

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELLE STROPE,

Claimant,

v.

KOOTENAI MEDICAL CENTER, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Surety,
Defendants.

IC 2011-003968

ORDER

Filed June 22, 2016

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 not proven that her current need for a lumbar MRI and potential additional medial treatment of her lumbar spine are due to her 2011 industrial accident.
2. Claimant has not proven that due to her industrial accident, she is entitled to additional temporary disability benefits.
3. Claimant has not proven her entitlement to an award of attorney fees.

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

DATED this 22nd day of June, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
R.D. Maynard, Chairman

_____/s/_____
Thomas E. Limbaugh, Commissioner

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

LEA KEAR/ MATTHEW VOOK
PO BOX 6358
BOISE ID 83707-6358

sc

_____/s/_____

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed June 22, 2016

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 Coeur d'Alene on December 1, 2015. Claimant, Michelle Strobe, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Kootenai Medical Center, Inc. (KMC), and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Lea Kear, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 23, 2016.

ISSUES

The issues to be decided are:

1. Claimant's entitlement to medical care due to her industrial accident;
2. Claimant's entitlement to temporary disability benefits due to her industrial accident; and

3. Claimant's entitlement to attorney fees.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant suffered an industrial accident causing lumbar disc reherniation on January 13, 2011, while working for KMC. She underwent lumbar discectomy in June 2011, but alleges she never reached maximum medical improvement thereafter. She seeks further medical benefits, including lumbar MRI and possible additional medical treatment, and temporary disability benefits. Claimant also asserts Defendants have unreasonably denied further medical care and are thus liable for attorney fees.

Defendants acknowledge Claimant's industrial accident and have paid for her June 2011 discectomy but assert that Claimant became medically stable in September 2011, has received appropriate permanent impairment benefits, and is entitled to no further medical or temporary disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant taken at hearing;
3. Claimant's Exhibits A-Q, U, V, and X admitted at hearing;¹
4. Defendants' Exhibits A-M admitted at hearing; and
5. The post-hearing deposition testimony of Bret Dirks, M.D., taken by Claimant on December 15, 2015.

¹ Claimant's Exhibits R, S, T, and W were denied admission at hearing due to relevance because they addressed Dr. Larson's medical opinions involving individuals other than Claimant.

All pending objections are overruled. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1965. She was 50 years old and resided in Post Falls at the time of hearing. She is a registered nurse.

2. **Background.** At age 18 Claimant was involved in a motor vehicle accident and was hospitalized for 11 days. In 1992, she was involved in another motor vehicle accident. She attended nursing school at North Idaho College and became licensed as a nurse in Idaho and Washington in 1994. Claimant also completed her bachelor's degree in nursing in 2002.

3. In 2002, Claimant began working at KMC as a registered nurse. She trained in all units at the hospital and eventually worked as a float pool nurse. Claimant was also a clinical nursing instructor for nurses in training.

4. In approximately 2004 Claimant fell while skiing. Thereafter she noted periodic back pain and reported that her back "went out" every four to six months. Claimant's Exhibit X, p. 562. From 2005 through 2010, Claimant received more than 150 chiropractic treatments from Charlene Stoddard, D.C., for back pain and, at times, acute sciatica radiating down her left leg.

5. In 2009, Claimant was hit by a car. The record contains almost no information about this event.

6. On March 11, 2010, Claimant noted sharp back pain radiating to her left hip when bending over and picking up a bucket at home. She presented to her family physician, Allen Seely, M.D., who diagnosed lumbar strain. However, her symptoms did not resolve and she

sought treatment from Jeffrey Larson, M.D. A March 17, 2010 lumbar MRI revealed degenerative disc disease at multiple levels, including L5-S1.

7. On June 11, 2010, Claimant underwent bilateral L5-S1 discectomy by Dr. Larson.² She recovered with no radicular leg pain, although she noted continued intermittent back pain. On September 1, 2010, Dr. Larson recorded Claimant's Oswestry score was 34%,³ and released her to return to work as a nurse performing her usual duties, including transferring patients. Claimant returned to work and by January 2011, was performing her usual duties as a nurse at KMC.

