

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
4. Whether a pre-existing or subsequent injury/condition requires apportionment of medical and income benefits; and
5. Whether the Commission should retain jurisdiction beyond the statute of limitations.

In her opening brief, Claimant, for the first time, raises a claim for attorney fees and costs against Zurich for the reason that Zurich's denial of benefits was unreasonable. However meritorious Claimant's attorney fee claim may appear on the record in this proceeding, it was not raised in a timely manner, and will not be considered by the Commission.

CONTENTIONS OF THE PARTIES

Claimant asserts that she sustained a low back injury as a result of a work-related accident on March 14, 2002 that resulted in the need for surgery on her lumbar spine. Following her surgery, Claimant returned to her time-of-injury employer with some permanent work restrictions. Claimant's low back pain never completely resolved following her surgery, and in September and October of 2005, work activities aggravated or exacerbated her 2002 back injury, which resulted in time loss from work and additional medical care. Claimant contends that she is entitled to medical and time loss benefits from Zurich, the workers' compensation surety for

Basic American, Inc., at the time of her March 2002 injury.

Zurich argues that Claimant had a long history of low back complaints prior to her 2002 injury, that subsequent to her 2002 injury, Claimant was involved in a motor vehicle accident that involved injuries to her back, and that she had a new accident and injury at work in the fall of 2005. At the time of Claimant's 2005 accident and injury, Travelers had undertaken liability of Employer's workers' compensation claims. Because Claimant's current condition is a result of pre-existing conditions, the 2002 injury for which Zurich assumed responsibility, the motor vehicle accident, and fall 2005 work accidents for which Travelers is the surety, any income or time loss benefits to which Claimant may be entitled must be apportioned among the various contributors to her condition and their insurers.

Travelers asserts that all of the medical evidence in the record pertaining to Claimant's lumbar spine relates her current condition back to her March 2002 injury and subsequent surgery, for which Zurich is the responsible surety. There was no industrial accident and Claimant sustained no new injury as a result of events in September and October 2005. Travelers has no liability on the claims at issue in this proceeding.

PROCEDURAL BACKGROUND

Prior to the August 2006 hearing, Claimant filed a Motion for Payment Pending Determination of Policy Coverage. The motion cited to Idaho Code § 72-313, which provides that when a Claimant's entitlement to compensation is not at issue, but there is a question as to liability among one or more employers or sureties, the Commission may order one or more of the sureties or employers to make immediate payment of compensation pending a final determination of liability.

The Parties were given an opportunity to provide written memoranda in response to

Claimant's motion, and the Referee heard oral argument on the motion via a telephonic conference. On April 13, 2006, the Commission entered its Order requiring that Zurich immediately undertake payment of income and medical benefits to Claimant pending the final outcome of the proceedings. Zurich has complied with the Commission's Order and Claimant concedes in her post-hearing brief that Zurich's payment of benefits mooted the issues of payment for medical care and payment of income benefits. Because no physician has declared Claimant medically stable and benefits are being paid, the issue of retention of jurisdiction is moot as well.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Mike Patten, taken at hearing;
2. Joint Exhibits 1 through 29 admitted at hearing; and
3. Post-hearing depositions of Gary C. Walker, M.D., and David C. Simon, M.D.

Objections made at pages 24 and 52 of the deposition of Dr. Simon are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 28 years of age, and the mother of three children, ages nine, six, and three.
2. As noted by all of the parties at the hearing, Claimant is not a reliable historian; the medical records provide the best evidence of Claimant's medical history.
3. Before going to work for Basic American, Inc., Claimant had been employed as a nurse assistant at two different care facilities in Idaho Falls. During the course of her

employment as a nurse assistant, she had sustained three work-related injuries involving her lumbar spine. The first of these occurred December 30, 1997, while she was transferring a patient from bed to a wheelchair. She was diagnosed with a back strain and was released without restrictions on January 14, 1998.

4. In January 1999, Claimant was dressing a patient and hurt her low back. X-rays showed slight narrowing of the lumbosacral interspace, but was otherwise normal. Claimant was placed on light duty, underwent physical therapy, and was released without restrictions on March 18, 1999.

5. In December 1999, Claimant once again injured her low back while assisting with a patient. Claimant's diagnosis, treatment, and recovery was complicated by a pregnancy, which precluded any radiologic studies and most pain medications. During the course of her pregnancy, she reported pain in her lower extremities, first the right, and then later on the left. After her delivery, Claimant underwent an MRI on October 3, 2000. It showed desiccation at L3-4, L4-5 and L5-S1, broad-based disc bulges at the same levels, an annular tear at L4-5, and some foraminal narrowing at L5-S1 on the right side. The MRI did not show any significant central canal or left foraminal stenosis in the lumbar spine. Dr. Simon believed that Claimant's complaints were caused by dysfunction in her sacroiliac (SI) joints and was made worse by her pregnancy. He placed Claimant on light duty, and ordered physical therapy. On April 10, 2001, Dr. Simon found Claimant to be at maximum medical improvement (MMI), although she continued to have some mild tenderness associated with her SI joints and in her lumbar spine. She was released without restrictions.

MARCH 14, 2002 ACCIDENT, INJURY, AND MEDICAL CARE

6. On March 14, 2002, while working for Employer, Claimant injured her low back

while placing fifty-pound bags of pearl potatoes on pallets. An MRI performed the following day showed an acute paracentral left-sided disc rupture at L4-5. Initially, she was treated conservatively, but by mid-April Claimant's condition worsened, with radicular pain in both lower extremities, and on April 19, she underwent bilateral laminectomies and discectomies at L4-5. Robert Cach, M.D., neurosurgeon, performed the surgery. Dr. Cach's records end on May 1, 2002, when he released Claimant to return to restricted work starting May 6 with a four-week schedule of increasing hours and decreased lifting restrictions.

7. Dr. Simon picked up Claimant's post-surgical care on May 13. He modified Claimant's return to work schedule and lifting restrictions. Claimant returned to work pursuant to the schedule, but still complained of intermittent low back pain, which Dr. Simon described as normal post-operative complaints.

8. On September 17, 2002, Dr. Simon declared Claimant to be at MMI, and awarded her permanent partial impairment (PPI) of 10% of the whole person pursuant to *Guides to the Evaluation of Permanent Impairment*, 5th Ed. (DRE Category III, Table 15-3, p. 384). Permanent restrictions were: medium exertion level, lifting up to 50 pounds occasionally, and up to 25 pounds frequently. Claimant could bend and twist frequently so long as lifting was not involved.

9. Claimant returned to Dr. Simon in January 2003. She reported that she was still having pain in her low back that was made worse by her work. Claimant was twelve weeks pregnant, but her obstetrician did not believe that the back pain was related to the pregnancy. Because of her condition, Dr. Simon could not do radiologic studies to look for lumbar pathology or prescribe medications that might alleviate Claimant's symptoms. He did decide that the permanent work restrictions he had imposed upon Claimant in September were probably

too liberal. Dr. Simon increased Claimant's permanent restrictions, including no lifting over 35 pounds, up to 35 pounds occasionally and 15 pounds frequently. Claimant could bend and twist occasionally if it did not involve lifting. She should avoid any position that required her low back to remain in a flexed position for prolonged periods, such as leaning over a table, and should alternate sitting and standing.

10. In April 2003, Claimant saw Eric Walker, M.D. upon referral by Ty Erickson, M.D.¹ She presented to Dr. Walker with significant ongoing low back complaints and also bilateral lower limb pain. Based on Claimant's reported history, Dr. Walker's impression was that Claimant had a work injury in March 2002 that resulted in surgery by Dr. Cach and that she had chronic low back complaints that persisted despite the surgery. He noted that Claimant's pregnancy complicated treatment options, and confounded efforts to sort out whether her complaints were related to the pregnancy or other pre-existing conditions. Finally, he noted that Claimant had no conclusive neurologic findings. Dr. Walker did not have access to any of Claimant's prior medical records and based his conclusions strictly on his exam and Claimant's report of her medical history.

11. In August 2003, following the successful conclusion of her pregnancy, Claimant returned to Dr. Simon. Dr. Simon continued to believe that Claimant's low back complaints were related to her industrial accident. He ordered an MRI and x-rays with extension and flexion to assure that there was no new pathology. Both the x-rays and the MRI were negative, so Dr. Simon began treating Claimant's SI joints, including an epidural steroidal injection (ESI) in the right SI joint. Claimant's symptoms improved in her right leg, but her left leg became more symptomatic, so Dr. Simon administered an ESI in the left SI joint.

¹ The record is devoid of any medical records from Dr. Erickson. We do not know his area of practice, or how Claimant came to see him.

12. Claimant returned to work following her pregnancy in mid-September and two days later, on September 25, again saw Dr. Simon. She reported that the injections had not helped and returning to work made her low back symptoms more severe. Dr. Simon sent Claimant back to Dr. Cach for a consultation. Dr. Cach had nothing further to offer Claimant, and Dr. Simon was out of treatment options. He released her from care on November 3, 2003, stating that her back was not normal, there was nothing more to be done about it, and it was the result of her March 2002 industrial accident.

NOVEMBER 2003 TO AUGUST 2005

13. In May 2004, Claimant was involved in a motor vehicle accident. She was the passenger in a vehicle that was rear-ended. Dr. Gary Walker treated Claimant from May 27, 2004 through March 2005, primarily for complaints of neck pain. Dr. Walker's chart notes do mention low back complaints, but they are consistent with the low back complaints that Claimant had before the motor vehicle accident. Dr. Walker released Claimant on March 29, 2005.

AUGUST 2005 TO AUGUST 2006

14. In August or September 2005, the production line Claimant normally worked on was not running, so she was reassigned to a job that required pushing a broom. Sweeping made her back pain worse. She continued to work despite the pain until September 13. On that date, Claimant visited the emergency room at Bingham Memorial Hospital (BMH) in Blackfoot, complaining of low back pain. She was treated and released and worked off and on until October 10. On that date, Claimant was packing product into boxes.² Her back hurt and she found a place to sit down and then she couldn't move. She was taken by ambulance to the ER at BMH. X-rays taken showed the prior laminectomy, and moderate disc narrowing and mild

² The product that was being packed weighed five pounds or less per package.

osteophytic lipping at L3-4 and L4-5, but was otherwise negative. Claimant was advised to follow up with Dr. Simon.

15. On October 20, 2005, Claimant returned to Dr. Simon; she reported continued low back pain radiating down her right leg all the way to her foot. The leg pain was new since September 13. Claimant also reported pain in her upper left leg. Dr. Simon's impressions are illuminating:

Chronic low back pain, status-post L4-5 discectomy in 2002. She either had an exacerbation or aggravation of her low back pain around September 13. I did not have any records from the recent emergency room visits to get any more details. This may be as simple as a temporary flare up which can be resolved with steroids to treat the inflammation [sic; inflammation?], or it may indicate any more significant problems such as a recurrent disc herniation. There is not an obvious radiculopathy present at this time. I would recommend trying treatment with oral steroids and obtaining the recent emergency room records before determining if any further radiologic studies will be needed at this time, or whether any more aggressive treatment will be needed. In the long run, if she continues to have repeated exacerbations or aggravations of her low back problems, she may need to consider last [sic; less?] physical work.

Defendants' Ex. 17, p. 092.

16. Claimant returned to Dr. Simon on October 31 after completing a course of oral steroids. She reported improvement while on the steroids but a return of her pain the day after she finished the steroids. Dr. Simon noted that Claimant's improvement indicated some inflammatory component to her complaints, but ordered an MRI. The MRI showed an abnormality at L4-5 on the left side and a small disc bulge at L5-S1, neither of which involved any nerve impingement. Dr. Simon observed in his chart note that it was possible that a supine MRI might not show impingement that might occur with activity. He did not feel that a myelogram was appropriate, but did order flexion and extension x-rays, which were negative.

17. Claimant called Dr. Simon's office on December 14, and reported she was having severe back pain. She was seen in the office the following day. Dr. Simon continued to

diagnose chronic low back pain following her L4-5 discectomy in 2002. When Claimant was no better by early January 2006, Dr. Simon ordered a myelogram. While the results of the myelogram demonstrated that Claimant's back was not normal, it did not provide any objective evidence of any pathology that could cause her complaints. Dr. Simon sought to have Claimant re-evaluated by Dr. Cach.

18. Claimant saw Dr. Cach on February 7, 2006. Dr. Cach's chart note includes the following history:

Has been out of work for 5 months because of back pain. She cannot perform her work activities at this time which involves a lot of manual labor. She has bilateral leg pain worse on the left. Leg pain is not in a specific radicular pattern. Back pain is much worse than leg pain and leg pain is infrequent. Back pain appears mechanical in nature based on clinical history given to me by the patient. Has been on steroids and lidoderm patches which really [sic] have not helped. Has not had epidural steroid injections. Has not had PT but does home exercises.

Defendant's Ex. 19, p. 115. Dr. Cach reviewed her myelogram results, noting the collapse of disc space at L4-5. Based upon his review of the myelogram and his examination of Claimant, he concluded that "her pain is most likely due to DDD [degenerative disc disease] at L4-5 and is related to the original injury for which she had surgery . . ." *Id.*, at p. 117. He prescribed physical therapy.

19. On February 21, 2006, Dr. Simon wrote to counsel for Travelers. Defendants' Ex. 24. In his letter, Dr. Simon opined that it was more likely than not that Claimant's low back problems were the result of her March 2002 work injury and the subsequent surgery. He further opined that incidents in August 2005 and September 13, 2005 were not new injuries, but were flare-ups of her chronic low back problems.

20. Claimant returned to Dr. Simon for at least three more visits on March 9, April 6, and May 2, 2006. The May 2 record is the last documented visit with Dr. Simon. Claimant's

condition was unchanged through these visits, and the chart notes center around finding medications that might singly, or in combination, provide some relief for Claimant. Claimant had not pursued physical therapy because she could not afford it. As of the date of hearing, Claimant had not been released to return to work.

DISCUSSION AND FURTHER FINDINGS

21. The burden of proof in an industrial accident case is on the claimant.

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

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

22. Claimant has presented medical evidence from both Dr. Simon and Dr. Cach, her two primary treating physicians for her low back, that it is more likely than not that Claimant's current low back problems are the result of her 2002 accident and subsequent surgery. Both doctors treated Claimant over a long period of time and were familiar with Claimant's medical history prior to her March 2002 accident. They were both able to monitor and observe changes in her condition. Both had access to numerous imaging studies and were able to compare them over time. Both were familiar with the kind of work she did for Employer.

More importantly, *no* defendant introduced *any* evidence, medical or otherwise, that casts doubt on either Dr. Simon or Dr. Cach or their respective opinions as to the cause of Claimant's low back complaints in 2006.

23. Zurich argues that Claimant's current problems were the result of a combination of her pre-existing back injuries, her 2002 work injury, her motor vehicle accident, and new accidents and injuries that occurred in the autumn of 2005. While not disputing that Claimant is entitled to additional medical care and income benefits, Zurich cites to *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006), for the proposition that Zurich cannot be held liable for medical expenses unrelated to any on-the-job accident.

24. The medical records show that following each of Claimant's low back injuries in 1997 and 1999 she was released without restrictions and returned to her time-of-injury employment. While recovery from her December 1999 injury took additional time because of an intervening pregnancy, Claimant started working for Employer on January 18, 2001, without accommodation and without restrictions, even though she was not released from care until two-and-a-half months later, on April 1, 2001. Claimant worked for Employer for fourteen months without restrictions or accommodations before her March 2002 accident. Zurich presented no medical evidence that contradicts the record that Claimant was able to perform her work for Employer prior to March 2002.

Claimant was involved in a motor vehicle accident in May 2004. The records of Dr. Gary Walker focus primarily on injuries to Claimant's cervical spine. The records do make reference to occasional low back complaints, but such complaints were of the same type and nature that Claimant had consistently reported since her March 2002 accident and surgery. Zurich presented no medical evidence that suggests that Claimant sustained any new low back injury or aggravated or exacerbated her pre-existing low back injury as a result of the motor vehicle accident.

Finally, in the autumn of 2005, Claimant on two occasions experienced low back pain so

severe that it forced her to the emergency room. Zurich asserts that these incidents constituted new accidents and injuries.

“Accident” means 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). “Injury” is defined by Idaho Code § 72-102(17)(a) and (c):

(a) “Injury” means a personal injury caused by an accident arising out of and in the course of any employment covered by worker’s [sic] compensation law.

* * *

(c) “Injury” and “personal injury” shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

Nothing in the record provides any evidence to support Zurich’s assertion that Claimant had accidents or sustained injuries as those terms are defined by statute, in the autumn of 2005. After reviewing a new MRI, new x-rays, and a myelogram, Dr. Simon specifically opined that Claimant did not sustain any new injuries in the fall of 2005. Her renewed complaints were, at most, aggravations or exacerbations of her pre-existing condition, specifically, the deterioration in her lumbar spine that was the result of her 2002 injury and subsequent surgery.

25. While the record in this proceeding does contain evidence regarding Claimant’s pre-2002 low back injuries, her motor vehicle accident, and her renewed complaints in the fall of 2005, no physician who has had any involvement in Claimant’s treatment history has related Claimant’s current low back pain and need for treatment to any cause other than her March 2002 injury and subsequent surgery. The facts in this case fall squarely within the Court’s analytical framework set out in *Henderson*, and place liability for Claimant’s treatment and other statutory benefits squarely upon Zurich, the surety for the 2002 accident.

CONCLUSIONS OF LAW

1. Claimant's low back complaints are not the result of injuries or conditions that pre-existed her March 2002 industrial injury, nor are they the result of subsequent injuries or conditions.

2. Claimant's existing condition is solely attributable to her March 2002 industrial accident.

3. Because Claimant's condition is not the result of pre-existing or subsequent injuries or conditions, apportionment of benefits is unnecessary.

4. Claimant is entitled to statutory medical and time loss benefits, which are being paid by Zurich.

5. The issue of retention of jurisdiction is not ripe for decision, as benefits are being paid and Claimant is not medically stable.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 22 day of December, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of January, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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5. The issue of retention of jurisdiction is not ripe for decision, as benefits are being paid and Claimant is not medically stable.

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

DATED this 5 day of January, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

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