BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMBER M. LAWSON, Claimant, v. ADDUS HEALTHCARE, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2012-024774** **2013-031337** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 24, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur D'Alene, Idaho, on July 18, 2014. Claimant was represented by Starr Kelso, of Coeur D'Alene. Joseph M. Wager, of Boise, represented Addus Healthcare, Inc., ("Employer") and Liberty Insurance Corporation ("Surety"), Defendants. Oral and documentary evidence was admitted. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 28, 2015.

ISSUES

By agreement of the parties, the issues to be decided are:

Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary disability benefits, partial or total (TPD/TTD); and

c. Attorney fees.

Claimant's impairment and disability issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant injured her back in August 2012 while in the course and scope of her employment with Employer. Her claim was accepted, and she received medical attention. Her work duties were altered to fit her restrictions.

On January 2, 2013, Claimant fell while working for Employer, exacerbating her symptoms from the August incident. Employer initially rejected this claim, but subsequently changed its position one week before hearing. Soon after her second accident, Claimant's treating physician determined she was at MMI based solely upon the August 2012 injury, while discounting Claimant's complaints from the January accident.

Claimant is not at MMI. Based upon the opinion of Claimant's personal physician, and the testimony of the treating doctor, Claimant is entitled to additional reasonable medical care under Idaho Code § 72-432, starting with a repeat MRI. Claimant is also entitled to temporary disability benefits for time she spent treating her industrial injury during work hours, as well as from the time she was fired in January 2013 until she no longer qualifies for them.

Defendants argue Claimant has failed to establish she is entitled to additional medical or time loss benefits, as she was declared medically stable by Michael Ludwig, M.D., as of January 9, 2013. Claimant has failed to prove she is entitled to attorney fees under any circumstance.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. The hearing testimony of Claimant's witnesses Sherry Kleven and Debra Lawson;

3. Claimant's Exhibits A through O, admitted at hearing;

4. Defendants' Exhibits 2, 7, and 9 through 13, admitted at hearing;

5. The post-hearing deposition transcript of John McNulty, M.D., taken on July 28, 2014; and

6. The post-hearing deposition transcript of Michael Ludwig, M.D., taken on September 4, 2014.

All objections posed during the depositions are overruled. At the hearing, Claimant objected to Defendants' Exhibit 8, and the matter was taken under advisement pending the completion of post-hearing depositions. Claimant's objection is hereby overruled. Defendants' Exhibit 8 is admitted. Defendants' Exhibits 1, 3, 4, 5, and 6 were withdrawn at the start of the hearing as being duplicates of exhibits introduced by Claimant.

Having considered the evidence and 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 a thirty two (32) year old woman living in Coeur d'Alene, Idaho.

2. On November 11, 2008, Claimant began working for Addus Health Care (Employer) as a home health aide. Her primary job initially entailed caring for her infirm

mother, and other clients of Employer as needed. She was paid approximately $8.20 per hour over a forty (40) hour work week.

3. On August 19, 2012, Claimant was assigned to assist a client with MS. As Claimant attempted to transfer this client, who weighed well over two hundred (200) pounds, from her bed to the commode, Claimant felt pain in her left buttocks near the base of her spine.

4. Contrary to Claimant's hope and belief, her pain and limitation of movement did not spontaneously improve over time. However, she continued to work for Employer, assisting the client with MS. Eventually the pain got to the point where Claimant asked the nurse at work for assistance and advice.

5. Claimant formally reported the injury to Employer in late September 2012. Employer sent her to the ER physician at Kootenai Medical Center, who, after an initial examination, referred her to Michael Ludwig, M.D., a physical medicine and rehab doctor.

6. On October 1, 2012, Claimant came under the care of Dr. Ludwig. He examined Claimant and reviewed her previous lumbar spine x-rays dated 2004, 2006, and 2009, taken when Claimant had prior complaints of low back pain from non-industrial causes. They showed progressive disc height loss at L5-S1 without evidence of spondylolisthesis. He felt Claimant strained her lumbar spine during her recent industrial accident, which exacerbated her chronic low back condition. He began treatment with pain medications, physical therapy, and light-duty work restrictions.

7. At Claimant's October 8, 2012 visit, Dr. Ludwig ordered an MRI due to Claimant's complaint of increased low back and left-sided radicular pain.

