressive laminectomy with posterior pedicle screws are obscuring the exam, however I do not see evidence of nerve root impingement or spinal canal stenosis.

DE 6 p. 1226. A CT myelogram of December 20, 2018 was read as follows:

T12-L1: Shallow annular bulge

L1-2: Severe desiccation of disc with osteophytosis and facet arthrosis is noted causing mild canal stenosis. There is 11 degree dextroscoliosis at this level. There is moderate bilateral neural foraminal narrowing.

L2-3: Annular bulging, facet arthrosis and ligamentum hypertrophy is seen causing moderate spinal canal stenosis and moderate bilateral neural foraminal narrowing.

L3-4: Shallow annular bulging, facet arthrosis and ligamentum hypertrophy is seen causing very severe spinal canal stenosis and severe bilateral neural foraminal narrowing.

L4-5: Annular bulging and facet arthrosis is seen causing mild bilateral neural foraminal narrowing.

L5-S1: Decompressive laminectomy with pedicle screws without evidence of nerve root impingement and spinal canal stenosis.

DE 6 pp. 1230-1231.

31. For his progressive low back complaints, Claimant was eventually seen by Jeffrey Larson, M.D. At Dr. Larson's direction, another MRI was performed on August 6, 2019. A copy of the radiologist's report is not contained in the record. However, per Dr. Larson, the study demonstrated severe stenosis with a listhesis at L3-4, stenosis at L2-3, and that L4-5 was "unremarkable". DE 8 p. 1292. Dr. Larson's records reflect that Claimant did not present with a history of an industrial accident as the cause of his current complaints. However, Claimant did tell Dr. Larson that his prior surgeries were industrially related, which Dr. Larson felt was "conceivable" based on Claimant's job description. DE 8 p. 1292.

32. After review of radiological studies referenced above, Dr. Larson recommended a L3-4 fusion to address the "new" listhesis at that level. Dr. Larson recommended leaving the L4-5 level alone as it was thought to be "normal". DE 8 p. 1303.

33. Dr. Larson performed the L3-4 decompression and fusion surgery on or about December 6, 2019. DE 8 p. 1309.

34. Claimant's Exhibit 2 is a report dated April 6, 2020 authored by R. David Bauer, M.D., and evidently solicited by Shaan Seet, Inc., the Alaska employer in whose employ Claimant was injured in 2002. Although there is no evidence on the point, it appears that the independent

medical evaluation performed by Dr. Bauer may have been ordered by the Alaska employer in order to assess whether it had exposure for the L3-4 injury treated by Dr. Larson. Concerning the relationship between Claimant's L3-4 lesion and the 2002 claim, Dr. Bauer proposed:

> In my medical opinion, the work injury is not still a substantial factor in the conditions that are currently symptomatic. As a result of the industrial injury, Mr. Lowery underwent an L5-S1 fusion. L4-5 was not affected by this injury. There is a concept of "adjacent segment degeneration" (ASD), in which after a fusion the immediate next level becomes symptomatic. The development of adjacent level degeneration following cervical, lumbar, and lumbosacral fusions is most likely related to several postoperative mechanical factors as well as the normal aging process of the spine. Patients with preoperative disc degeneration at an adjacent segment were more at risk for the development of ASD. However, this does not extend to the non-adjacent or upper lumbar levels, or levels that are remote to the prior surgery. Therefore, the prior surgery at L5-S1 is not a substantial factor in the degeneration that occurred at the thoracolumbar junction, resulting in the surgery at L2 to L4. The contribution of the work injury to any subsequent degeneration at L4-5 would be vanishingly small, a remote or trivial factor, because it has not degenerated in the decade since the L5-S1 fusion; if L4-5 were to now experience degeneration, it would be dur [sic] to the fusion performed for the more recent symptoms.
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> Mr. Lowery's thoracolumbar spine has degenerated due to genetics and time. Degeneration appears to be a heritable systemic phenomenon, demonstrated at both ends of the spine even in asymptomatic patients. Regardless of the incident and the subsequent surgery from the 2002 incident, Mr. Lowery's condition would be the same. Said another way, the industrial injury is not a significant factor. But for the work injury, Mr. Lowery would be exactly the same as he is now. The work injury was not so important as to cause the condition for which he had the subsequent surgery. Please note that the chronic pain that Mr. Lowery had been experiencing was present even weeks prior to the industrial injury. Therefore, the work is not a significant factor in the etiology of his narcotic habituation, nor is it a significant factor in the treatment that he received in 2019.

CE 2 pp. 32-34 (internal footnotes omitted).