8. **Industrial accident and treatment.** On January 13, 2011, Claimant was working in the progressive care unit at KMC. She helped lift a patient and felt immediate pain in her low back at the same level as the scar from her prior surgery. Claimant immediately reported her injury. She attempted to continue working; however, over the next several days she developed progressive low back and left buttock pain. She was sent to Michael Ludwig, M.D., KMC's occupational health physician.

9. On February 7, 2011, Claimant presented to Dr. Ludwig who recommended conservative treatment. Her back pain did not improve and on February 28, 2011, she received a lumbar MRI which the reporting radiologist and Dr. Ludwig believed showed no structural change from her 2010 MRI. On March 7, 2011, Dr. Ludwig assessed lumbar strain. Claimant underwent physical therapy and chiropractic treatments without significant relief. By April

² At hearing Claimant's counsel characterized this as "a non-industrial surgery." Transcript, p. 17, l. 16.

³ The Oswestry Disability Index uses a self-reported back pain disability questionnaire to quantify how low back pain affects a patient's everyday life. It is medically considered a worthwhile outcome measure. Scoring of 0-20% indicates minimal disability, 21-40% moderate disability, 41-60% severe disability, and 61-80% crippled. Claimant's Exhibit V, pp. 498-502.

2011, when her condition remained unchanged with conservative treatment, she requested a second opinion from Dr. Larson, who had performed her prior surgery.

10. On May 11, 2011, Claimant presented to Dr. Larson. Her Oswestry score was 62%. Dr. Larson reviewed her February 2011 MRI and noted L5-S1 recurrent disc herniation on the left, not mentioned in the radiologist's report. Dr. Larson contacted the radiologist who then reviewed the films and provided an addendum to the original radiology report, identifying a questionable recurrent disk fragment at L5-S1 adjacent to the S1 nerve root. Dr. Larson recommended left L5-S1 discectomy. On June 6, 2011, Dr. Larson performed lumbar surgery. The operative report noted a disc fragment at L5-S1 which Dr. Larson removed.

11. On June 13, 2011, KMC terminated Claimant's employment as she was unable to return to her usual work duties. From approximately June through August 2011, Claimant worked an average of 50 hours per week as director of nursing for Beehive Homes.

12. On July 19, 2011, Claimant's Oswestry score was 66%. She noted modest improvement after surgery; however, she remained symptomatic. Dr. Larson noted that Claimant had returned to work. He prescribed a TENS unit and Claimant participated in physical therapy. Her strength improved; however her pain persisted. Surety provided a TENS unit for Claimant, which she used but found only minimally helpful.

13. On September 7, 2011, Dr. Larson recorded Claimant had no pain with straight leg raising, and was ready for a permanent impairment rating. Dr. Larson indicated Claimant attained medical stability on September 2, 2011, and rated her permanent impairment at 7% of the whole person, attributing 5% to her pre-existing condition and 2% to her 2011 industrial accident. Surety advised Claimant that her treatment with Dr. Larson was completed.

14. On September 28, 2011, Claimant presented to Dr. Seely because of her ongoing back pain. He diagnosed left sciatica and recommended a lumbar MRI. He also prescribed Hydrocodone and acetaminophen.

15. On October 17, 2011, Claimant wrote a letter seeking an appointment with Richard Gascoigne, M.D. Her letter recounts her January 13, 2011 accident at KMC and then states: “This is my second back injury in less than a year at this facility and it did result in corrective surgery both times.” Claimant’s Exhibit K, p. 215.⁴ Dr. Gascoigne checked with the Surety and then declined to schedule her appointment, advising her that the Surety reported her worker’s compensation claim was closed.

16. From October 2011 through 2015, Claimant worked for various periods. She actively sought nursing positions that did not require lifting patients. Claimant used a variety of conservative measures—including hot showers, heating pads, and ibuprofen—to manage her increasing back pain. In spite of these efforts, Claimant was not able to continue working full-time due to her back pain and had to leave her employment.

17. From January through August 2012, Claimant worked an average of 50 hours per week as a nurse case manager at SCHH/Rockwood HH.

18. On March 7, 2012, Claimant presented to Dr. Stoddard for chiropractic treatment reporting she was trying to work around her house and exacerbated her January 2011 injury.

19. In July 2012, Claimant was involved in an auto accident with a front collision at ten miles per hour. She received chiropractic treatment.

20. In December 2012, Claimant scheduled an appointment to return to Dr. Larson’s office. Claimant understood she would be examined by Dr. Larson. However, upon arriving,

⁴ The record contains only one report of a back injury at KMC—that of January 13, 2011.