8. The MRI, taken on October 12, 2012, showed a broad-based central and slightly rightward protrusion with annular tear at L5-S1superimposed on degenerative disc disease and endplate ridging. No focal or high-grade neural effacement was seen throughout the lumbar spine. There was also a central noncompressive protrusion with annular tear at L4-5.

9. Dr. Ludwig read the MRI as showing a progressive loss of disc height since 2004 on lumbar imaging at L5-S1, which he felt was consistent with the progression of Claimant's chronic disc disease. He saw no acute focal disc herniation, and no acute structural abnormality. He diagnosed chronic and progressive degenerative disc disease of a non-industrial nature, and exacerbation of low back pain related to her industrial accident. He kept Claimant on light duty, and suggested bilateral epidural steroid injections (ESI) for Claimant's continuing pain. The injections were performed on October 22, 2012.

10. At her November 5, 2012 followup visit, Claimant reported a 70% reduction in her low back pain since the ESI. She was also making steady progress with physical therapy.

11. A second round of steroid injections was performed on November 12, 2012. These injections further reduced Claimant's pain by about half, although she still complained of left-sided buttocks and leg symptoms. Claimant was prescribed Lyrica for her leg symptoms.

12. On November 29, 2012, Dr. Ludwig performed a left leg EMG/nerve conduction study to rule out evidence of leg denervation. The results were normal.

13. Claimant returned to Dr. Ludwig on December 6, 2012. She reported dramatic reduction in leg pain since starting Lyrica. She still had some lumbar pain with extension. Dr. Ludwig wanted her to continue with physical therapy for another three or four visits, then transition to a two-week work conditioning program. He kept Claimant on light-duty restrictions but increased her lifting to ten pounds and occasional bending.

14. On December 17, 2012, Claimant returned to Dr. Ludwig. She had begun work conditioning that day, and her lumbar spine was sore. Dr. Ludwig increased Claimant's Lyrica dosage.

15. By December 28, 2012, Claimant reported progress in her work conditioning without increased leg pain. Dr Ludwig felt if Claimant continued to progress he would consider extending the duration of her work conditioning program. He kept Claimant on light duty, but increased her lifting limit to fifteen pounds occasionally.

16. Claimant's January 2, 2013 work conditioning session was limited due to her increased back and left leg pain caused by increased personal activities of the past two days — moving her belongings from one residence to another — which left her sore. Her therapist intended to resume full exercises in the coming sessions as tolerated.

17. In the late afternoon of January 2, 2013, while attending to an off-site client as part of her work assignment, Claimant slipped on black ice and fell on her backside. The fall resulted from a combination of the slick surface and Claimant's weak left leg, which had on occasion since the previous August accident, "given out" on her. In fact, she had fallen on a few occasions since the first accident, including in mid-December, but had never suffered significant injury or lasting increase in pain as a result. Her January 2 slip-and-fall caused an immediate increase of her previous low back symptoms.

18. The fall caused Claimant to limp more than she had been. At work the next day, when asked about her limp, Claimant informed two other employees, Jody Hampton and Rhonda Anderson, of her fall. The day following that, she informed the "head boss" Kelly Mirran, of the accident. Claimant did not file a written notice of injury at that time, but belatedly did so in late 2013. Employer did not file a notice of injury, nor accept the claim, until 2014.

19. Claimant felt increased pain during her January 3, 2013 therapy session. She informed the therapist of her fall the day before. He noted her complaint of "significant" increase in her lower back and left leg pain secondary to her fall. She also complained of her left foot being numb with "pins and needles" and a stabbing pain in her sacroiliac.

20. Claimant stated at her January 8, 2013 work conditioning session that she had a slight increase in her low back and left lower extremity symptoms since her recent fall. She complained of low back pain throughout her session, but wanted to continue her treatment.

21. On January 9, 2013, Claimant stated she felt slightly better than she had the previous day. She complained frequently of low back pain, but insisted on finishing the session. Immediately after her therapy session, Claimant presented to Dr. Ludwig's office.[1]

22. Claimant told Dr. Ludwig of her January 2 fall, and how it affected her. While acknowledging the fall, Dr. Ludwig felt it did not cause Claimant any new injury. He noted that while Claimant's fall increased her level of reported pain, it did not

[1] Claimant testified that during her work out, her therapist made a phone call, and soon thereafter Dr. Ludwig showed up at the therapist's facility, which is located right by Dr. Ludwig's office. Dr. Ludwig had no memory of this, but in any event it is undisputed Claimant presented at Dr. Ludwig's office on January 9, 2013, following her therapy work out.

objectively change her examination or cause symptoms in a new distribution. Dr. Ludwig testified that during his physical examination of Claimant on January 9, 2013, he saw no bruising or significant discoloration. Claimant continued to walk with a significant limp. Her lumbar spine continued to demonstrate a limited range of motion, with increased pain on extension and flexion.[2] He reviewed Claimant's previous MRI. He assessed Claimant as having L5 degenerative disc disease with posterior protrusion, left sided radicular leg pain which was significantly reduced with Lyrica, and mild L4/5 degenerative disc disease. These findings were consistent with Dr. Ludwig's previous assessments.