35. At hearing, Claimant testified that the June 1, 2018 date of injury referenced in the notice of injury and claim for benefits (*see* DE 1 p. 3) does not represent a date of a mishap/event. He testified that he provided that date only because Surety's representative insisted that a specific

date was required. He did testify, however, that his pain really started bothering him in May of 2018. Tr. 26. However, Claimant also testified to pain which had been increasing from approximately December 1, 2017. Tr. 22-23. Notwithstanding this testimony about the dates on which his pain began or increased, Claimant testified that he did not understand that his increasing pain complaints were related to a "new injury" at L3-4 until June 19, 2019, the date on which he learned from Dr. Larson that his pain complaints were referable to a new condition at L3-4 as opposed to his old injury at L5-S1. Tr. 29-30. However, June 19, 2019 is the date of Claimant's first visit with Dr. Larson, and in the treatment note of that date, Dr. Larson expressed no opinion on the cause of Claimant's presenting complaints. *See* DE 8 pp. 1275-1279

36. Claimant did not describe any discrete work-related mishap or event to which he related the onset of his current complaints. He did acknowledge being told by Dr. Popovics, beginning in 2014, that he should not be operating a shovel logger. Tr. 36.

37. On or about June 25, 2019, Employer was notified by Claimant of the alleged work-related low back injury, with a date of injury of June 1, 2018. *See* DE 1 and 3.

38. In his complaint filed with the Commission on November 25, 2019, Claimant stated that he did not really know a date of injury or manifestation. DE 11 p. 1360. He described his mechanism of injury as follows: "by shovel logging, getting beat, bang(sic), jared(sic) and slamed(sic) around, and hanging from seat belt." *Id.*

DISCUSSION AND FURTHER FINDINGS OF FACT

39. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

40. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v. Hara's, Inc.*, 123 Idaho 472, 89 P.2d 934 (1993).

41. Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

42. The Referee found that Claimant's demeanor appeared credible. The Referee noted that Claimant made a good first impression as a reasonably stoic, hard-working logger. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's credibility. However, as explained *infra*, Claimant's testimony is not without some internal conflict.

Accident/Injury

43. In order to obtain workers' compensation benefits for his injuries, Claimant must demonstrate that his injuries are either the result of an accident, or constitute an occupational disease. Both routes to compensability are at issue and must be examined separately.

44. An "accident" is defined as 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. Idaho Code § 72-102 (17)(b). An "injury" is defined as a "personal injury caused by an accident arising out of and in

the course of any employment covered by the workers' compensation law." Idaho Code § 72-102 (17)(a). The definition of what constitutes an "injury" is further explained by Idaho Code § 72-102(17)(c), which specifies that the term only includes an injury caused by an accident which results in violence to the physical structure of the body. It has been noted that while the terms "accident" and "injury" are definitionally interrelated, they are not synonymous. *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004). An accident must cause an injury and an injury must be caused by an accident.

45. In order for an "accident" to occur, it is not necessary that the Claimant demonstrate the occurrence of a slip or fall, external trauma to his body, or unusual exertion. An accident may occur while the Claimant is engaged in his usual work activities, and the strain of his work overcomes his body's resistance to injury. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983); *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002). Even so, neither *Wynn* nor *Spivey* dispense with the requirement of demonstrating the occurrence of an actual untoward mishap or event which can be identified as to time when and place where it occurred. In *Wynn*, the occurrence of the mishap was identified to the minute, i.e. 7:30 a.m., when Claimant experienced a sharp pain in his left arm while performing his usual work, later identified by medical testimony as the likely occurrence of his cervical disk herniation. Conversely, in *Konvalinka v. Bonneville County, supra*, the bilateral thumb pain experienced by Claimant during a two-month period was not shown to satisfy Claimant's obligation of demonstrating the occurrence of a mishap or untoward event causing injury sufficient to satisfy the requirements of statute, there likewise being no evidence that Claimant's work over the period in question caused any damage to the physical structure of her body.

46. In this case, the evidence concerning the occurrence of an "accident" is in conflict. The notice of injury and claim for benefits reflects that Claimant identified June 1, 2018, as his date of injury. However, he later testified that he provided this date only upon urging by the Surety representative who told him that the identification of a specific date of onset was necessary to his claim. Claimant disavowed the occurrence of any specific mishap on that date.

47. Next, Claimant commenced his questioning of Dr. Popovics with a reference to a specific mishap of December 1, 2017. This date also figures in Dr. Popovics' chart notes. Claimant's question to Dr. Popovics was stated as follows:

> Q: [by Claimant] And that indicates the first initial onset of this accident. On that day that's dated in here 12/1/17, and on 12/1/17, if I remember correctly, I had changed a cylinder out of my shovel, which weighs probably about 150 pounds.
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> REFEREE: I'll get that from you when you testify. Ask him a question.
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> MR. LOWERY: Okay Okay.
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> REFEREE: There you go.
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> Q. (by Mr. Lowery) So, anyway, so after that date I had been treated by you. From that date on is there proving a showing an onset of this injury from my work through the period of time as it progressed from this date?

Tr. 13:16-14:4.

48. Setting aside the leading nature of the question, it presupposes that Claimant suffered a mishap/event on December 1, 2017 while lifting a heavy object. However, Dr. Popovics was unable to endorse that such a history was given to him. His testimony was to the effect that Claimant's L3-4 disk degenerated over a brief period of time. Tr. 14-15. He later testified that he was unable to identify a specific date of injury and a specific job or machine that might be responsible for Claimant's L3-4 injury. He also stated that from his very first treatment of Claimant

in 2014 he reinforced with Claimant that Claimant's work, generally, was responsible for the continued deterioration of his low back. Dr. Popovics' chart notes do make reference to a date of December 1, 2017. However, the chart notes only reflect an onset date of December 1, 2017, not a workplace mishap/event of December 1, 2017. *See* DE 5 pp. 1170-1223.