Claimant learned Dr. Larson was on vacation and Claimant was examined by Dr. Larson's nurse practitioner, Holly More, NP-C, who recorded Claimant's gross Oswestry score of 35 and advised her that she needed an MRI. The Surety refused to approve the MRI.

21. From January through July 2013, Claimant worked an average of 40 hours per week as a nurse consultant for the State of Washington. In March and April 2014, she worked an average of 40 hours per week as director of nursing at Moran Vista.

22. From approximately March through June 2014, Claimant attempted to establish a medical consulting business from her own home. However, this was not steady employment as she only consulted for about 30 hours total in three month's time.

23. On June 23, 2014, Claimant was examined by Sarah Hartzell, PA-C, who recorded Claimant's report that she had been pushed down and assaulted around June 8, 2014, and "was not able to sleep for 3 nights related to her pain." Claimant's Exhibit M, p. 258. Her chiropractor recommended x-rays before working on her back. Claimant complained of mid-back pain, but denied low back pain.

24. From October through December 2014, Claimant worked an average of 50 hours per week as director of nursing at The Bridge.

25. On November 10, 2015, Brett Dirks, M.D., examined Claimant, at her counsel's request, and subsequently recommended a lumbar MRI. Defendants again refused to authorize the MRI.

26. **Condition at the time of hearing.** At the time of the hearing, Claimant had continuing left foot numbness, tingling in her left three smallest toes, and pain in her left foot. She also experienced back pain that radiated into her buttocks. She noted some thoracic and cervical pain. Her back pain alternated from right-sided to left-sided, and occasionally

bilaterally. Sitting increased her back pain, as did bending, lifting, pulling weeds, and putting laundry in the dryer. Claimant continued to seek medical consulting work, but had located nothing in 2015.

27. **Credibility.** Having observed Claimant at hearing, and carefully compared her testimony with other evidence in the record, the Referee finds that Claimant is generally a credible witness.

DISCUSSION AND FURTHER FINDINGS

28. 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).

29. **Medical care.** The first issue is whether Claimant is entitled to further medical care due to her 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. Thus, 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.

30. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court overruled in part Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), regarding the determination of reasonable medical treatment, stating:

[T]he central holding of Sprague, which remains valid, is simply: “It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable.” 116 Idaho at 722, 779 P.2d at 397.

The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

Chavez, 158 Idaho at 797-798, 353 P.3d at 418-419.

31. Of course, even though the injured employee's treating physician may require the treatment, 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, 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). Thus Claimant's requests for medical benefits herein must be supported by medical evidence establishing causation.

32. Claimant asserts that she requires further medical treatment for her low back. She requests a lumbar MRI and additional medical treatment, including but not limited to possible chiropractic care, depending on the results of the MRI. Defendants acknowledge that Claimant may well need a lumbar MRI, but assert she has not proven that such need is due to her industrial accident, rather than to her pre-existing degenerative condition. Claimant must not only prove she needs a lumbar MRI, but must also prove she needs the lumbar MRI because of her industrial

accident. Several medical practitioners have addressed Claimant's asserted need for additional medical care.

33. Dr. Seely. Dr. Seely recommended Claimant receive an MRI and referred her to Dr. Larson for her non-industrial lumbar surgery in 2010. After her June 2011 industrial-related lumbar surgery, Dr. Seely examined Claimant on September 28, 2011. He observed positive straight leg raising on the left at 60 degrees and assessed left sciatica. He recorded: "Needs F/U MRI recommend consult." Claimant's Exhibit D, p. 73. While Dr. Seely recommended an MRI, he did not specify whether Claimant's need for an MRI was related to her industrial accident.

34. Linda Moore. Linda Moore, NP-C, nurse practitioner for Dr. Larson, examined Claimant on December 13, 2012, and recorded:

Michelle R. Strobe is here for new consultation. Mrs. Strobe presents with complaints [of] low back pain and that has progressed to left leg pain and tingling over the last 2 months. She reports she had recently done some painting and flooring in her home and noticed an increase in symptoms following this. She reports she feels the left knee feels weak. She had a lumbar Discectomy Left L5/S1 on 6/6/2011 following a work injury, which the case is closed. The symptom location/locations is/are low back, radicular left lower extremity. Symptom specifics are: left, L3. Anterior thigh pain and numbness around the left knee. In general, the symptoms have been inhibiting most activities, worsening.

Claimant's Exhibit H, p. 176.

35. Although Nurse Moore recorded Claimant's acknowledgement of prior low back problems, there appears to be no indication that Nurse Moore was informed of Claimant's June 2010 bilateral L5-S1 discectomy. Nurse Moore found no pain with straight leg raising. She diagnosed low back pain and left L3 radiculopathy and recommended a lumbar MRI. She did not specify that the need for an MRI was caused by Claimant's January 2011 industrial accident, rather than by her home painting and flooring. Claimant mentioned re-opening a worker's

compensation claim to which Nurse Moore responded that all such proceedings would have to be done through Claimant and her case manager.

36. Dr. Dirks. Board certified neurosurgeon Bret Dirks, M.D., examined Claimant at her counsel's request on November 10, 2015, and issued a report noting: "The patient states she sustained a work-related injury in January of 2011 with subsequent surgery in June of 2011 which was a re-exploration and diskectomy on the left at L5-S1. She previously had a bilateral L5-S1 diskectomy in 2010 as well." Claimant's Exhibit N, p. 272. Dr. Dirks made no mention of straight leg raise testing but assessed "Left L4-5 lumbar radiculopathy" and concluded: "I think Michelle has clearly had persistent pain since her previous surgery which was Worker's Compensation related. I think her current problem is related to her old surgeries and her Worker's Compensation should be reopened." Claimant's Exhibit N, p. 273. He recommended a lumbar MRI.

37. In his post-hearing deposition, Dr. Dirks testified:

A. I think she needs an MRI. I think you can relate it back to her previous injury.

Q. Okay. Can you discuss your opinion with regards to the causal nature of having the industrial accident in January of 2011, the surgery in June of 2011, and then not being symptom free or making improvement through today. I mean--

A. I think the bottom line is ... if I just want to look at the medical aspects of the case ... this patient comes to see me, I'm going to say you need an MRI until we can further delineate what is going on in your lower back. She has had two back surgeries. She has had really persistent symptoms during that time. Honestly, I don't know what is going on in her back until I see an MRI. And that's kind of the bottom line. So if the workers [sic] compensation insurance company has accepted the claim of January 13th, 2011—then if they accepted a claim at that time, then I would relate her current symptomatology back to that claim until we get the MRI. Once the MRI is obtained, then we can gather—we can—or I can make some sort of determination of whether or not it absolutely was related to this claim or whether it's a new problem. But until we have the MRI, that's not possible, unequivocally.

Q. How about the fact that she didn't improve after the June 2011 surgery, maintain having those same symptoms, if not more?

A. I think I tried to make it very clear. I relate it back to the January 2011 injury until I see the MRI. Let's say we get the MRI, everything looks clean, it's just scar tissue and she has persistent radiculopathy secondary to nerve injury, then certainly surgery would not be warranted. But I am making a conjecture that is not even possible at this stage. I don't know.

Q. Okay.

A. Maybe she has a herniated disk at L1,2 that's completely unrelated to the previous injury. I don't know. Until I see an MRI, it is impossible to make the determination. It's as clear as I can state it. On a more probable than not basis, I would relate her current symptoms back to the January 2011 injury, which has been accepted by Liberty Mutual, until after the MRI is obtained to make a determination is it related or not.

Dirks Deposition, p. 10, l. 7 through p. 12, l. 23 (emphasis supplied).

38. Dr. Larson. Dr. Larson first examined Claimant on April 7, 2010, and recorded her "longstanding history of low back pain intermittently for the last 5-10 years. She has episodes every 6 months wear [sic] her back 'goes out.'" Claimant's Exhibit H, p. 137. He encouraged Claimant in conservative treatment measures and epidural steroid injections. Ultimately Dr. Larson performed Claimant's June 11, 2010 L5-S1 bilateral discectomy. He recorded her significant improvement, but also her continued low back pain post-surgery.

39. On May 11, 2011, Dr. Larson examined Claimant again for increased low back pain and left buttock pain after her January 13, 2011 lifting injury at KMC. He found pain with straight leg raising and upon reviewing Claimant's February 2011 MRI, Dr. Larson recognized a recurrent L5-S1 disc herniation that had not been identified by the radiologist or by Dr. Ludwig. On June 6, 2011, Dr. Larson performed left L5-S1 discectomy. By July 19, 2011, Claimant's buttock pain was reduced and she had no pain with straight leg raising. Dr. Larson prescribed a TENS unit after reviewing the physical therapist's recommendation.

40. On September 7, 2011, Dr. Larson found Claimant medically stable with guarded lumbar range of motion, intermittent low back and left buttock pain, but no pain with straight leg raising. He noted her pre-accident MRI showed degenerative disease at L3-4 and L4-5 with annular tears, and degenerative disease at L5-S1. Also on September 7, 2011, Dr. Larson met with Claimant's physical therapist who agreed that Claimant had reached maximum medical improvement from her January 2011 industrial accident. Dr. Larson rated Claimant's permanent impairment at 7%, with 5% attributable to her pre-existing degenerative disc disease and prior L5-S1 discectomy, and 2% attributable to her January 2011 accident at KMC.

41. On October 10, 2011, Dr. Larson agreed with the recommendation of physical therapist Ann Simonich, D.P.T., that Claimant receive six weeks of additional physical therapy to address her low back pain; decreased core, lower extremity, and postural strength; and difficulty walking due to her industrial accident. Apparently neither Claimant nor Defendants were informed of this recommendation or Dr. Larson's agreement therewith until November 2015. Claimant did not receive the recommended therapy and does not appear to presently request such therapy.

42. By letter dated April 9, 2013, Claimant's former counsel requested Dr. Larson's opinion as follows:

In other words, if you believe that Ms. Strobe has had additional symptoms in her lower back that warrant further study, as your office stated per your nurse practitioner on 12-13-12 that a new MRI was indicated, then I would ask you to address yourself to that question by sending a copy of this letter with the appropriate box marked.

Claimant's Exhibit H, p. 180. In response to the letter's statement: "I believe Michelle Strobe has had additional symptoms from her industrial accident of 2-4-11 [sic] that warrant further

study by MRI, notwithstanding that I previously felt that she was at a fixed and stable condition at an earlier time,” Dr. Larson checked the box: “I disagree.” Claimant’s Exhibit H, p. 181.

43. Weighing the medical opinions. Dr. Larson disagreed that Claimant’s present need for a lumbar MRI was due to her industrial accident. He was apprised of Claimant’s medical history, including five to ten years of low back pain and sciatica with her back going out every six months prior to her 2010 L5-S1 discectomy. He performed both of her lumbar surgeries. Claimant correctly observes that Dr. Larson has not examined her since 2011, thus his opinion is dated and subject to dispute. However, it is not Defendants’ burden to prove the industrial accident did not cause Claimant’s need for the medical treatment she now requests. Rather, Claimant bears the burden of proving her present need for medical treatment was caused by her industrial accident.

44. Dr. Seely, Nurse Moore, and Dr. Dirks have each recommended the lumbar MRI that Claimant requests. However, Dr. Seely and Nurse Moore have not indicated whether the need for a lumbar MRI is due to Claimant’s industrial accident or to other causes. Nurse Moore’s note recommending an MRI also mentions Claimant’s increased back symptoms after painting and doing flooring work in her home.

45. Only Dr. Dirks has related Claimant’s need for a lumbar MRI to her industrial accident. Defendants assert that Dr. Dirks’ opinion is not persuasive because he was not informed of Claimant’s extensive pre-existing lumbar condition. Dr. Dirks’ conclusion is undermined by his repeated acknowledgement that until the MRI is performed; he cannot determine whether Claimant’s symptoms are related to her industrial accident or to another cause. His current causation conclusion is, at best, tentative. As Defendants note, Claimant suffers from preexisting degenerative disc disease, which is by nature progressive and Dr. Dirks’

opinion is similar to the position the Commission found unpersuasive in Lawson v. Addus Healthcare, Inc., 2015 WL 1774300 (Idaho Ind. Com. 2015) (“while a repeat MRI would show anatomy, it would not ... demonstrate a causative relationship between the MRI findings and [Lawson’s] fall in January 2013.”).

46. Equally if not more concerning, Dr. Dirks’ conclusion is also open to dispute because he failed to review and familiarize himself with Claimant’s extensive pre-existing medical records. Claimant’s counsel provided and requested that Dr. Dirks review a number of Claimant’s pre-existing medical records prior to his deposition; however, Dr. Dirks failed to do so. At his deposition, Dr. Dirks testified regarding the medical records Claimant provided:

Mr. Kelso showed me this about three minutes before I walked in here. I didn’t review it. As I said I have not—this was sent to my office and he wanted me to review it. But again, I am not an attorney’s doctor so I don’t review charts unless I am going to have a reason to do it. I did not review it.

Dirks Deposition, p. 19, ll. 18-24. On redirect, Dr. Dirks acknowledged that he probably reviewed some of Claimant’s prior medical records provided to him by Claimant’s counsel before agreeing to examine Claimant, “But from the standpoint that she had something going on, that’s what I would have reviewed.” Dirks Deposition, p. 23, ll. 2-4. When expressly questioned, Dr. Dirks did not know what he would have looked at and nothing stood out in his mind. He confirmed that the primary basis for his opinion was his November 10, 2015 examination of Claimant and her brief self-reported history at that time.

47. Claimant’s pre-accident medical records establish her extensive history of pre-existing low back issues. She received more than 150 chiropractic treatments for low back pain and sciatica between 2005 and 2010. Her pre-existing degenerative lumbar disc disease eventually requiring L5-S1 discectomy by Dr. Larson in 2010 was clearly documented by her March 17, 2010 lumbar MRI thus:

L3-4: Broad based disc protrusion is present The anterior thecal sac is deformed with a concave margin. There is encroachment on the origin of both L4 nerve roots.

L4-5: Diffuse minimal annular bulging and central annular fissuring are present but there is no disc protrusion

L5-S1: Broad based disc protrusion is accompanied by more central component with minor caudad migration posterior to the S1 vertebral body. There is no disc extrusion or free fragment. This contacts the thecal sac in the origin of the left L5 nerve root and causes minimal deviation of the left S1 nerve root.

Defendants' Exhibit D, p. 80. Notably, the medical records comprising Exhibit 1 to Dr. Dirks' Deposition do not contain Claimant's 2010 lumbar MRI or any records of her 150 chiropractic treatments for low back pain and sciatica prior to 2011. The foundation of Dr. Dirks' opinion is materially lacking.

48. Claimant's industrial accident required L5-S1 re-exploration and discectomy. More than a year after the L5-S1 re-exploration and discectomy, Nurse Moore diagnosed L3 radiculopathy. Nearly three years after Nurse Moore's diagnosis, Dr. Dirks diagnosed L4-5 radiculopathy. Neither diagnosis appears on its face to correspond to Claimant's industrially caused L5-S1 recurrent herniation and resulting discectomy. Thus it is not clear whether either of the current and differing diagnoses of L3 or L4-5 radiculopathy are somehow due to recurrent pre-existing pathology at L5-S1, recurrent industrially-caused pathology at L5-S1, or—seemingly more likely—subsequently occurring pathology at different spinal levels due to progressive degeneration or post-accident activity, such as Claimant's home painting or flooring work. Even ignoring Dr. Larson's adverse opinion, the supportive causation opinions Claimant relies upon are open to serious question and unpersuasive.

49. Claimant has persuasively shown her current need for a lumbar MRI. However, Claimant has not proven that her current need for a lumbar MRI and potential additional medial treatment of her lumbar spine are due to her 2011 industrial accident.

50. **Temporary disability.** The next issue is whether Claimant is entitled to temporary disability benefits due to her industrial accident. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

51. In the present case, Claimant has not proven that she is presently entitled to additional medical treatment for her industrial accident or that she was still in a period of recovery after September 2011. Claimant has not proven her entitlement to temporary disability benefits.

52. **Attorney fees.** Claimant seeks attorney fees pursuant to Idaho Code § 72-804 for Surety’s denial of medical treatment. However, she has not proven that Defendants’ denial was unreasonable. Claimant has not proven her entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has not proven that her current need for a lumbar MRI and potential additional medial treatment of her lumbar spine are due to her 2011 industrial accident.

2. Claimant has not proven that due to her industrial accident, she is entitled to additional temporary disability benefits.

3. Claimant has not proven her entitlement to an award of attorney fees.

RECOMMENDATION

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

DATED this 13th day of June, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

LEA KEAR/ MATTHEW VOOK
PO BOX 6358
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_____/s/_____