**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| GABRIEL CAPILLA,<br><br>Claimant,<br>v.<br><br>BETTENCOURT DAIRIES,<br><br>Employer,<br>and<br><br>LIBERTY NORTHWEST INSURANCE CORP.,<br><br>Surety,<br>Defendants. | **IC 2012-013605**<br><br>**FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION**<br><br>**FILED**<br>**FEBRUARY 8, 2019** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on January 26, 2018. Claimant, Gabriel Capilla, was present in person and represented by Patrick D. Brown, of Twin Falls. Defendant Employer, Bettencourt Dairies (Bettencourt), and Defendant Surety, Liberty Northwest Insurance Corp., were represented by Matthew Vook, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. Judith Atkinson of Boise substituted in as successor counsel for Defendants on the briefing. The matter came under advisement on December 12, 2018.

## ISSUE

The sole issue presented is Claimant's entitlement to additional medical care due to his industrial accident. All other issues are reserved.

## CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on May 26, 2012, when he was struck by a loader bucket. Defendants accepted the claim and paid benefits, including medical benefits for lumbar surgery in 2013. Claimant now asserts he is entitled to additional medical care, including another lumbar surgery due to his industrial accident. Defendants maintain that Claimant was found medically stable after his 2013 surgery and has failed to prove he is entitled to additional medical care.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Gabriel Capilla taken April 27, 2016;
3. Claimant's Exhibits A through S and Defendants' Exhibits A through M, admitted at the hearing;
4. The testimony of Claimant, Luis Escobar, Juan Vasquez, and Jocelyn Capilla taken at hearing;
5. The post-hearing deposition testimony of Anthony Sirucek, D.C., taken by Claimant on March 27, 2018;
6. The post-hearing deposition testimony of Michael V. Hajjar, M.D., taken by Claimant on July 20, 2018; and
7. The post-hearing deposition testimony of David Mark Christensen, M.D., taken by Defendants on August 27, 2018.

All outstanding objections are overruled and motions to strike are denied.

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

## FINDINGS OF FACT

1. Claimant was born in 1959 and is right-handed. He was 58 years old and resided in Jerome at the time of the hearing.

2. Bettencourt is a dairy farming enterprise operating several dairies at different locations in Idaho.

3. **Background.** Claimant was born in Mexico. He came to the United States at the age of 18 and to Idaho at the age of 26. He has worked in the dairy industry most of his life. He has sustained several prior work injuries including multiple knee injuries requiring surgical repair and a forearm fracture, but recovered from each injury and returned to his usual work.

4. Commencing in approximately 2006, Claimant worked at several of the dairies owned by Bettencourt where he eventually became a working supervisor.

5. Claimant performed demanding physical work and had no back symptoms or functional limitations prior to May 26, 2012.

6. **Industrial accident and treatment.** On May 26, 2012, Claimant was at work helping lift a cow that had fallen. He was bent over attaching straps around the cow and the raised bucket of a front end loader when the loader bucket unexpectedly detached and fell approximately 10 feet or more, crushing the cow, striking Claimant on his low back, and knocking him to the ground out of the path of the falling bucket. The weight of the 12-feet long, four-yard capacity steel loader bucket that struck Claimant was estimated at approximately 2,800 pounds.

7. Claimant was taken to the hospital emergency room where examination revealed low back abrasion and bruising. He reported extreme low back pain and left leg numbness and parasthesia. CT imaging ruled out acute spinal or pelvic fracture. Claimant received prescription medications and several months of conservative treatment, including physical therapy; however, his back and leg pain persisted.

8. On October 13, 2012, Claimant underwent a lumbar MRI that revealed: "L3-L4 global annular bulge and central disc protrusion, Extruded fragment extends inferiorly. L4-5 annular bulge and central protrusion, mild inferior right disk extrusion, moderate to severe spinal stenosis. L5-S1 small right paracentral disk protrusion and mild canal narrowing." Defendants' Exhibit H, p. 30. Radiologist Terry Buccamouso, M.D., reported L3-L4 and L4-L5 disk protrusions with extruded component causing moderate to severe spinal stenosis.

9. On October 29, 2012, Claimant came under the care of orthopedic surgeon Justin Dazley, M.D., who diagnosed lumbar radiculopathy and recommended an epidural steroid injection which provided no lasting benefit.

10. On February 1, 2013, Dr. Dazley performed lumbar surgery including "partial laminectomy L3, a full laminectomy L4, a partial laminectomy L5, and bilateral medial facetectomies L2-3, L3-4 and L4-5." Defendants' Exhibit H, p. 31. Claimant's back and leg pain improved while he was recuperating from the surgery and largely inactive but returned when he attempted to resume activity post-surgery.

11. On March 20, 2013, Dr. Dazley recorded Claimant's recurrent radicular symptoms and recommended an updated MRI.

12. On March 26, 2013, Claimant underwent another lumbar MRI which revealed "recent bilateral L4 laminectomies with a probable small incidental midline seroma just posterior

to the spinal canal. No significant excess epidural scarring. No disk extrusion seen. Congenitally short pedicles contribute to mild to moderate spinal stenosis at L3-4 and mild residual spinal stenosis at L4-5." Defendants' Exhibit H, p. 32. Claimant's back and leg pain continued.

13. On October 24, 2013, Dr. Dazley reported Claimant was fixed and stable with no impairment and restrictions of no prolonged standing or lifting.

14. Claimant continued to have back and leg pain and on January 27, 2014, he presented to Dr. Dazley who referred him for pain management and an epidural steroid injection. Claimant received another epidural steroid injection that provided no lasting benefit. His leg pain worsened and Dr. Dazley recommended another MRI.

15. On May 13, 2014, Claimant underwent another lumbar MRI that revealed L3-4 small subannular tear posteriorly in the midline, with slight central protrusion and a small volume of extruded disc substance migrated downward, partially effacing the midline epidural space; L4-5 sub annular tear or disceotomy defect protrusion in the midline with slight central protrusion and a small volume of extruded disc substance migrated downward, similar to the level above and similar to MRI of 2013. Defendants' Exhibit H, pp. 32-33. Dr. Dazley suggested Claimant consider another lumbar surgery. Claimant's Deposition, p. 41.

16. On October 9, 2014, Claimant was examined by Keith Holley, M.D., at Defendants' request. Dr. Holley concluded Claimant was medically stable and back and leg pain were due to pre-existing conditions.

17. In 2015, Claimant began treating with Anthony Sirucek, D.C. On March 3, 2016, Dr. Sirucek opined that Claimant's persisting back and leg pain were due to his 2012 industrial accident.

18. On July 25, 2016, Claimant underwent another lumbar MRI that revealed further L4-5 disc herniation.

19. On November 9, 2016, Michael Hajjar, M.D., examined Claimant and recorded his complaints of back and leg pain, right greater than left. Dr. Hajjar reviewed the 2016 lumbar MRI and noted "there is a fairly sizable disk herniation at the L4-5 level with caudal migration eccentric to the right side with impression of the right L5 nerve root and some foraminal narrowing at the L5-S1 level." Claimant's Exhibit G, p. 871. On November 11, 2016, Dr. Hajjar recommended lumbar decompression at L4-5 and L5-S1. Claimant's Exhibit G, p. 873.

20. At the time of his 2016 deposition, Claimant was treating regularly with Dr. Sirucek. Claimant has had no further back surgery since his 2013 lumbar surgery by Dr. Dazley.

21. **Condition at the time of hearing.** At the time of hearing, Claimant continued to work at Bettencourt in a supervisory capacity where he directed other employees and was not required to perform significant lifting, bending, or pushing. He testified that he continues to experience low back and bilateral leg pain and avoids prolonged sitting or standing.

22. **Credibility.** Having observed Claimant at hearing, and compared his testimony with other evidence in the record, the Referee finds that Claimant is a credible witness. Having observed Luis Escobar, Juan Vasquez, and Jocelyn Capilla at hearing, the Referee finds that they are all credible witnesses.

## DISCUSSION AND FURTHER FINDINGS

23. 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). 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).

24. **Medical benefits.** The sole issue is Claimant's entitlement to additional medical care for his May 26, 2012 industrial accident. Idaho Code § 72–432(1) requires an employer to provide 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. Of course an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus claims for medical treatment must be supported by medical evidence establishing causation. 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).

25. In the present case, Claimant asserts he needs further surgery due to his industrial accident for his lumbar condition. Several medical experts have opined regarding his need for lumbar surgery.

26. Dr. Holley. Dr. Holley examined Claimant on October 9, 2014, at Defendants' request and opined that his initial treatment with physical therapy, medication, and light duty work was medically necessary for the industrial injury. However, Dr. Holley reported: "I do not believe his subsequent lumbar spinal surgery and all the treatment thereafter was directly related

to the work injury …. No further treatment is indicated for the May 26, 2012 work incident." Claimant's Exhibit F, p. 851. Dr. Holley opined that "there is clearly a pre-existing degenerative condition of the lumbar spine which I feel is the major contributing cause to his ongoing symptoms and need for treatment …." Claimant's Exhibit F, p. 852. Dr. Holley's report affirmed there were no imaging studies submitted for his review.

27. Dr. Dazley. Dr. Dazley performed Claimant's 2013 lumbar surgery. He initially agreed with Dr. Holley's assessment that all of Claimant's continuing back problems were attributable to pre-existing injuries or conditions. However, subsequently, Dr. Dazley agreed with Dr. Sirucek's conclusion discussed hereafter that Claimant's need for further back treatment is due to his 2012 industrial accident. Dr. Dazley indicated he was unaware of any pre-existing injuries or conditions prior to the industrial accident and further noted that Claimant's L4-5 herniated disc should have additional workup and treatment. Claimant's Exhibit O, p. 937.

28. Dr. Christensen. Dr. Christensen is a board certified orthopedic surgeon. He examined Claimant on March 16, 2017 and reviewed Claimant's lumbar MRI's from October 2012, March 2013, May 2014, and July 2016. He opined that Claimant had pre-existing congenital spinal stenosis. In his deposition, Dr. Christensen acknowledged that Claimant's October 13, 2012 MRI showed L4-5 disc protrusion extending caudally. Although Dr. Christensen could see no annular tear he testified: "It would stand to reason, based on the anatomy of the disc, that annular fibers would have to be torn in order for disc protrusion to actually protrude and extend caudally like that." Christensen Deposition, p. 31, ll. 9-12. He reported: "The right sided L4-5 disc herniation was new on July 2016 MRI and was not present on any previous MRI's. Therefore, this is not directly related to the patient's 2012 work related

injury." Claimant's Exhibit M, p. 929. On June 6, 2017, Dr. Christensen again examined Claimant and recorded:

> I informed Gabriel that I mainly only saw stenosis on the right side, and could not account for his left leg radicular symptoms based on his most recent MRI findings. I do not see where surgical intervention would have a reasonable chance to improve his left leg symptoms. Also, in reviewing the lumbar MRIs, the inferiorly extruded right L4-5 disc herniation which is present on July 2016 MRI, was not present on previous MRIs to the degree seen in the July 2016 MRI, so the disc herniation on the right at L4-5 seen on July 2016 MRI, in my opinion, I [sic] more probable than not basis, it is not directly attributable to his work-related injury that occurred almost 4 years prior to this.

Claimant's Exhibit M, p. 932. Dr. Christensen concluded that since the size of the L4-5 disk extrusion is larger, Claimant's current need for lumbar surgery is not related to his industrial accident.

29. Dr. Christensen testified that he did not have any specific history of any inciting event to increase the size of the L4-5 disc herniation. In response to counsel's questions, Dr. Christensen testified:

> Q. (by Ms. Atkinson) Okay. So based on your review of the records, the—that you have in front of you there and the 2012, 2013, 2014, and 2016 MRI studies that you note in your examination notes, would it have been just as possible, given Mr. Capilla's preexisting stenosis, age and degenerative disc disease, that he would have developed the herniation you saw on MRI in 2016?
> ….
>
> A. That's really hard to tell. I don't know if I could really answer that.
>
> Q. …. Can you say to any reasonable degree of medical certainty that natural aging processes and ordinary daily activities were not the cause of what you saw on the MRI in 2016 for Mr. Capilla?
> ….
>
> A. I can't say that for certain. I'm not exactly sure what caused the enlargement or the progression of—that large disc herniation in July 2016. I don't have anything in my medical records that specifically states anything that occurred between the time of the 2014 and 2016 MRI.

Christensen Deposition, p. 21, l. 19 through p. 22, l. 19.

30. Dr. Christensen agreed that "one condition of an annular tear is that it leaves an opening for the nucleus pulposus to exit the interior of the disc." Christensen Deposition, p. 65, ll. 2-4. However, Dr. Christensen summarized his perspective: "Because of the timeframe that had passed between the loader bucket and the time that that disc fragment actually extruded, it was remote enough that I don't feel that the loader bucket was the direct result [sic] of something that spit out of a disc three or four years later." Christensen Deposition, p. 77, ll. 4-9.

31. Dr. Sirucek. Anthony Sirucek, D.C., is certified in accident reconstruction. He is also certified in MRI by the State of New York Medical School through successful completion of a series of nationally offered courses by neuroradiologist Robert Peyster, M.D., chief of staff at Stony Brook Medical School in New York.[1] Dr. Sirucek has been Claimant's treating chiropractic physician since 2015.

32. Dr. Sirucek reviewed Claimant's lumbar MRI films and reported: "The MRIs that were taken at St. Luke's Hospital on 10/18/2012, 3/26/2013 and 5/13/2014 do not meet the national standards of the North American Radiology Association. Therefore, they may not be utilized to rule out small tears and other pathology, especially within a disc." Defendants' Exhibit H, p. 34. He noted that the St. Luke's MRIs utilized Lumbar Axial 3mm slices with gaps of 4mm and Lumbar Saggital 4 mm slices with gaps of 5mm, whereas the "minimum parameters, as published by the American College of Radiology in 2006, are: Lumbar Axial <4mm slice w/gaps of <1mm[,] Lumbar Saggital <5mm slice w/gaps of <1.5mm." He reported that the

> broader the slices and gaps, the more likely it is that the MRI will not reveal small tears and other pathology. MRI sequences employing a 4 or 5mm slice thickness

[1] Some of the courses include: MRI Spinal Anatomy & Protocols, MRI Disc Pathology and Spinal Stenosis, MRI Spinal Pathology, and MRI Methodology of Analysis.

> may not identify small tears due to partial volume averaging with the surrounding hypotense annulus. Gaps between the slices further compound the problem and result in missed pathology on an MRI image. …. It is my opinion that St. Luke's substandard MRI's may have missed disc pathology which may well be contributing to Mr. Capilla's ongoing pain, guarding and neuritis.

Defendants' Exhibit H, p. 34.[2]

33. Although the MRIs are substandard, Dr. Sirucek noted:

> The MRIs did, however, demonstrate mild disk desiccation changes, global annular bulging and central disc protrusions which are herniations, at L3-L4. Extruded fragments extend Inferiorly. At L4-L5, there was annular bulging and central protrusions (herniation), mild inferior right disk extrusion, moderate to severe spinal stenosis, a component of facet arthropathy, narrowed lateral recesses, right more than left. L5-S1 had a small right paracentral disk protrusion (herniation), mild canal narrowing, and asymmetric hypertrophy of the right facet joint narrowing both the right lateral recess and right foramen.

Defendants' Exhibit H, pp. 34-35.[3]

---

[2] Dr. Sirucek elaborated further during his deposition:

> I mean when you have gaps that are 4, 5 millimeters, those are—and you should have a millimeter, no more than 2 millimeters—remember, a gap of 4 or 5, there should be at least three slices or more through that disc. If you only get the top of a disc and bottom of a disc, you can miss things.
>
> Q. (by Mr. Vook) So you're saying that these MRIs, because they don't meet the national standards, they're not useful?
>
> A. No. that's not what I'm saying. I'm saying you can miss thin slices of things. …. But this is not a known in Twin Falls for the radiology department. I've brought it up with them.
>
> Q. Okay. And so what was the purpose of putting that in there?
>
> A. Because there—a lot of these MRIs, if we're looking for thin slices, I can see the radial tears. And if we have a thick slice, only getting the top of the bone here or here, you're missing a lot of disc pathology.
> ….
>
> Okay. If there's a national standard, this is what we recommend the slices to be, this is what the protocol that it should be. … Right now, Twin Falls only has one MRI company ordering MRIs. If I have that same MRI in Boise, I have thinner slices.

Sirucek Deposition, p. 98, l. 5 through p. 99, l. 14.

[3] Dr. Sirucek described a disc herniation "as a tearing of the annular fibers where the gelatinous material, the disc material, is now extruding out past the boundary of the rim of the vertebral body." Sirucek Deposition, p. 24, ll. 20-23.

34. Dr. Sirucek issued a report on March 3, 2016, noting that Claimant had pre-existing arthritic lumbar facets, shortened lumbar pedicles, and degenerative disc disease which "are not accompanied by any history which caused any symptoms or affected function prior to the work incident." Defendants' Exhibit H, p. 35. Dr. Sirucek diagnosed spinal stenosis, disc herniations, facet lumbar syndrome, sciatica, neuralgia, post laminectomy syndrome, neuritis or radiculitis, and muscle spasm. He concluded:

> From a medical perspective, the 5/26/12 incident where the loader bucket fell on Mr. Capilla is the predominant proximate cause of his low back injuries. I arrive at this by clinically correlating the history of the accident (the bucket is the mechanism for injury), Mr. Capilla's medical history, the physical examinations, and the structural findings and loss of function Mr. Capilla has sustained since the incident, but not before.
>
> Mr. Capilla has no medical history of low back problems before the work incident. I am unaware of any evidence which would establish that he had symptomatic, pre-existing back conditions which in any way affected his ability to fully function. The pre-existing arthritis in the facet joints of the lumbar spine had no reported effect, either in terms of pain or function, prior to the incident. While the imaging shows some degenerative disc disease, some of which certainly pre-existed the incident, there is no evidence that there was pain or dysfunction from the degeneration prior to the work incident. Likewise, the pedicles being anatomically shorter than normal did not cause pre-existing pain or loss of function.
>
> The herniations, including with extrusions, are more likely than not the type caused by trauma from the incident. These along with the additional damage or aggravation to the arthritic facet joints and other areas within the joint continue to be the cause of Mr. Capilla's problems[.] Thus, correlating all of the evidence leads to my opinion that Mr. Capilla's ongoing back problems are permanent and a direct result of the work incident. It is unfortunate that Mr. Capilla's back surgery has been less than fully successful, but his ongoing problems are nevertheless continuing, permanent symptomology from the incident and a direct result of the work incident. The weight of the bucket not only caused damage to the discs, but aggravated any pre-existing arthritis and degeneration.

Defendants' Exhibit H, pp. 35-36. Dr. Sirucek later reviewed the July 25, 2016 lumbar MRI showed an L4-5 disc extrusion and opined "With the next MRI, we saw the extrusion that was

now more prevalent." Sirucek Deposition, p. 20, ll. 3-4. He reaffirmed his conclusion that Claimant's present need for additional lumbar treatment is due to his 2012 industrial accident.

35. In his post-hearing deposition, Dr. Sirucek testified and identified on MRI scans taken October 13, 2012, March 23, 2013, May 13, 2014, showing L4-L5 disk annular tear with disc protrusion and extrusion caudally into the spinal canal and the right subarticular recess. Sirucek Deposition, pp. 47-54. Dr. Sirucek also testified and identified on MRI scan images taken July 25, 2016, demonstrating large L4-L5 disc extrusion extending caudally.[4] Based on his thorough comparison of the MRI images from 2012 to 2016, Dr. Sirucek testified that the L4-L5 disc extrusion, the same condition identified in the 2012 MRI, had progressed and gotten larger. He affirmed this did not represent a new injury but was a "natural progression" at the same disc level with the disc material migrating outward and that the original trauma is what caused the tears in the disk. Sirucek Deposition, pp. 55-56.

36. Dr. Sirucek found no evidence that Claimant ever had any back problems or treatment for his back prior to the industrial accident and strongly disagreed with Dr. Holley's opinion that Claimant's back problems were attributable to pre-existing conditions. Sirucek Deposition, pp. 57-58.

37. Dr. Sirucek disagreed with Dr. Christensen's characterization of the right-sided L4-5 disc herniation showed on the July 2016 MRI as being new, rather Dr. Sirucek testified it was larger, and had gotten larger as more disc material was extruded. Sirucek Deposition, pp. 67-68. He explained: "Because once the annular fibers are torn, there's pressure on the disc to force any material out, outward. Kind of like jelly in a doughnut: You put pressure

[4] Dr. Sirucek also sent MRI images to radiologist Chris Malcolm, M.D., who labeled the images documenting L4-L5 "annular tear and disc protrusion that was extending caudally or downward." Sirucek Deposition, p. 45, ll. 1-2.

downward, it's going to try to push material to the area of least resistance. So wherever the tear was that filling, the collagen, it would be more vulnerable to tearing outward." Sirucek Deposition, p. 69, ll. 1-7. Dr. Sirucek opined the enlarged L4-5 herniation "was a result of the radial tear from that original injury of the bucket hitting him." Sirucek Deposition, p. 70, ll. 5-7. "So he had—he described no other force—force that would have caused this, that caused the bursting of this new disc to come out. So the causation was really from that same injury." Sirucek Deposition, p. 72, ll. 21-23.

38. Dr. Sirucek opined Claimant "probably should have another surgery on the extrusion." Sirucek Deposition, p. 42, ll. 18-19. He referred Claimant to both Dr. Hajjar and to Dr. Christensen for evaluation. Based on his conversations with Drs. Christensen and Hajjar, Dr. Sirucek testified regarding a second lumbar surgery for Claimant: "Dr. Christensen thought there was a lot of scar tissue, and it could be kind of complicated. Hajjar didn't feel that way, that he could—stuff that he does all the time. So it's the difference of opinion between the two surgeons." Sirucek Deposition, p. 88, ll. 16-20.

39. Dr. Hajjar. Dr. Hajjar is a board certified neurosurgeon. He testified that he reviewed Claimant's records and "did not see any evidence of any pre-existing spine issues." Hajjar Deposition, p. 7, ll. 10-11. He also reviewed the post-accident records and concluded: "Other than the history and the MRIs that were done over time, there were no other specific injuries, accident or any other events that can be noted to have caused any new problems specifically." Hajjar Deposition, p. 7, ll. 21-24. Dr. Hajjar disagreed with Dr. Holley's opinion and testified "An injury of that kind of force is enough to cause many spinal problems, absolutely." Hajjar Deposition, p. 11, ll. 12-13.

40. Dr. Hajjar testified that the October 2012 lumbar MRI showed an L4-5 "annular tear and a disc protrusion, herniation in the setting of an already narrow spinal canal." Hajjar Deposition, p. 14, ll. 13-15. Dr. Hajjar agreed with Dr. Sirucek's opinions and conclusions and was unaware of any pre-existing injuries or conditions prior to the industrial accident. Claimant's Exhibit N, p. 935. Hajjar Deposition, p. 15. Dr. Hajjar opined that the images annotated by Dr. Malcom from the October 13, 2012 MRI showed annular tears and disc cartilage protruding into the spinal canal and would be likely to cause radiating leg pain. Hajjar Deposition, p. 18.

41. Dr. Hajjar considered the 2012 and 2016 MRIs, noting both showed disc extrusions in the same area, which extrusion had become worse or recurred. He testified:

> Well, in early 2013, Mr. Capilla had a surgery to decompress the spinal canal and remove a herniated fragment disc, which is an operation called a discectomy.
>
> Whenever that surgery is done there is a known risk of recurrence of the herniation, which can happen at any time after surgery. I would quote that risk as about 8 percent in people.
>
> And based on this series of images, what the most likely scenario is is that Mr. Capilla had surgery in 2013, they removed the fragment that was present on the 2012 scan, and that at some point based on the possibility of recurrence, as it can occur in anybody who has had surgery like this, he can recur the disc. And his recurrence is seen on the second series of scans is larger than the first occurrence. So the herniation is a different herniation, <u>but it's related to the first herniation</u>.

Hajjar Deposition, p. 19, l. 23 through p. 20, l. 15 (emphasis supplied). Dr. Hajjar testified that the L4-5 disc herniation present on the July 25, 2016 MRI was clearly bigger than on the prior scan, but it was present on the first scan in October 2012. He concluded: "I would say that in this case all of the disc pathology is just related over time." Hajjar Deposition, p. 22, ll. 17-18. "I believe that based on this time course the loader bucket incident exacerbated the degenerative

changes leading to the 2012 scan, more likely than not the need for surgery, and the current state of this image in 2016." Hajjar Deposition, p. 23, ll. 16-20.

42. Dr. Hajjar testified that Claimant was a candidate for revision surgery of the L4-5 disc herniation, and proposed a redo microdiscectomy with the goal of decompressing the nerve by removing the material putting pressure on the nerve.

43. Weighing the expert medical opinions. Defendants maintain that Claimant's enlarged L4-5 disc herniation must be a new injury because Dr. Dazley, Claimant's surgeon, found him fixed and stable in October 2013. Although Dr. Dazley initially considered Claimant fixed and stable as of October 24, 2013, Dr. Dazley's perspective notably changed in May 2014, when he ordered another lumbar MRI because of Claimant's continuing back and leg pain and then recommended lumbar epidural steroid injections.

44. Defendants also criticize Dr. Sirucek for forwarding his report and opinions to various physicians and soliciting their response. Dr. Sirucek however noted that having concluded Claimant needed further treatment for his back and was likely a surgical candidate; he would have been negligent to not have referred Claimant to a surgeon for further evaluation. Sirucek Deposition, p. 108.

45. The weight of the medical evidence is that Claimant's 2012 accident caused L4-5 disk herniation and disc extrusion. Once the disk annular fibers were torn, allowing extrusion of the disc nucleus pulposus, the weakness caused by the tearing of the annular fibers remains. Further disc extrusion may result as a natural progression of the original injury or as the result of new trauma. In the present case there is no evidence of a new trauma causing further L4-5 herniation.

46. Dr. Christensen testified the rate of recurrent disc herniation even with discectomy and disc fragment removal is up to 10%, Christensen Deposition, p. 61, and expressly acknowledged he was aware of no other cause of Claimant's current back symptoms:

> Q. (by Mr. Brown) So you don't have any evidence that would suggest that something other than the loader bucket more likely than not to have been the cause?
>
> A. The cause of his symptoms?
>
> Q. Yes.
>
> A. Yeah. I don't know if that was the cause of the disc herniation. But I know it was the cause of—based on his history, it seems to be the most logical cause of the beginning of his symptoms.
>
> Q. Okay. And his symptoms continued through 2016 when you last saw him, correct?
>
> A. 2017, yes.

Christensen Deposition, p. 70, l. 21 through p. 71, l. 7.

47. The controversy is succinctly summarized by Dr. Sirucek's account of his discussion with Dr. Christensen: "His idea that—that it became larger. And I say yes, but that doesn't mean that the tear wasn't there prior. You have to have a tear before the extrusion. And you have to have an event that causes that tear. So the tear takes a burst of energy to tear through these annular fibers." Sirucek Deposition, p. 105, l. 25 through p. 106, l. 6.

48. Dr. Sirucek testified:

> A herniated disc is a burst of energy. It is not age; it's not normal aging. It is a burst of energy that causes that nucleus to tear through the annular fibers and extruded. It's from the inside of the disc outward. It is not outward inward at all. Normal aging is the outer rim of the disc. So you can have a bulged disc, normal aging, causes no pain.
>
> ….

> So when you have a radial tear, a burst of energy, a strong force, that causes radial tears, something that caused that force of energy.
> ….
>
> I asked him [Dr. Christensen] was he familiar with the past history. He said at that point in time, no. I says, well, would it make a difference if you knew he got hit by this big bucket; that's plenty of energy to cause it. And I said yes. Now, yes, I'm agreeing with that. But those tears were there prior—prior from the date of the injury all along these disc sequences. And those tears are what allows this material to extrude outward.

Sirucek Deposition, p. 106, l. 17 through p. 107, l. 24.

49. The opinions of Dr. Hajjar and Dr. Sirucek are well explained, well supported by the weight of the evidence, and more persuasive than the opinions of Dr Christensen and Dr. Holley.

50. Claimant has proven his entitlement to additional medical care, including lumbar surgery, due to his industrial accident.

## CONCLUSION OF LAW

Claimant has proven his entitlement to additional medical care, including lumbar surgery, due to his industrial accident.

## RECOMMENDATION

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

DATED this 4 day of February, 2019.

INDUSTRIAL COMMISSION

_/s/_____
Alan Reed Taylor, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8 day of February, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PATRICK D BROWN
PO BOX 125
TWIN FALLS ID 83303

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

_/s/_____

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

| | |
|---|---|
| GABRIEL CAPILLA,<br><br>Claimant,<br>v.<br><br>BETTENCOURT DAIRIES,<br><br>Employer,<br>and<br><br>LIBERTY NORTHWEST INSURANCE CORP.,<br><br>Surety,<br>Defendants. | **IC 2012-013605**<br><br>**ORDER**<br><br>**FILED**<br>**FEBRUARY 8, 2019** |

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

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

1. Claimant has proven his entitlement to additional medical care, including lumbar surgery, due to his industrial accident.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8 day of February, 2019.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
Aaron White, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8 day of February, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

PATRICK D BROWN
PO BOX 125
TWIN FALLS ID 83303

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

sc _/s/_____