49. Claimant intimates that it was from Dr. Larson he learned that he had a "new" injury at L3-4 which was unrelated to either of his Alaska claims. Tr. 29:19-30:4. However, nowhere in Dr. Larson's records is there any indication that he related Claimant's L3-4 lesion and need for surgery to a particular mishap/event suffered in the course of Claimant's employment by Employer. The only comment offered by Dr. Larson was one in which he acknowledged that it is conceivable that Claimant's past low back surgeries were industrial in origin.

50. The most persuasive evidence on the question of whether Claimant suffered a discrete "accident" responsible for causing injury at the L3-4 level is Claimant's own testimony. After filing his claim, he was pressed by a representative of Surety for a date of injury. Claimant denied the occurrence of an accident.

> They asked me, well, what date was your injury? Well, I explained to them, I said, I didn't have an accident. I mean, this is ongoing. It's from my job, and it is ongoing, you know, and I'm trying to find out. And I explained the situation, just like I did to you, about the VA and everything. And I says, I don't really have a date. Well, we need to have a date, and so I threw out a date. And it was June 18th[sic]2018. That was the closest time that – that's when the pain really started bothering me was in May. It was starting to go into my knee. My knee was getting numb and all that.

Tr. 26:3-13.

51. Based on the foregoing, we are unable to conclude that Claimant has met his burden of proving, by a preponderance of the evidence, the occurrence of an "accident" causing the bodily damage for which he seeks benefits.

Occupational Disease

a. Causation

52. In the alternative, Claimant asks the Commission to conclude that his L3-4 injury represents a compensable occupational disease. Occupational disease is defined at Idaho Code § 72-102(21)(a) as follows:

> "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.

A disease is "characteristic of and peculiar to" a covered employment when the conditions of that employment result in a hazard which distinguishes that employment in character from the general run of occupations. *Bowman v. Twin Falls Construction Co.,Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). "Contracted and "incurred", when referring to an occupational disease, are deemed equivalent to "arising out of and in the course of employment." Idaho Code § 72-102(21)(b). "Disablement" means becoming actually and totally incapacitated because of the disease from performing work in the last occupation in which the worker was injuriously exposed to the hazards of the disease. *See* Idaho Code § 72-102(21)(c). Where a disease is shown to be caused by a claimant's employment, the claimant is entitled to compensation for his disease upon his date of disablement. Idaho Code § 72-437. A special rule obtains relating to entitlement to medical benefits payable under Idaho Code § 72-432. Entitlement to medical benefits does not depend on disablement. Rather, such benefits are payable after the date of first manifestation of the disease, i.e., after Claimant knows he has an occupational disease, or is told by qualified medical authority that he has an occupational disease. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d

372 (2000). A disease may be incurred in more than one employment, but where it is, only the employer on the risk at the time of the last injurious exposure to the hazards of the disease can be held liable for the payment of benefits. Idaho Code § 72-439(3). As discussed in more detail below, a pre-existing condition is compensable only if aggravated by an accident. A pre-existing condition aggravated or worsened by an occupational exposure is not compensable as an occupational disease. *Nelson v. Ponsness Warren Idgas Enterprises*, *supra*.

53. Before addressing the application of *Nelson* to this case, we first examine two somewhat related inquiries: (1) How should Claimant's L3-L4 lesion be characterized? Is it part of an ongoing degenerative disease of the spine that first manifested in 1992, or is it a separate disease, distinct from his earlier Alaska injuries? (2) Has Claimant proven that his L3-L4 lesion is causally related to the demands of his employment?

54. In arguing that he suffers from a compensable occupational disease, Claimant acknowledges that he has degenerative and operative changes to his lumbar spine which predate his employment with Employer. He also asserts that his L3-L4 lesion is the result of his exposure to the same kind of occupational hazard which caused his earlier L5-S1 lesion. However, we agree with Defendants that by his testimony Claimant appears to argue that his L3-L4 lesion represents a "new" disease process that arose independent of the L5-S1 condition, the condition which is the subject of his prior Alaska claims. *See* Defendants' Brief at p. 8; *see also* Tr. 23, 25, 27, 29-30.

55. Defendants argue that Claimant suffers from longstanding degenerative back disease and has known for many years that his back problems are related to the demands of his employment. Defendants' Brief at pp. 13-16. Defendants contend that Claimant's current problems at L3-L4 represent the expected progression of a disease process that first manifested in the early

1990s. The implicit assertion is that Claimant's longstanding back symptoms are part of a single disease process.

56. Whether Claimant's L3-L4 lesion represents a new disease, or simply the progression of a previously established occupational disease, has implications for the application of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), which Defendants have raised as a defense to the occupational disease claim. Defendants assert that Claimant's multi-level degenerative back disease is a pre-existing occupational disease under *Nelson* and *Sundquist*, which was aggravated by the demands of Claimant's work with Employer. Since this pre-existing condition was manifest many years prior to 2010, the rule of *Nelson* operates to deny benefits.

57. To evaluate this aspect of the case we must first come to some conclusion about whether Claimant's L3-4 lesion is part of a single disease process that earlier manifested as the lesion at L5-S1. If the L3-4 condition exists independent of the Claimant's earlier problems at L5-S1, then it is difficult to argue that the L3-L4 lesion is simply the result of the aggravation of a pre-existing occupational disease by subsequent wear and tear. We turn then to an examination of the relationship between Claimant's current complaints and his prior L5-S1 problems.

58. Claimant has performed the same type of work for the last 40 years. He acknowledges understanding that his L5-S1 injury is related to the type of work he performed in the past. However, he appears to contend that his L3-4 injury is a new disease, resulting from the work he did while in the employ of Defendant Employer. Further, he contends that he did not recognize that his current complaints are referable to the L3-4 level until being so advised by Dr. Larson in June of 2019. In support of his occupational disease claim, Claimant relies on the records

and testimony of Dr. Popovics, the independent medical evaluation of Dr. Bauer, and the radiological studies performed over the years.

59. Dr. Popovics has warned Claimant since 2014 that his spine degeneration is due to the demands of his work. Dr. Popovics has testified that following the L5-S1 fusion redo in 2005, Claimant's lumbar spine stayed relatively stable, with preservation of the disk space at L4-L5, the level immediately above the L5-S1 fusion. However, in a relatively brief period of time before the December 2019 surgery Claimant suffered rapid deterioration of the level above the L5-S1 disk space. Although Dr. Popovics' hearing testimony describes Claimant's surgical lesion to be at L4-L5, we conclude that he misspoke, since his notes of November 2019 clearly reflect his understanding that the anterolisthesis which prompted surgery was at the L3-L4 level. DE 5 p. 1221. At any rate, while Dr. Popovics related this deterioration to the demands of Claimant's current work, he did not also say that the L3-L4 lesion developed independent of Claimant's earlier problems at L5-S1.

60. The report of Dr. Bauer, however, clearly articulates his opinion that the L3-L4 lesion arose independent of the earlier problem at L5-S1. Dr. Bauer responded to a causation question that arose in connection with the 2002 Alaska claim. Claimant may have asserted, or the Alaska Surety may simply have been trying to rule out, a causal connection between the L5-S1 fusion and Claimant's difficulties at L3-4. Dr. Bauer addressed the argument that Claimant's L3-4 problems are related to the L5-S1 lesion via "adjacent segment disease." *See* CE 2 p. 33. Because the L5-S1 level is fused, more stress is placed on adjacent motion segments, and in this fashion, accelerated degeneration at segments adjacent to a fusion can be seen to be causally related to the fused segment. In this case, Dr. Bauer rejected the assertion that adjacent segment disease is

responsible for the L3-4 lesion, since the motion segment immediately adjacent to the fusion, the L4-5 level, has not suffered degeneration. Dr. Bauer's report supports the proposition that Claimant's L3-4 lesion is related to something other than the L5-S1 fusion and is not connected to that condition.

61. Based on the foregoing we conclude that Claimant's L3-L4 lesion is a condition that arose independent of his previous L5-S1 lesion, even though it may have been caused by exposure to the same type of work activities. Defendants essentially ask the Commission to conclude that Claimant's L5-S1 lesion is an integral part of his current claim, and without this prior injury he would not now be suffering from the lesion at L3-L4. However, no evidence has been adduced to show that absent the L5-S1 lesion Claimant would not now have his current problem at L3-L4. To the contrary, Dr. Bauer's report convincingly explains that the development of the L3-L4 lesion has nothing to do with Claimant's problems two levels below. The L3-L4 lesion is not shown to be the result of the aggravation of Claimant's problems at L5-S1, even though the L3-L4 lesion may have resulted from exposure to the same type of occupational hazard that caused the original L5-S1 injury.

62. Next, we must consider whether Claimant has met his burden of proving that his L3-L4 lesion is causally related to the demands of his employment. As with industrial accident claims, an individual claiming an occupational disease has the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation is claimed and the occupational exposure alleged to have caused the condition. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995); *Hagler v. Micron Technology*, 118 Idaho 596, 798P.2d 55 (1990). Therefore, Claimant bears the burden of

establishing by medical evidence that it is more probable than not that his condition at L3-L4 is causally related to the demands of his work for Employer. "Probable" is defined as having more evidence for than against. *Soto v. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1997). Causation must be established by expert medical testimony. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296 939 P.2d 1375 (1997). However, no special verbal formula is required to meet Claimant's burden of proof, so long as the medical evidence plainly conveys the medical expert's opinion that Claimant's condition is causally related to his employment. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P. 3d 211 (2000).

63. Dr. Popovics has testified to his opinion that Claimant's L3-4 injury is caused by his work as a heavy equipment operator. Claimant operated such equipment for Employer, but he also performed the same type of work for another employer in Alaska on at least three occasions, most recently in the spring of 2019. It will be recalled that following a two-month period of work in Alaska in the spring of 2018, Claimant returned to Dr. Popovics with significantly more severe symptomatology than that with which he presented on March 9, 2018, his last visit with Dr. Popovics prior to leaving for Alaska. *See* DE 5 pp. 1179-1184. Dr. Popovics was questioned about these injuries at hearing, and testified that he could not say which of Claimant's jobs caused or contributed to his L3-4 injury:

> Q. [by Ms. Veltman] Okay. And although it's your testimony that the job the claimant performed as a heavy equipment operator impacted his symptoms in his lower back, do you have an opinion about the specific timeframe or which employer he was working for when that happened?
>
> A. I can't be specific to a specific date. My opinion is it's been a continual and gradual onset. I have seen lots of loggers over the years, and usually it is due to repetitive impact and movement in heavy equipment because there isn't very good suspension. But I can't point to a specific day and to which job or machine that may have contributed to that injury.

Tr. 20:5-16.

64. This testimony clearly conveys the opinion expressed elsewhere in Dr. Popovics' testimony that Claimant's L3-4 lesion is causally related to gradual wear and tear to which Claimant was subjected in his profession as an equipment operator. However, Dr. Popovics was unable to speak to whether a specific day and job or machine contributed to the trend of general worsening. Such specificity is not required for Claimant to prove that he suffers from an occupational disease. He need only prove that his condition is related to the hazards of his employment, and that the hazards to which he was exposed can be distinguished from the hazards to which workers are exposed in the general run of occupations. We accept that Claimant was exposed to similar hazards in both his Alaska and Idaho employments. Indeed, Dr. Popovics has plainly stated that it is Claimant's customary work that is responsible for his L3-L4 lesion, regardless of where and for whom it was conducted. However, it is not necessary to understand whether one employment was more or less injurious than the other. As discussed in more detail *infra*, Idaho law anticipates that an occupational disease can be incurred in successive employments, with each employment contributing something to the eventually diagnosed occupational disease. Idaho Code § 72-439(3). In such circumstances, it is only the employer on the risk at the time of the last injurious exposure who can be held liable for the payment of workers' compensation benefits. Here, the evidence plainly points to Employer as the entity in whose employ Claimant was last injuriously exposed to the hazards of his disease at L3-L4. In fact, Claimant quit his job because he could no longer tolerate the insults to his body from a worn-out piece of equipment, an item of heavy equipment that his Employer had previously committed to replacing. Shortly thereafter, Claimant consulted with Dr. Larson, and received the diagnosis that

a lesion at L3-L4 was responsible for his symptoms. Notwithstanding the contribution of prior employments to Claimant's condition, the evidence establishes that Claimant was last injuriously exposed to the hazards of his disease while in the employ of Employer.

65. We appreciate that Dr. Bauer is of the opinion that Claimant's L3-L4 lesion is entirely unconnected to his employment, and is, rather, a result of the unfortunate intersection of age and genetics. He states that vibration and heavy work are no longer thought to play a role in the development of degenerative back disease.

> **4. Following the original treatment, over a decade ago, Mr. Lowery was told not to return to running heavy equipment. Please explain the impact, if any, of Mr. Lowery's continued work running heavy machinery on his low back conditions.**
>
> It used to be axiomatic that heavy work and vibration increased the risk of degenerative disease. This has since been proven not to be true. Vibration does not worsen degenerative disease.
>
> **A. How has remaining in this line of work impacted his spinal conditions, if at all? Please cite to any relevant medical literature and thoroughly explain your answer.**
>
> In my opinion, his working in the line of work has not impacted his spinal conditions. Vibration does not worsen degenerative disease, as shown above.
>
> **B. Has continued to work in heavy equipment definitely worsened or aggravated his lumbar conditions? If so, has this worsening or aggravation been permanent? Has it resulted in the need for treatment? Please describe any indications of this, if such exists, using references to the medical records.**
>
> His continued work in heavy equipment has not definitely worsened or aggravated his lumbar conditions. The work by Vattie, et al., demonstrates that the progression of degenerative disease is not related to heavy work, but genetics.

CE 2 pp. 39-40 (bold emphasis in original. Internal footnotes omitted).

66. We are not prepared to accept these assertions without more elaboration. Dr.

Bauer's view is not shared by Dr. Popovics or, apparently, by any of the many physicians who have advised Claimant over the years to change jobs in order to protect his back. On the whole, the opinion of Dr. Popovics is more persuasive on the question of causation.

67. Claimant has established the requisite causal connection between his L3-L4 lesion and the hazards to which he was exposed in connection with his employment with Employer.

68. Next, as developed in the statement of facts, there are numerous radiological studies that have been performed over the years. Very generally, the studies seem to demonstrate that as of 2005, and perhaps as late as November 2015, Claimant had no to minimal degenerative changes at L3-4, and that his problems with significant pathology at L3-4 only appear in October of 2016. However, the record does not allow us to conclude with any assurance that Claimant's L3-L4 level was pristine prior to the commencement of his employment with Employer in 2010; the studies reviewed above seem to admit the possibility of minor degenerative problems at L3-L4 prior to 2010. Therefore, it is impossible to say that Claimant's L3-L4 lesion is entirely referable to work activities he undertook subsequent to 2010. Claimant may have had minor "pre-existing" degeneration at L3-L4 at the time he started work for Employer. As discussed, *infra*, it is important to understand whether such minor pre-existing changes are work related or non-work related. We have concluded that the most reliable medical evidence supports the conclusion that the demands of Claimant's work after 2010 are responsible for the development of the L3-L4 lesion. Claimant has done the same kind of work for over 40 years. As Counsel for Employer has pointed out, Claimant has been counseled since 1992 that his work is responsible for his back problems. Defendant's Brief, pp., 13-16. We conclude that any minor L3-L4 changes pre-dating Claimant's employment with Employer are likewise shown to be related to the demands of his profession.

Having reached this point, we must consider the impact of the rule of *Nelson v. Ponsness-Warren Idgas Enterprises*, *supra*, to these facts.

b. Nelson and Sundquist

69. The rule of *Nelson* is not without limitation, the most notable caveat to be found in *Sundquist v. Precision Steel & Gypsum*, 141 Idaho 450, 111 P.3d 135 (2005). *Sundquist* recognizes that an occupational disease may be incurred in the course of multiple successive employments. Indeed, this is anticipated by the provisions of Idaho Code § 72-439(3), the so-called last injurious exposure rule. That section provides:

> (3) Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.

70. Therefore, as in *Sundquist*, a claimant may be exposed to the hazards of a particular disease in a number of successive employments. It is only the employer in whose employ the claimant was last injuriously exposed to the hazards of the disease that can be held liable for the payment of workers' compensation benefits. Of course, an occupational disease is not actionable until the date of "manifestation" as that term is defined at Idaho Code § 72-102(18). Notwithstanding that an employee may have signs and symptoms of an occupational disease in a particular employment, the condition is not actionable until the claimant knows, or is told by qualified medical authority, that his condition is related to his employment. In *Sundquist*, the claimant had symptomatology consistent with a developing cubital tunnel syndrome in several earlier employments. However, it was not until his employment by Precision that he learned that his condition was causally related to his employment. Even though the claimant had symptoms of his disease in earlier employments, his condition did not mature into a compensable occupational

disease until his employment by Precision. In *Sundquist*, it was argued that the rule of *Nelson* should apply to deny the claimant's occupational disease claim, since it was demonstrated that he had physical signs and symptoms of the disease prior to his occupational exposure at Precision. In other words, the claimant had a "preexisting condition" from earlier employments which was aggravated/accelerated by the demands of his employment at Precision. The court rejected the application of *Nelson* to the facts of *Sundquist*, ruling that where the preexisting condition is itself occupational in origin, in order for such condition to be recognized as preexisting, it must qualify as an occupational disease. Because the claimant's date of manifestation did not occur until after his employment with Precision commenced, the claimant's preexisting signs and symptoms of cubital tunnel syndrome did not qualify as a preexisting condition for purposes of the application of the rule of *Nelson*, *supra*.

71. To reach a different conclusion would undermine the last injurious exposure rule, which was adopted in Idaho in 1997, after the Court's 1994 decision in *Nelson*, *supra*. Implicit in the provisions of Idaho Code § 72-439(3) is the recognition that diseases may be incurred in the course of several successive employments, but only the last employer in line can be held responsible for the occupational disease. If an employer could rely on *Nelson* to defend an occupational disease claim by arguing that a claimant exhibited some signs of physical injury consistent with the development of a potential occupational disease in earlier employments, the statutory language holding only the last employer liable under Idaho Code § 72-439(3) would be frustrated.

72. As applied to the facts of the instant matter, we have concluded that Claimant's L3-L4 lesion is an occupational disease distinct from his L5-S1 disease process. We also conclude

that Claimant had evidence of minor work-related degenerative changes at L3-L4 prior to the commencement of his employment with Employer in 2010. Claimant has testified that he did not know that his symptoms were related to a new lesion at L3-L4, as opposed to his earlier L5-S1 fusion, until he was so advised by Dr. Larson on or about June 19, 2019. Tr. at 29-30. However, receiving a diagnosis is not the equivalent of understanding that the condition is work related, and pursuant to Idaho Code § 72-102(18) manifestation does not occur until Claimant knows, or is advised by a qualified physician, of the work-related nature of his disease. We believe the facts of this case demonstrate that as soon as he received his diagnosis from Dr. Larson, Claimant knew that his condition was related to the demands of his employment under the test we articulated in *Dahlke v. Ash Grove Cement Co.*, IC 2012-016998 (Idaho Ind. Comm. April 25, 2014):

> Knowledge is defined as "justified true belief." *In Re Cacciatori*, 465 B.R. 545, 551 (2012). In order for a person to know something, "three conditions must be satisfied: 1) the person must believe it to be true, 2) the person must have justifying reasons for believing it to be true, and 3) it must in fact be true." *Id.* at 551-552.
>
> Therefore, before a claimant can be said to "know" something, it must first be demonstrated that the thing the claimant believes to be true is *actually* true; one cannot be said to "know" something that proves to be false. However, as *Cacciatori*, *supra*, makes clear, the fact that the claimant's belief actually proves to be true is not, in itself, sufficient to prove that the claimant had genuine knowledge. Knowledge is belief of a true fact that has been "given account of," meaning that the belief in the true fact is explained or justified in some way. *See e.g.* Plato, *Theaetetus* 187a-201c; G. Dawson, *Justified True Belief is Knowledge*, 31 The Philosophical Quarterly 125, 315-29 (October 1981); Matthias Stetup, The Analysis of Knowledge, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Fall 2008). In order to know that a given proposition is true, one must not only believe the relevant true proposition, but one must also have a good reason for doing so. A clear consequence of the rule announced in *Cacciatori* is that no one can be said to gain knowledge solely by believing something that subsequently turns out to be true. For example, an ill person with no medical training might "know" that his condition is work-related because of a peculiar superstition he happens to have. Nevertheless, even if this belief turns out to be true, the patient could not be said to have "known" that his condition was work-related, since his belief lacked a satisfactory justification.

Dahlke, at ¶¶39-40 (italic emphasis in original).

73. We have concluded that Claimant's L3-L4 lesion represents a distinct occupational disease, so Claimant's belief that this condition is work related is demonstrated to be true. We also conclude that Claimant has a satisfactory justification for his belief; Claimant has been advised by numerous physicians over the past decades that his work is responsible for the degeneration of his back.

74. We conclude that Claimant's disease manifested on or after June 19, 2019, the date he learned of his diagnosis from Dr. Larson. We have also concluded that pursuant to Idaho Code § 72-439(3) Claimant was last injuriously exposed to the hazards of his disease while in the employ of Employer. From this, it follows that Employer is responsible for Claimant's L3-L4 disease, even though the disease may have been incurred in more than one employment. *Sundquist*, supra.

Notice and Limitations Requirements of Idaho Code §§ 72-701 – 706

75. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604 is a noticed issue for hearing. Idaho Code § 72-701 provides that a claimant must give an employer notice of a workplace accident no later than sixty (60) days after the happening thereof. As discussed *supra*, we find that Claimant has failed to prove the occurrence of a workplace accident, therefore, whether Claimant complied with Idaho Code § 72-701 is rendered moot. However, we have determined that Claimant has proven that he suffers from an occupational disease that manifested on or after June 19, 2019. Idaho Code § 72-448 governs the notice and limitations of occupational disease claims. The statute provides, inter alia, that written notice of the manifestation of an occupational disease must be given to the employer within sixty (60) days after its first manifestation, and a claim for worker's compensation benefits must be filed

with the Commission within one (1) year after the first manifestation. Idaho Code § 72-448(1).

76. The Employer's First Report of Injury or Illness ("FROI") indicates that Employer was notified on June 25, 2019; the nature of injury/illness was "strain," and was described as "**Strains Over Time Due To Work**/Strains Back & R Leg." DE 1 p. 3 (emphasis added). Claimant's uncontroverted testimony at hearing was that he explained to his Employer that the nature of his pain complaints was due to the L3-L4 lesion on June 25, 2019 and that he was instructed by his Employer to file a claim, and the FROI was generated. *See* Tr. 24:22-26:13. The Commission determines that the FROI, filed on August 13, 2019, constitutes written notice to Employer of Claimant's L3-L4 occupational disease and that it was made within sixty (60) days of the manifestation of June 19, 2019. Furthermore, the November 25, 2019 Complaint seeking benefits (DE 11 p. 1360) was filed with the Commission within one (1) year of the June 19, 2019 manifestation. The notice requirements of Idaho Code § 72-448 are satisfied.

77. Idaho Code § 72-704 provides that notice given under Idaho Code § 72-448 shall not be held "invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby." Employer has not demonstrated that he was prejudiced by any inaccuracy in the FROI's notation that the "accident" occurred on June 1, 2018. As discussed *supra*, Claimant's testimony is that he provided that date because the Surety's representative insisted that a "date of accident" be given. Claimant testified that he merely "threw out a date" because it was the closest time to when his pain complaints, later manifested as a L3-L4 occupational disease by Dr. Larson's diagnosis on June 19, 2019, started to bother him. Claimant explained to Employer and Surety's representative that his pain was due to his exposure to shovel logging work and that

Dr. Larson informed Claimant that his pain was due to a L3-L4 lesion and did not derive from his pre-existing L5-S1 condition as Claimant had previously thought. Despite the discrepancies found in the FROI, the Commission determines that Defendants had sufficient notice and knowledge of an occupational disease claim to satisfy Idaho Code §§ 72-448 and 72-704.

78. Finally, Claimant has complied with the provisions of Idaho Code § 72-706. That statute provides that, when no compensation is paid on a claim, the claimant has "one (1) year from the date of making his claim within which to make and file with the Commission an application requesting a hearing and an award under such claim." As discussed *supra*, Claimant made his claim when he notified Employer on June 25, 2019. Claimant subsequently filed his Complaint[1] on November 25, 2019. DE 11 p. 1360. The Complaint is timely filed.

79. Claimant has complied with the notice and limitations requirements set forth in Idaho Code §§ 72-701 – 706 and § 72-448.

Medical and Indemnity benefits

80. Claimant's entitlement to medical, TTD/TPD, PPI and PPD are noticed issues for hearing. Claimant bears the burden of proving his entitlement to these benefits.

a. Medical benefits

81. We have found Claimant's occupational disease to be a compensable condition. Claimant is entitled to medical care for his compensable disease per Idaho Code § 72-432. Moreover, for care that was denied by Defendants, he is entitled to recover the invoiced amount of bills he incurred in treatment under *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d

[1] Filing a complaint with the Industrial Commission constitutes an "application requesting a hearing and an award under such claim" as contemplated in Idaho Code § 72-706(1).

852 (2009). However, Claimant has put on only minimal proof of his medical expenses. CE 3. Invoiced hospital charges of $52,196.32 were incurred in connection with the surgery performed in December of 2019 by Dr. Larson. The hospital bill was negotiated and paid by a third-party insurer. Dr. Larson's charges for office visits were apparently paid by third-party insurance. Claimant apparently claims only his co-pay expenses for these visits, even though he is entitled to the full invoiced amount of Dr. Larson's bills. We find that Claimant has proven entitlement to $53,135.18, representing the invoiced amount of Kootenai Health bills and the co-pays associated with Dr. Larson's care.

b. Time loss

82. Claimant claims time loss benefits for the period that he was off work following his December 2019 surgery. CE 3; Tr. 40-41. He claims benefits for December 6, 2019, the date of his surgery, through February 28, 2020. He has apparently calculated what he thinks he would have made had he worked during this period. His projections include regular time, and what he thinks he would have earned in overtime pay as well. He claims that he would have earned $24,765 between December 6, 2019, and February 28, 2020. Dr. Larson's records show that surgery was performed on December 6, 2019. On December 19, 2019, Claimant was released to begin physical therapy, and was given a ten-pound lifting restriction. On January 14, 2020, Claimant's lifting restriction was revised to twenty pounds, and Dr. Larson noted that at the next visit he and Claimant would discuss return to work. DE 8 p. 1313. On February 25, 2020, Dr. Larson released Claimant to return to work with a brace and a 30 to 40-pound lifting restriction. DE 8 p. 1316. From these records, we conclude that Claimant was taken off work entirely by Dr. Larson from December 6, 2019 through February 25, 2020. We appreciate that ten- and twenty-pound lifting

restrictions are referenced in the notes of December 19 and January 14, respectively. However, rendering such restrictions is not the equivalent of releasing Claimant to return to modified work. This appears to have only been done on February 25, 2020.

83. Pursuant to Idaho Code § 72-408, Claimant is entitled to time loss benefits during his period of recovery. Claimant must put on medical proof that he is in a period of recovery in order to qualify for TTD benefits. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). Here, the evidence before the Commission supports a conclusion that Claimant was in a period of recovery from December 6, 2019, through February 25, 2020. Under Idaho Code § 72-403, once Claimant has been released to modified duty work, he must act reasonably to search for or accept suitable employment or imperil his right to continued TTD benefits. *Roberts v. Portapros, LLC.*, IC 2019-008048 (Idaho Ind. Comm. October 11, 2019). Claimant has not met his burden of proving entitlement to time loss benefits after February 25, 2020. We conclude that Claimant is entitled to time loss benefits payable at the statutory rate from December 6, 2019, through February 25, 2020, as anticipated by Idaho Code §§ 72-408 and 409.

c. PPI/PPD

84. Claimant has the burden of proving entitlement to permanent physical impairment and disability over and above impairment. Impairment is a component of disability. Idaho Code §§ 72-422, 425; *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016). An injured worker must prove entitlement to impairment in order for a claim for additional disability to be entertained. *Urry v. Walker,* 115 Idaho 750, 769 P.2d 1122 (1989). Here, Claimant put on no proof that he is entitled to permanent physical impairment as a result of his occupational disease. Regardless, the record contains no proof that Claimant's present and future ability to engage in

gainful activity has been compromised as a result of his compensable occupational disease. Claimant has failed to meet his burden of proving entitlement to permanent disability, inclusive of impairment.

CONCLUSION OF LAW AND ORDER

1. Claimant has failed to meet his burden of proving the occurrence of an accident causing an injury.

2. Claimant has satisfied his burden of proving that his L3-L4 lesion represents an occupational disease separate and distinct from his L5-S1 injury, that his L3-L4 lesion is causally related to the demands of his employment, and that he was last injuriously exposed to the hazards of his disease while in the employ of Employer.

3. The date of first manifestation of Claimant's occupational disease is on or after June 19, 2019.

4. Claimant's claim is not barred by the rule of *Nelson v. Ponsness-Warren Idgas Enterprises, supra.*

5. Claimant has complied with the notice and limitations requirements set forth in Idaho Code §§ 72-701 – 706 and § 72-448.

6. Claimant is entitled to recover medical benefits in the amount of $53,135.18.

7. Claimant is entitled to time loss benefits during his period of recovery from December 6, 2019 through February 25, 2020, at the statutory rate.

8. Claimant has not proven entitlement to PPI or PPD.

9. All other issues are moot.

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

DATED this 2nd day of February, 2023.

INDUSTRIAL COMMISSION

Participated but did not sign.

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of Febnuany, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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