BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN MCCONNELL, Claimant, v. AUTOZONE, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2012-013368** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 10/16/17**

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 Boise on April 14, 2017. Claimant, Steven McConnell, was present in person and represented by Bryan S. Storer, of Boise. Defendant Employer, AutoZone, and Defendant Surety, New Hampshire Insurance Company, were represented by W. Scott Wigle, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted.[1] The matter came under advisement on August 21, 2017. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

The issues to be decided are:

[1] Bryan Storer submitted Claimant's Opening Brief. Matthew Steen, of Boise, submitted Claimant's Reply Brief.

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
2. Whether Claimant is entitled to additional medical care, specifically surgery by Dr. Andrew.

All other issues are reserved. [2]

CONTENTIONS OF THE PARTIES

Claimant asserted an injury at work on May 20, 2012, for which he eventually underwent sacroiliac fusion surgery. He alleges the need for surgery is related to his industrial accident. Defendants accepted Claimant's 2012 industrial accident and provided conservative medical care. However, they contend Claimant's sacral surgery is not related to his industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1 through 20 and Defendants' Exhibits 1 through 11, admitted at the hearing.
3. The testimony of Claimant and his wife, Janice McConnell, taken at hearing.
4. Post-hearing deposition testimony of Thomas Faciszewski, M.D., taken by Claimant on June 1, 2017.
5. Post-hearing deposition testimony of Daniel Marsh, M.D., taken by Claimant on June 1, 2017.

[2] Claimant requested a decision on the compensability of the surgery only, not other denied medical care that Claimant may have received after Dr. Friedman's IME and before the date of hearing. However, in his post-hearing briefs, Claimant also requested "past and future medical/surgical treatment… at the fully invoiced amount" and "ongoing pain management… PT and related reparative, palliative treatment" Because these issues were neither listed in Claimant's Request for Calendaring, nor, in the Commission's Notice of Hearing, the Commission cannot address these additional issues herein but will consider them reserved. (See Idaho Code § 72-713).

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

FINDINGS OF FACT

1. Claimant was born in 1955. He is right-handed. He was 62 years old and lived in the Nampa area at the time of the hearing. AutoZone is an employer selling auto parts from multiple commercial locations.

2. **Background.** Claimant graduated from high school and worked at Mountain Bell for 29 years as a DSL and loop technician, installing and repairing internet links. He routinely climbed poles to complete installations. Claimant retired from Mountain Bell and worked briefly at Micron as an inspector and packager.

3. In 2007, Claimant began working part-time at AutoZone. He had no prior pelvic or sacroiliac pain. Claimant also completed a two-year small engine repair program, graduating in 2010. That same year Claimant started a small engine repair business out of his home. He repaired chain saws, blowers, and various other small engines. Over time he hired others to help in his business because of the growing workload.

4. By 2012, Claimant was a parts sales manager at AutoZone. His duties included regular lifting. He had no sacroiliac symptoms and never missed work due to any back injury.

5. Claimant saw Michael Chenore, M.D., for a routine physical on May 14, 2012. Dr. Chenore noted resolved rare left-side sciatica. There is no other mention of any back-related symptoms in Claimant's pre-injury medical records.

6. **Industrial accident and treatment.** On May 20, 2012, Claimant was working at AutoZone when he attempted to stop a crankshaft weighing in excess of 300 pounds from rolling off of a cart. His low back audibly "popped" and he noted immediate pain two inches below his

beltline as well as pain and numbness into his toes. AutoZone did not contest the occurrence of the accident.

7. Claimant received medical treatment from Timothy Doerr, M.D., who ordered a lumbar MRI and physical therapy. The lumbar MRI was read as negative. A thoracic MRI was also unrevealing. Claimant took Norco as prescribed by Dr. Doerr, but noted increasing sacroiliac pain. Claimant's low back pain worsened and he saw a series of doctors at Defendants' direction, including neurosurgeon Peter Reedy, M.D., and neurologist James Redshaw, M.D., however none identified Claimant's source of continuing pain. Later, Claimant saw Paul Montalbano, M.D., who ordered another MRI, which was unrevealing. Claimant was eventually referred to Daniel Marsh, M.D., a pain specialist, for sacroiliac examination.

8. On January 7, 2013, Dr. Marsh examined Claimant and identified likely sacroiliac injury. Claimant reported that his examination by Dr. Marsh was different than any prior exam. Dr. Marsh recommended Percocet and also prescribed Opana, a morphine derivative. Claimant's pain was then 6 out of 10. Percocet provided more relief than Norco. Claimant's personal health insurance paid for Dr. Marsh's treatment. Over the ensuing months, Dr. Marsh performed a series of diagnostic sacroiliac region injections, some of which provided relief for 10 hours or more. Claimant's sacroiliac pain gradually worsened and Dr. Marsh prescribed increased dosages of pain medication.

9. By November 2013, Dr. Marsh had positively confirmed sacroiliac joint injury with multiple precisely placed injections and believed sacroiliac fusion surgery would be needed for permanent improvement. After significant research, Dr. Marsh recommended Claimant see Louis Rappoport, M.D., in Phoenix, Arizona, who specialized in minimally invasive sacroiliac joint fusion surgery—a surgery not then performed in Idaho.

10. On November 25, 2014, Dr. Rappoport examined Claimant and agreed with Dr. Marsh's diagnosis of sacroiliac joint injury and recommended minimally invasive sacroiliac joint fusion surgery. He expressed concern with evidence of Claimant's osteoporosis and also recommended narcotic medication reduction or elimination prior to fusion surgery. Surety paid for Claimant's transportation to Phoenix and for the examination by Dr. Rappoport.

11. Claimant continued to treat with Dr. Marsh who coordinated the tapering off of Claimant's medication preparatory to fusion surgery. Dr. Marsh began to taper Claimant's Opana prescriptions; concluding that Claimant needed to be weaned off of Opana for a month prior to surgery consistent with Dr. Rappoport's direction. Over the following year, Dr. Marsh monitored Claimant as he gradually tapered his use of Opana. As Claimant's medication dosage decreased, his pain increased and his pain-induced physical limitations also increased. Claimant's mobility was increasingly limited by pain and he was sometimes bedridden.

12. On December 30, 2015, Robert Friedman, M.D., examined Claimant at Surety's request. Dr. Friedman allowed an audiotape of his exam. Claimant was tapering off Opana at the time he saw Dr. Friedman and found the examination particularly painful. Dr. Friedman did not diagnose any limiting sacroiliac issue. Claimant strongly disagreed with Dr. Friedman's conclusion that there was nothing wrong. However, after Dr. Friedman's examination, Surety refused to authorize sacroiliac fusion surgery. Based on Dr. Friedman's opinion, Surety closed Claimant's case and did not authorize the recommended fusion surgery.

13. Claimant returned to treating with Dr. Marsh who provided prescription medication and continued to research surgeons performing minimally invasive sacroiliac fusion. Dr. Marsh slightly increased Claimant's Opana dosage when surgery was delayed to allow him

to be more mobile. Even so, Claimant's function, including mobility, was very limited due to his ongoing pain. Claimant took pain medications as prescribed by Dr. Marsh.

14. On January 10, 2017, Thomas Faciszewski, M.D., thoroughly examined Claimant, reviewed his MRIs and Dr. Marsh's diagnostic injections, and diagnosed left sacroiliac joint intra-articular injury. Dr. Faciszewski also noted opiod dependency related to Claimant's chronic pain from his sacroiliac joint dysfunction, but saw no signs of drug seeking behavior. He agreed with Dr. Marsh and Dr. Rappoport's conclusions and diagnosis of sacroiliac injury. Dr. Faciszewski found that Claimant was not medically stable and recommended a minimally invasive sacroiliac joint fusion. Dr. Marsh recommended followup with spinal surgeon Shane Andrew, M.D.

15. On February 9, 2017, Claimant presented to Dr. Andrew. Claimant had reduced his daily intake of Opana by 75% by the time he saw Dr. Andrew. Dr. Andrew reviewed Dr. Marsh's records and evaluated Dr. Marsh's documented injection results. Dr. Andrew diagnosed sacroiliac injury and recommended surgery.

16. On March 3, 2017, Dr. Andrew performed minimally invasive sacroiliac fusion surgery. The surgery was paid for by Medicare as Surety had cut off all of Claimant's medical benefits after receiving Dr. Friedman's report.

17. **Condition at the time of hearing.** At the time of hearing on April 14, 2017, Claimant continued to notice some persisting low back symptoms; however, he was much improved as compared to his condition prior to surgery. He walked better, had neither shooting leg pain nor numb toes. Since his surgery just six weeks earlier, he had secured another shop and hired two others to work. Claimant was still not able to bend over, but he was able put a car on a hydraulic lift and change the oil. He was able to walk without a limp across a large parking lot—

which he could not do before surgery. Surgery dramatically improved Claimant's condition. He characterized his improvement after sacroiliac fusion surgery as a "miracle."

18. **Credibility.** Having observed Claimant and his wife at hearing, and compared their testimony with other evidence in the record, the Referee finds that both Claimant and his wife are credible witnesses. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

19. 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).

20. **Medical care.** The crux of the issue presented is Claimant's entitlement to surgery as performed by Dr. Andrew on March 3, 2017.

21. Idaho Code § 72-432 provides in pertinent part:

> the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, 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 is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

22. Claimant herein asserts that his surgery performed by Dr. Andrew on March 3, 2017, constituted reasonable treatment necessitated by his industrial accident. During the surgery Dr. Andrew fused Claimant's sacroiliac joint. Thereafter Claimant noted less pain in his lower extremities and regained normal ambulation. Claimant's unrefuted testimony is that he benefited dramatically from surgery. Defendants challenge both whether Claimant's industrial accident caused his need for surgery by Dr. Andrew on March 3, 2017, and whether his surgery was reasonable.

23. *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).

24. Claimant alleges that his 2012 accident at AutoZone caused his need for 2017 sacroiliac surgery. Several physicians have opined on the issue. Dr. Doerr, Dr. Reedy, Dr. Redshaw, and Dr. Montalbano all examined Claimant at Defendants' request. None recommended the surgery Dr. Andrew ultimately performed. However, none apparently examined Claimant's sacroiliac joint. None indicated that they had reviewed Dr. Marsh's notes of his thorough procedure of diagnostic sacroiliac injections and his resulting conclusions regarding Claimant's sacroiliac joint injury.

25. Dr. Friedman also examined Claimant at Defendants' request and his notes indicate he performed some sacroiliac examination. Dr. Friedman's notes indicate he reviewed at least some of Dr. Marsh's notes of his diagnostic injections and resulting conclusions. Dr. Friedman failed to address let alone explain the inconsistency between his conclusions and Dr. Marsh's extensively documented diagnostic procedures and well supported conclusions of sacroiliac joint injury.

26. Dr. Marsh testified that physical examination and diagnostic injections are most significant to diagnosing sacroiliac joint injury, as it is not usually revealed by x-ray, CT, MRI, or bone scan imaging. Regarding his sacroiliac joint injury diagnosis, Dr. Marsh testified:

> You base it on what I have in my physical exam here. His leg was long on the left. His SI joint dysfunction was seen in prone—with a prone extension test. He had march testing positive. He didn't have any suggestion of straight leg raising or from disk problems and his MRI of his back looked good anyway and because he had a good MRI of his back everybody wrote him off as not having a problem, but it was obvious if you took the time or had the knowledge to do the physical examination of the sacroiliac joint that he did, in fact, have a problem.

Marsh Deposition, p. 10, ll. 7-17.

27. Dr. Marsh confirmed that Claimant became opioid dependantduring his extended wait for surgery, but took medications only as prescribed and did not display any aberrant, addictive, or drug seeking behavior. Dr. Marsh observed that without the pain medication, Claimant would hardly have been able to get out of bed. He testified that Claimant's condition improved drastically after the fusion surgery. Dr. Marsh opined that Claimant's left sacroiliac joint injury and resulting need for surgery were caused by his industrial accident. Dr. Marsh noted that post-surgery, Claimant reduced his use of prescription medication without direction from any physician because he no longer needed as much medication to manage his pain.

28. Dr. Faciszewski testified that Claimant had left sacroiliac intra-articular joint injury, and that Claimant's injury and need for sacroiliac joint fusion are a result of his 2012 industrial accident. Dr. Faciszewski testified that the surgery performed by Dr. Andrew was the same surgery recommended and offered by Dr. Rappoport but which Surety ultimately did not authorize. Dr. Faciszewski explained his clinical examination of Claimant by means of the thigh thrust, Gaenslen's compression, sacral thrust, and pelvic compression and pelvic distraction tests, and his review of the records of Dr. Marsh's diagnostic injections, all of which led him to

diagnose left sacroiliac joint intra-articular injury. Dr. Faciszewski also noted that Dr. Doerr's notes did not document clinical sacroiliac joint testing and that Dr. Friedman's notes were incomplete in their description of sacroiliac joint testing. Dr. Faciszewski testified that Claimant will likely not need narcotic medications for longer than approximately six months post-surgery.

29. Claimant described in detail the specific clinical examination performed by Dr. Marsh and Dr. Faciszewski to evaluate his sacroiliac joint and affirmed that none of the other physicians performed this type of examination on him.

30. The opinions of Dr. Marsh and Dr. Faciszewski regarding the cause of Claimant's ongoing low back and leg symptoms are persuasive evidence that Claimant's need for sacroiliac surgery on March 3, 2017, was causally related to his 2012 industrial accident.

31. *Reasonableness.* Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and the treatment is reasonable. The physician decides 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. Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015). The present case no longer admits to only a prospective analysis of reasonableness based on medical opinions. Rather, the instant case allows evaluation of the reasonableness of Claimant's sacroiliac fusion surgery with the further circumstance that Claimant has received the surgery and improved thereby.

32. In Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 722–23, 779 P.2d 395, 397-98 (1989), overruled by Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Court declared:

> Under the circumstances of this case, there is no dispute that: a) the claimant made gradual improvement from the treatment received; b) the treatment was required by the claimant's physician; and c) the treatment received was within the physician's standard of practice the charges for which were fair, reasonable and

> similar to charges in the same profession. We hold that in light of these facts a legal conclusion that the treatment was unreasonable under I.C. § 72–432(1) cannot stand.

33. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Court noted that Sprague had been misconstrued as creating a three-factor test as the exclusive method to determine reasonableness of a claimant's medical treatment. The Court declared:

> [W]e conclude that any indication in our prior cases that the three factors from Sprague were the sole means to determine reasonableness was an unsound reading of that opinion. In fact, we overrule Sprague to the extent that it stands for the adoption of a specific test for the reasonableness of medical treatment under Idaho Code section 72–432(1). We also overrule Sprague's holding that the reasonableness of medical treatment is a question of law. This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72–432(1) is a question of fact to be supported by substantial and competent evidence.

Chavez v. Stokes, 158 Idaho 793, 797, 353 P.3d 414, 418 (2015). The Court observed that the three circumstances of Sprague constituted evidence in that case that medical treatment was reasonable, but was not an iron-clad test. The Court continued:

> Whether the claimant's condition gradually improved should not be determinative of whether treatment is reasonable.
> ….
>
> [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. We are hesitant to provide specific factors for this fact-specific approach …. We note at a minimum, however, that the treatment must be required by the physician … as defined by worker's compensation law, unless it is treatment "needed immediately after an injury or manifestation of an occupational disease." I.C. § 72–432(1).

Chavez v. Stokes, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015)

34. Both Sprague and Chavez evaluated the reasonableness of past medical care. As Chavez demonstrates, unfortunately not all reasonable medical treatment achieves its intended benefit, thus an injured worker's failure to improve should not be deemed fatal to compensability of past medical care. While the Chavez Court cautioned against "armchair doctoring," the required "totality of the circumstances" evaluation of medical treatment in the instant case would be materially incomplete without recognition that Claimant's condition improved with his sacroiliac fusion surgery. Dr. Faciszewski testified that the surgery was related to the work injury and reasonable. Claimant has received surgery and his condition has improved. This positive change of condition further supports the opinions of Dr. Marsh and Dr. Faciszewski.

35. Claimant has proven that his 2012 industrial accident caused sacroiliac pathology resulting in his need for reasonable medical treatment therefore, including sacroiliac joint fusion surgery by Dr. Andrew on March 3, 2017.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven his May 20, 2012, industrial accident caused sacroiliac joint injury.

2. Claimant has proven his entitlement to medical benefits for sacroiliac fusion surgery by Dr. Andrew on March 3, 2017.

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

DATED this 16th day of _October_, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

__/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
R.D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of _October_, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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