23. Dr. Ludwig noted Claimant had not progressed beyond a fifteen pound lifting capacity with work conditioning, and likely was not going to. Previous epidural injections had provided only temporary relief. The Lyrica reduced Claimant's leg pain, but was not going to resolve all her complaints. Dr. Ludwig did not feel Claimant was a surgical candidate. He did not believe she would return to her time-of-injury job. He felt it likely she would have a permanent lifting restriction of fifteen pounds.[3] He declared her at MMI as a result of his findings and opinions.

24. Claimant underwent a functional capacity evaluation in February 2013. Thereafter, she was assigned PPI ratings from Dr. Ludwig and the FCE evaluator. Those findings are not at issue at this time.

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[2] Claimant's testimony on the extent of Dr. Ludwig's "examination" of January 9, 2013 differs significantly from the doctor's office notes. She claims the doctor did no examination whatsoever. Instead, he simply informed her she was at MMI. Regardless of the extent of examination (or lack thereof) on that date, it is undisputed Dr. Ludwig found Claimant to be at MMI on that date.

[3] Curiously, Dr. Ludwig subsequently in March 2013, released Claimant to full time work with *no* restrictions in spite of the fact her symptoms were unchanged. Dr. McNulty, Claimant's IME physician, speculated that perhaps Dr. Ludwig simply meant that any restrictions attributable to Claimant's August 2012 accident resolved, and her current restrictions were due to other causes, such as her pre-existing DDD, or as Claimant would argue, her January 2013 fall. Deciphering what Dr. Ludwig meant, and examining the soundness of his opinion on this matter, are not issues up for resolution in this decision.

25. On May 29, 2013, Claimant sought a second opinion evaluation from John McNulty, M.D., a North Idaho orthopedic surgeon. He was asked to evaluate her current condition to determine if she needed additional treatment.

26. In his written report dated May 29, 2013, Dr. McNulty agreed with Dr. Ludwig's January 9, 2013 assessment regarding Claimant's fifteen pound lifting restriction. He also noted Claimant did not respond adequately to physical therapy. She had functional deficits as of the date of Dr. McNulty's examination. The doctor noted Claimant's case was complicated by the fact she had "several falls" after her initial industrial injury in August 2012. Based upon these factors, Dr. McNulty recommended a repeat lumbar MRI in an attempt to determine whether Claimant's falls contributed to her current condition. In his post-hearing deposition, Dr. McNulty summed up his position by stating "I think there is a reasonable probability [Claimant] has a problem that needs to be evaluated further." McNulty depo. p. 15, ll. 24-25, p. 16, l. 1.

27. Dr. McNulty testified that while an MRI is indicated, he can not, without viewing and comparing the MRI films, attribute the need for the repeat MRI to a particular accident or event. He feels a repeat MRI would likely provide the information he needs to determine if Claimant's January 2013 fall caused or contributed to her current condition. Specifically, he would like to see if there is a herniated disc at a level different than that identified in the original MRI.

DISCUSSION AND FURTHER FINDINGS

28. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993). Employer and its surety are only liable for medical expenses incurred as a result of an

employment-related injury. I.C. § 72– 432(1). An employer can not be held liable for medical expenses unrelated to an on-the-job accident. *Sweeney v. Great West Transp.,* 110 Idaho 67, 714 P.2d 36 (1986). The fact that Claimant suffered a covered injury to a particular part of her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097, (2006).

Medical care

29. The first issue is Claimant's entitlement to medical care, specifically a repeat MRI. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, … 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. (Emphasis added.) If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The Idaho Supreme Court has held that Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. 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. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 727, 779 P.2d 395, 402 (1989).

30. Claimant's treating physician, Dr. Ludwig, determined a repeat MRI was not required to assess the effects of Claimant's January 2, 2013 slip-and-fall. As he testified in his deposition:

Q. Okay. What did [Claimant] tell you about that fall on January 2nd, 2013?

A. She stated that it increased her low back pain and leg pain. It occurred when she was leaving work.

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Q. Did you note any change in her condition from prior visits?

A. She appeared to be in more pain, from what I remember, and that's all.

Q. Did you feel it was necessary to do any additional diagnostic testings other than her physical exam?

A. No.

Q. Why not?

A. I didn't feel that there was a substantial change in presentation from objective findings

Q. And what [sic] was that opinion inclusive of her slip-and-fall?

A. Yes.

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Q. Did you meet with [Claimant] again after the January 9, 2013 visit?

A. Yes. She was seen on March 21st, 2013.

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Q. And when you met with her at that visit, did you do a physical examination?

A. I did.

Q. And did you see any change in her functional ability, based on your tests, from your prior visits?

A. Neurologically her exam had not changed. It appears she was still describing pain and findings of left leg discomfort at that time.

Q. Any reason for you to believe at that time an additional MRI or any other additional diagnostics would be appropriate?

A. I did not recommend any further diagnostics at that time.

Q. And how is that – how do you come to that conclusion if [Claimant] is still complaining of pain?

> A. Well, based upon the prior imaging, as well as the EMG that failed to show any evidence of denervation. At that time she also had pain. So I found no objective findings that would substantiate that there was another need for further imaging or a repeat EMG at that time.

Ludwig depo. p. 14, ll. 14-17; p. 15, ll. 3-14; p. 17, ll. 2,3, 19-25; p. 18, ll. 1-10.

31. Dr. Ludwig did testify under cross examination that if Claimant's symptoms were persisting to the time of his deposition (September 2014), then a repeat MRI "would be helpful in seeing if there [has] been a change or a new finding." Ludwig depo. p. 65, ll. 19, 20. He admitted taking such repeat MRI would be a reasonable medical practice.

32. Although Dr. Ludwig felt a repeat MRI would be reasonable and helpful, he did not opine it would be necessary as the result of either of Claimant's industrial accidents. It is true "magic words" are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). By analogy, if the totality of the record supports the notion that Dr. Ludwig believed a repeat MRI was necessary to treat Claimant's condition due to either (or both) of her industrial accidents in question, then the fact he used words like "helpful" and "reasonable" instead of "necessary" or "required" would not be fatal to Claimant's case. Unfortunately for Claimant, the record supports the opposite conclusion.

33. When asked if he agreed with Dr. McNulty that a repeat MRI was appropriate, Dr. Ludwig testified that in regard to the original industrial injury, he did not feel it was indicated. He further stated there was no need for a repeat MRI based upon Claimant's slip-and-fall of January 2, 2013, which he did not view as a separate injury-producing event. In response to a request from Surety to comment on Dr. McNulty's report, Dr. Ludwig opined that while a repeat

MRI would show anatomy, it would not, in his opinion, demonstrate a causative relationship between the MRI findings and Claimant's fall in January 2013.

34. Dr. McNulty believes a repeat MRI is needed at this time. However, he does not have an opinion as to whether the need for the MRI is due to either, or both, of Claimant's industrial accidents, or something else. Instead, he would use the MRI to assist him in making his causation analysis. He feels he can not address causation without looking at a current MRI, and comparing it to the original film taken in October 2012.

35. Claimant argues Dr. McNulty opined that the MRI is needed due to some yet-unknown combination of Claimant's two industrial accidents, and that because it is the same employer and surety, it does not matter which of the two industrial accidents accounts for Claimant's current condition. That argument overlooks other explanations for Claimant's ongoing complaints. Claimant suffers from preexisting degenerative disc disease, which is by nature progressive. A good deal of time has now passed since the October 12, 2012 MRI. As Dr. Ludwig has noted, a new MRI, (which, if ordered, would necessarily be performed more than two years following the incident of January 2, 2013,) would show anatomy, but would provide little to no information about whether an interval change could be said to be related to the accident of January 2, 2013. (See Claimant's Exhibit G at 78). Dr. McNulty has not testified that Claimant requires an MRI because of the January 2, 2013 accident. Rather, he has stated that based on Claimant's presentation on May 29, 2013, he believes an MRI is indicated to help identify whether there is a current condition that might explain her subjective complaints. (McNulty Depo., p. 18, ll. 15-24.) Thus, Dr. McNulty's opinion carries less weight than Dr. