BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES LOSEE, Claimant, v. GCX EXPRESS, INC. Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 04-527578** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 15, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted an emergency hearing in Boise on June 24, 2005. Claimant, Charles Losee, was present in person and represented by Reed G. Smith of Boise. Defendant Employer, GCX Express, Inc., and Defendant Surety, State Insurance Fund, were represented by Jon M. Bauman of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions and the submission of briefs. The parties requested and were granted a revised briefing schedule and the case subsequently

came under advisement on November 4, 2005. Referee Barclay retired from the Idaho Industrial Commission and the matter was reassigned to Referee Alan Taylor.

ISSUE

In the Notice of Hearing and as clarified at hearing, the issue to be resolved is whether, pursuant to Idaho Code § 72-432, Claimant is entitled to lumbar surgery due to injuries, or the aggravation of a pre-existing condition, caused by his industrial accident of December 6, 2004.

ARGUMENTS OF THE PARTIES

Claimant asserts that his December 6, 2004 industrial accident caused his present need for lumbar spine surgery and that he is entitled to medical benefits, including the surgery proposed by Dr. Douglas Smith. Dr. Smith has recommended decompressive laminectomies at L3, L4, and L5 and discectomies at L3-4 and L4-5.

Defendants contend that Claimant has failed to provide persuasive medical evidence to causally relate his present need for lumbar surgery to his industrial accident. They maintain, and rely upon the medical opinion of Dr. Paul Montalbano, that Claimant's present need for lumbar surgery is due to his 1979 L4-5 fusion and his October 27, 2004, motor vehicle accident, not his December 6, 2004, industrial accident. Defendants further assert that the L3-4 and L4-5 discectomies recommended by Dr. Smith are ill-advised and unreasonable as they would destabilize Claimant's spine, and ultimately necessitate yet further lumbar surgery.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the June 24, 2005, hearing;
2. Claimant's Exhibits C-1 through C-8 admitted at the hearing;

3. Defendants' Exhibits D-1 through D-9 and D-11 through D-15 admitted at the hearing;

4. The post-hearing deposition of Douglas Smith, M.D., taken July 13, 2005, on the part of the Claimant; and

5. The post-hearing deposition of Paul J. Montalbano, M.D., taken July 20, 2005, and continued on August 31, 2005, on the part of the Defendants.

Regarding the deposition of Dr. Smith, Claimant's objection at page 51 is sustained; Claimant's objections at pages 34, 37, 50 and 57 are overruled; Defendants' objection at page 12 is sustained; Defendants' objections at pages 18, 21-22, and 25 are overruled. Regarding the deposition of Dr. Montalbano, Claimant's objection at page 56 is sustained; Claimant's objections at pages 15 and 19 are overruled; Defendants' objections at pages 50 and 61 are sustained; Defendants' objections at pages 34, 35, 39, 52, 54, are overruled.

After having fully considered all of 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

1. In approximately 1978, when Claimant was 17 years old, he suffered a low back injury. In approximately 1979 he underwent L4-5 fusion. He experienced intermittent back pain from that time forward, but was generally able to carry on with his activities.

2. On September 15, 2003, Claimant presented to the Family Medical Clinic in Caldwell complaining of long term back pain. He was diagnosed with chronic back pain.

3. On October 14, 2003, Claimant presented to Lisa Koltes, M.D., complaining of

continued back pain and requesting pain medications. Claimant reported that Tylenol #3 helped his pain better than Vicodin. Dr. Koltes prescribed Ultram for Claimant's back pain. Dr. Koltes encouraged an appointment with a pain clinic specialist, but Claimant was noncommittal. The record contains no indication Claimant followed through with Dr. Koltes' recommendation.

4. On March 30, 2004, Claimant presented to Gesa Lamers, M.D., complaining of severe back pain. Claimant reported chronic back pain ever since he had surgery at age 17 for a ruptured disc. Claimant reported that the pain radiated into his buttock. He denied leg weakness but reported he had trouble walking any distance. Dr. Lamers noted an obvious several inch leg length discrepancy. Claimant reported taking 1600 mg of Advil all at once, together with Tylenol, for relief of his back pain. Dr. Lamers prescribed Tylenol #3 and Advil, and encouraged physical therapy. Apparently, Claimant did not participate in physical therapy because of his frequent travel as a truck driver.

5. On May 7, 2004, Claimant commenced working as a long haul truck driver for Employer, GCX Express. Claimant was paid twenty-eight cents per mile and on average earned approximately $750 per week.

6. Claimant's back pain continued and on June 17, 2004, Claimant received another prescription for Tylenol #3 through Dr. Lamers. On June 18, 2004, Claimant requested a refill of his ibuprofen prescription which he took with Tylenol #3 when his back pain flared up. He also requested an MRI or CT scan of his back.

7. On October 26, 2004, Claimant voluntarily quit his employment with GCX to look for alternate work.

8. On October 27, 2004, Claimant was riding in a car driven by his wife when their car

was rear-ended by another vehicle. Claimant's wife sustained whiplash injuries from the motor vehicle accident. Claimant was wearing his seat belt and declined to go to the hospital immediately after the accident.

9. On October 28, 2004, Claimant presented to Jeff Phillips, PA-C, assistant to Dr. Lamers, complaining of low back pain after a motor vehicle accident in which his vehicle was rear-ended the prior day. Phillips noted obvious leg length discrepancy. Ibuprofen, Flexeril, and Tylenol #3 were prescribed for Claimant's back pain. Claimant requested an MRI of his back, however he was advised he would be treated conservatively initially, and an MRI would be ordered if he was referred to a spine surgeon.

10. On November 3, 2004, Claimant began working for GCX again because he could not find alternate work. Claimant advised GCX of his motor vehicle accident the previous week and requested light duty work assignments. Apparently light duty work was not readily available because shortly thereafter Claimant resumed his prior duties driving over the road for Employer.

11. On November 19, 2004, Claimant presented to the emergency room at West Valley Medical Center with complaints of low back pain and intermittent right leg numbness. He described a motor vehicle accident three weeks earlier. The emergency room physician noted Claimant had back pain secondary to a disc problem and recurrent injury. He was taking prescription Motrin and Tylenol #3. Claimant was instructed not to drive while taking Tylenol #3. The nurse's notes from that visit record Claimant's complaints that he had suffered right leg numbness for the previous two weeks. The emergency room physician noted that Claimant's right leg went numb after sitting for long periods and ordered an MRI.

12. On November 26, 2004, Claimant underwent a lumbar MRI. In forms he completed

at the time of the MRI study, Claimant recounted the automobile accident in which his vehicle was rear-ended on October 27, 2004. Randy L. James, M.D., who performed the MRI, recorded Claimant's history of complaints "of right leg and hip pain in automobile accident rear ended 10/27/04." Claimant's Exhibit 2, p. 000017. The MRI study revealed marked posterior bulging of the L3-4 disc combining with facet overgrowth resulting in moderate central canal stenosis at L3-4, marked posterior broad based bulging of the L4-5 disc into the spinal canal combining with facet overgrowth resulting in moderate central canal stenosis at L4-5, moderate to severe narrowing of the neural foramen at L4-5, and severe chronic arachnoiditis.

13. On December 1, 2004, Claimant's wife called Jeff Phillips, PA-C, requesting the results of the recent MRI scan. Phillips advised her that he lacked the expertise to interpret the MRI results but noted that several abnormal findings were reported. Phillips recorded that "Patient is claiming this injury occurred after a rear-end MVA on October 28." Claimant's Exhibit 1, p. 000002. Claimant's wife told Phillips that Claimant was driving truck out of state and having some leg pain which was causing him difficulty. She questioned whether Claimant should be working. Dr. Lamers then referred Claimant to neurosurgeon Douglas Smith, M.D., for surgical evaluation and an appointment was arranged for Claimant to see Dr. Smith on December 8, 2004.

14. Claimant testified at hearing that on December 6, 2004, he suffered an injury at work when he threw a tarp weighing 100 to 125 pounds over a load on a flatbed trailer in California and noted neck pain, a sensation of bulging and pain in his left lumbar region, and pain in his right leg. Transcript, p. 34, Ll. 12-15. Claimant testified at hearing that this pain was different from the pain he experienced due to the October 27, 2004, motor vehicle accident. The accident was unwitnessed but Defendants do not dispute its occurrence. Claimant notified Employer of the accident that same

day. Claimant testified he finished tarping his load with assistance and then drove his truck back to Idaho, stopping to chain up due to inclement weather.

15. On December 8, 2004, Claimant presented to Douglas Smith, M.D. Dr. Smith noted Claimant's lumbar surgery in 1979 and, pursuant to Claimant's report, recorded: "he has had low back and lower extremity pain on an ongoing basis since that time. It has not limited him particularly, and he has not been seeking healthcare because of it." Claimant's Exhibit 3, p. 000026. Dr. Smith recorded Claimant's report of his October 27, 2004, motor vehicle accident. Dr. Smith also recorded Claimant's report of his December 6, 2004, industrial accident that in tarping a load, Claimant "experienced a sensation of bulging in the left lumbar region and neck pain." Claimant's Exhibit 3, p. 000026. Claimant then reported neck, back and right buttock pain, right leg numbness, and the beginning of left leg numbness to Dr. Smith. Dr. Smith scheduled Claimant for lumbar and cervical spine CT imaging with intrathecal contrast. Dr. Smith also recommended that Claimant continue working. Claimant's Exhibit 3, p. 000027.

16. On December 9, 2004, Claimant prepared a handwritten statement regarding his December 6, 2004, accident. It does not mention any leg pain, only pain in Claimant's "lower back left side and neck right side." Defendants' Exhibit 4. Similarly, the First Report of Injury or Illness, dated December 9, 2004, makes no mention of any leg pain, only lower left back and neck pain. Defendants' Exhibit 5. Claimant told GCX that his doctor said he could work light duty until he could work no more. On December 9, 2004, Claimant was laid off at GCX. The record does not indicate any subsequent employment.

17. On December 13, 2004, Claimant underwent a cervical spine CT study which showed only mild degenerative cervical changes and no surgical problems. The lumbar spine CT performed

the same day showed moderate to severe central canal stenosis at L3-4, moderate circumferential annulus bulge at L3-4, broad-based disk bulge with moderate sac deformity at L4-5, and evidence of arachnoidal adhesions.

18. On December 13, 2004, Dr. Smith wrote that Claimant could continue commercial driving, but not lift over 50 pounds.

19. On December 14, 2004, Claimant presented again to Jeff Phillips, PA-C, complaining of depression and chronic back pain. He denied numbness or tingling in his lower extremities and had good patellar and Achilles tendon reflexes. He was diagnosed with acute bronchitis and back pain.

20. On December 20, 2004, Claimant's then-attorney wrote Dr. Smith requesting his diagnosis, cost estimate, causation opinion, and apportionment of causation between Claimant's October 27, 2004 motor vehicle accident, his December 6, 2004 industrial accident, and his 1979 back surgery.

21. On December 29, 2004, Dr. Smith noted that after visiting with Claimant's lawyer, Claimant would be scheduled for lumbar surgery "presumably under Medicaid." Claimant's Exhibit 3, p. 0000333. Claimant was scheduled for lumbar surgery to be performed by Dr. Smith on January 13, 2005, contingent upon Medicaid's approval.

22. On January 2, 2005, Dr. Smith responded to Claimant's then-attorney's correspondence of December 20, 2004, reporting his diagnoses as "Lumbar strain secondary to the motor vehicle accident of October 28 [sic], 2004. Lumbar strain secondary to the work incident of December 6, 2004." He indicated: "I do not believe there is a specific causality related to the preexisting back surgery of 1979." Dr. Smith further wrote:

> "but for" the motor vehicle accident of October 27, 2004, to a reasonable degree of medical certainty, Mr. Losee would not have needed the recommended surgery. I believe the work incidence of December 6, 2004, accelerated the need for surgical intervention. He likely would have required surgery anyway, because of the symptoms that he had already experienced from the motor vehicle accident.

Claimant's Exhibit 6, pp. 000070-72.

23. On January 11, 2005, Medicaid denied Dr. Smith's request for authorization for Claimant's lumbar surgery, whereupon the proposed surgery was cancelled.

24. On January 27, 2005, Claimant became concerned about chest pain and underwent an adenosine nuclear perfusion stress test. The results were normal.

25. On February 23, 2005, Dr. Smith again examined Claimant and noted clinical worsening of Claimant's symptoms as manifested by increased lower extremity weakness. Dr. Smith appealed Medicaid's denial of approval for a decompressive laminectomy. Dr. Smith specifically anticipated decompressive laminectomies at L3, L4, and L5, with particular attention to the lateral recesses at L4-5; and discectomies at L3-4 and L4-5. Also on February 23, 2005, Dr. Smith authored a letter indicating Claimant had needed to be off work since December 8, 2004.

26. Claimant received no recovery from the driver responsible for the October 27, 2004, motor vehicle accident and did not make a claim or file suit against the driver because the driver was uninsured. The record does not indicate when Claimant became aware that no proceeds would be forthcoming from the driver responsible for the motor vehicle accident.

27. On March 23, 2005, Claimant filed his First Report of Injury and his Complaint in the present case.

28. On or before April 15, 2005, the review organization for Medicaid denied Dr. Smith's appeal and again refused to authorize Claimant's lumbar surgery as proposed by Dr. Smith.

Dr. Smith then encouraged Claimant to work with his attorney to see if there was a chance the surgery could be completed under workers' compensation or from motor vehicle accident insurance proceeds.

29. On May 10, 2005, Claimant was examined by clinical psychologist Michael H. McClay, Ph.D., at Defendants' request. Dr. McClay administered MMPI-2 and SF-36 testing and thereafter opined that Claimant had elements of chronic pain syndrome with heightened pain sensitivity and somatic complaints, depression, and symptom magnification syndrome. Dr. McClay recommended that Claimant's physical complaints be managed conservatively as much as possible because individuals with similar profiles tend to do poorly with aggressive medical intervention. He also advised consideration of treatment through a chronic pain program.

30. On June 3, 2005, Claimant was examined by neurosurgeon Paul J. Montalbano, M.D., at Defendants' request. Claimant presented with complaints of headaches, neck pain, bilateral shoulder discomfort, low back pain involving his posterior thigh and calf, and lower extremity numbness, tingling, and weakness. Dr. Montalbano recorded Claimant's description of a 1979 lumbar spine surgery after which he did well. Claimant reported his symptomatology commenced with his motor vehicle accident of October 27, 2004, after which he developed low back and left shoulder discomfort. Claimant also reported his work injury of December 2004, that while throwing a 125 pound tarp over a load he "felt pain on the left side of his back with further radiation into his left lower extremity." Defendants' Exhibit 10, p. 04001. Claimant reported these symptoms were different from his prior complaints. Dr. Montalbano ordered another lumbar MRI.

31. On June 8, 2005, Claimant underwent another lumbar MRI study which showed broad based L3-4 disk bulge with broad based protrusion resulting in mild central canal stenosis at

L3-4, broad based L4-5 disk bulge causing mild inferior left neural foraminal stenosis, broad based L5-S1 disc bulge with eccentric osteophyte resulting in moderate neural foraminal stenosis, and arachnoiditis from L3-4 down through the sacrum. Radiologist John Jackson, M.D., reported that the findings were not significantly changed when compared with Claimant's November 26, 2004, lumbar MRI.

32. On June 13, 2005, Dr. Montalbano reported that Claimant had no acute injury related to his December 6, 2004, work injury, and that Claimant's current need for treatment was related to his 1979 surgery and subsequent arachnoiditis. Dr. Montalbano further opined that Claimant sustained no impairment or pathology related to his December 6, 2004, industrial accident. He noted:

> Surgical pathology was present prior to the incident at work on December 6, 2004. The injury on December 6, 2004 minimally exacerbated his symptomatology. His symptomatology was also exacerbated by his motor vehicle accident. …. I believe that less than 10% of the etiology of his symptomatology is related to his work-related injury as well as to his motor vehicle accident.

Defendants' Exhibit 11, p. 04004. Dr. Montalbano opined that Claimant's pre-existing condition warranted decompressive laminectomies at L3, L4, and L5, but not discectomies at L3-4 and L4-5 as such would tend to destabilize Claimant's spine thus creating a probability of additional future surgery.

33. Drs. Smith and Montalbano compared Claimant's November 26, 2004, lumbar MRI with his December 13, 2004, CT scan and found no significant changes. Both Drs. Smith and Montalbano noted that MRI and CT imaging techniques are sufficiently dissimilar that small differences cannot be validly compared. Drs. Smith, Montalbano, and Jackson compared Claimant's November 26, 2004, lumbar MRI with his June 8, 2005, MRI and found no significant differences.

34. Having closely compared Claimant's testimony at hearing with his reports to his Employer and various physicians, and his medical records for the 15 months prior to his industrial accident, the Referee concludes that Claimant is not an entirely accurate historian. Significantly, he did not advise Dr. Smith or Dr. Montalbano of the extent of his medical treatment for low back pain and lower extremity symptoms prior to his December 6, 2004, industrial accident.

DISCUSSION AND FURTHER FINDINGS

35. **Entitlement to surgery.** The provisions of the 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).

36. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

37. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The Idaho Supreme Court has held that Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The Court further held it was for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

38. In the present case, Claimant asserts that the last injury rule requires Defendants be held responsible for his proposed lumbar surgery. The last injury or last injurious exposure rule has application when two or more sureties are liable for a claimant's work-related injuries. See Ulvan, 1990 IIC 0622; Sheets, 1991 IIC 0997. However, the present case involves only one surety and the pivotal issue is whether the need for the lumbar surgery Claimant seeks was caused by his December

6, 2004, industrial accident. Defendants maintain that Claimant has failed to prove that the industrial accident caused his present need for surgery and also that Claimant has failed to prove that the surgery he requests is reasonable and necessary.

39. Claimant next asserts that Defendants are responsible for his proposed surgery noting: "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). Claimant cites two Commission decisions, Van Sickle, 1987 IIC 0241, and Smith, 1989 IIC 0626, to support the assertion that if an industrial accident hastens the need for surgery, it is compensable.

40. In Van Sickle, claimant injured her knees in an industrial accident in December 1983. She underwent arthroscopic knee surgery in March 1984 and a total knee replacement in November 1985. The Commission noted that while Van Sickle likely would have required a total knee replacement at some future time, the industrial accident accelerated the progression of her arthritis and thus was the cause of her surgery at the time it was performed. Significantly, there was no indication that Van Sickle already needed knee surgery immediately prior to her December 1983 industrial accident.

41. In Smith, claimant had a history of prior knee problems and treatment, including ligament and meniscus surgery. In February and May 1984, Smith reinjured his knee when he slipped while at work. In June 1984, Smith underwent a total knee replacement. Medical evidence established that his preexisting knee condition would have eventually required a total knee

replacement at some future time, however, the Commission found Smith entitled to benefits for the surgery because the industrial accidents had exacerbated or aggravated his knee condition thus requiring the knee replacement surgery in June 1984. There was no indication that Smith already needed knee replacement surgery immediately prior to his industrial accidents.

42. In the present case, Claimant emphasizes that Dr. Smith opined Claimant's industrial accident aggravated or accelerated his underlying condition. Dr. Smith apportioned two-thirds of Claimant's present need for surgery to his October 27, 2004, motor vehicle accident and one-third to his December 6, 2004 industrial accident. Dr. Smith also opined that Claimant's industrial accident accelerated his need for surgery. Dr. Smith testified that Claimant had degenerative changes present for many years, including arthritic changes and arachnoiditis. He diagnosed Claimant with lumbar strain related to his industrial accident. Nevertheless, Dr. Smith refused to attribute any of Claimant's present need for back surgery to his 1979 back surgery or degenerative conditions.

43. More concerning is the accuracy of the history which is the foundation of Dr. Smith's opinion. Dr. Smith recognized that Claimant's credibility was at issue in determining the cause of his need for surgical treatment. Dr. Smith testified that he was satisfied with Claimant's credibility as he encountered nothing which called it into question. In arriving at his opinion, Dr. Smith was not aware that Claimant had reported leg pain to medical practitioners prior to his work accident. Not until nearly the conclusion of his post-hearing deposition, when Dr. Smith was directed to medical records of December 1, 2004, documenting Claimant's complaints of leg pain, did Dr. Smith realize and candidly acknowledge: "I stand corrected" in that Claimant suffered leg pain before his industrial accident. Smith Deposition, p 42, L. 13. When then questioned about whether the industrial accident accelerated Claimant's need for surgery, Dr. Smith testified:

Q. Without the car accident, he wouldn't have needed the surgery?

A. That is what I believe.
Q. Then you say, "I believe that the work incident of December 6, 2004, accelerated the need for surgical intervention"; is that right?

A. Yes.

Q. It says, "He likely would have required surgery anyway because of the symptoms that he had already experienced from the motor-vehicle accident." Was that sentence also correct when you wrote it?

A. I believe so.

Q. He needed the back surgery after the car wreck; is that right?

A. I felt so, within the limitations that we have all discussed.

Q. If he already needed it after the car wreck, he didn't need it – how do you mean he accelerated the need for surgical intervention after December 6? He couldn't need it more if he already needed it; could he? You're either pregnant or you're not; right?

A. That is true. I base that line of thought on what was given to me as a history of further worsening after the work accident.

Q. And yet the objective studies reflect, in your own words, "no significant change." Isn't that true?

A. Correct.

Smith Deposition, p. 56, L. 2 – p. 57, L. 5.

44. Dr. Smith's opinion regarding aggravation was thus premised on Claimant's report of "further worsening" after the work accident. However, Dr. Smith was not provided a complete history of Claimant's symptoms, including leg pain, which clearly preceded the December 6, 2004, accident. Thus part of the foundation of Dr. Smith's opinion is the incomplete and inaccurate history provided by Claimant.

45. Contrary to Claimant's representation to Dr. Smith, that he had not been seeking

healthcare because of his back, Claimant sought medical assistance for his low back pain on at least eight occasions during the 15 months preceding his December 6, 2004, industrial accident. For over a year prior to his industrial accident Claimant had been taking prescription medications intermittently for chronic low back pain. Claimant requested an MRI scan of his back twice during the six months prior to his industrial accident. Claimant requested light duty work of his Employer after his motor vehicle accident and less than five weeks before his industrial accident. Less than three weeks before his industrial accident Claimant presented to the emergency room with low back pain and reported leg numbness for the prior two weeks. Ten days before his industrial accident he reported back and leg pain while preparing to undergo an MRI which showed significant lumbar spine abnormalities needing surgical correction. Five days before his industrial accident, Claimant's wife called a medical practitioner reporting Claimant's back and leg pain and questioned whether he should be working. At the time of his industrial accident he was already taking two medications prescribed to help manage his ongoing back pain. At the time of his industrial accident, Claimant's previously scheduled appointment for consultation with a neurosurgeon in preparation for back surgery was only two days away. The evidence establishes that Claimant was already in actual and present need of lumbar surgery before his industrial accident.

46. Furthermore, Claimant's accounts of worsened symptoms he experienced at the time of his industrial accident on December 6, 2004, have not been entirely consistent. Claimant told Dr. Smith on December 8, 2004, that at the time of his industrial accident he experienced "a sensation of bulging in the left lumbar region and neck pain." Claimant's Exhibit 3, p. 000026. Claimant wrote on December 9, 2004, that at the time of his industrial accident he felt pain: "lower back left side and neck right side." Defendants' Exhibit 4. Similarly, the First Report of Injury or Illness, dated

December 9, 2004, mentions only lower left back and neck pain. Defendants' Exhibit 5. However, on June 3, 2005, Claimant told Dr. Montalbano that at the time of his industrial accident he felt "a pain on the left side of his back with further radiation into his left lower extremity." Defendants' Exhibit 10, p. 04001 (emphasis supplied). Finally at hearing on June 24, 2005, Claimant testified that at the time of his industrial accident he felt "pain, a bulge in the left side here, pain in the neck, pain in the right leg." Transcript, p. 34, Ll. 12-15 (emphasis supplied). Claimant's December 9, 2004 hand-written note specifically describes his back and neck pain at the time of the accident. The absence of any mention in that same note of leg pain is both conspicuous and concerning given Claimant's later reports that he also experienced left or right leg pain at the time of the accident. Claimant's long-standing back pain is well documented, however these inconsistent accounts of worsening symptoms, particularly lower extremity symptoms, further undermine the basis for Dr. Smith's opinion.

47. Claimant emphasizes that Dr. Montalbano attributed 5% of Claimant's symptomatology to the industrial accident. Dr. Montalbano attributed the overall etiology of Claimant's condition to his chronic arachnoiditis and degenerative stenosis of his lumbar spine which pre-existed his work accident. He opined that Claimant's current need for treatment is related to his pre-industrial accident conditions, especially his 1979 surgery and subsequent arachnoiditis. Dr. Montalbano noted that Claimant's imaging studies showed surgical conditions, all of which predate his industrial accident. He opined that Claimant's industrial accident did not cause his present need for surgery, and that the surgery proposed by Dr. Smith is not causally related to Claimant's industrial accident. Dr. Montalbano concluded that Claimant's industrial accident minimally exacerbated his symptomatology and by June 13, 2004, no acute injury existed related to

Claimant's work accident. However, when asked in his deposition to put a percentage on Claimant's December 6, 2004, accident, Dr. Montalbano indicated he needed to review the records, but attributed 5% of the etiology of Claimant's symptomatology to the December 6, 2004, industrial accident.

48. As with Dr. Smith's opinion, Dr. Montalbano's apportionment relied to some extent upon Claimant's incomplete history and his report that at the time of the industrial accident, he experienced worsened symptoms of "pain on the left side of his back and further radiation through his left lower extremity." Montalbano Deposition, p. 31, Ll. 12-13 (emphasis supplied). Dr. Montalbano recognized these as slightly different complaints than Claimant had previously reported. These complaints were not only different, but inconsistent with Claimant's prior and subsequent reports. Dr. Montalbano's conclusion that the industrial accident minimally aggravated Claimant's symptoms is thus based upon the incomplete history and inconsistent post-accident symptoms reported by Claimant.

49. In contrast to Van Sickle and Smith, Claimant in the instant case already had a present and actual need for lumbar surgery immediately prior to his industrial accident. This was objectively documented by his MRI scan only 10 days before his industrial accident. Given comparison of pre and post-accident MRI scans showing no objective evidence of injury, only Claimant's subjective complaints of increased symptoms remain to prove his industrial accident caused any worsening of his back condition. When examined closely, Claimant's subjective symptoms of back and leg pain before and after his industrial accident, as documented by the medical records in evidence, are strikingly similar. His reports of worsened symptoms are inconsistent. Claimant's incomplete history and inconsistent reports of worsened symptoms are the

foundation for the opinions of Drs. Smith and Montalbano regarding aggravation.

50. This is not a case where an asymptomatic or mildly symptomatic condition became debilitating by reason of a work accident. Objective radiographic evidence need not be present to prove a compensable injury or aggravation. However, here Claimant sought light duty work from Employer before the industrial accident. Claimant's wife contacted a medical professional expressing concern about Claimant's fitness for his work duties before the industrial accident. Objective radiographic evidence shows no difference before and after the industrial accident. Claimant's neurosurgeon initially recommended he continue working and did not actually take Claimant completely off work until over 60 days after the industrial accident. Claimant's reports to medical providers of the extent of his pre-accident symptoms and treatment therefor are materially incomplete. Claimant's reports of worsened subjective complaints at the time of his industrial accident to different medical providers are inconsistent. Claimant has simply not sustained his burden of proving that the surgery he desires was necessitated by his industrial accident.

51. Drs. Smith and Montalbano disagree on the surgical procedures which should be performed to address Claimant's complaints. However, the question of whether the surgical procedures recommended for Claimant by Dr. Smith are necessary and reasonable is moot.

CONCLUSIONS OF LAW

1. Claimant has proven that his industrial accident of December 6, 2004, caused lumbar strain.
2. Claimant has failed to prove that he is entitled to lumbar surgery due to his December 6, 2004, industrial accident.

RECOMMENDATION

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

DATED This 28th day of February, 2006.

INDUSTRIAL COMMISSION

/s/_____
Alan Reed Taylor
Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th__ day of _March_____, 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

REED G SMITH
942 MYRTLE STREET
BOISE ID 83707

JON M BAUMAN
PO BOX 1539
BOISE ID 83701

kkr _____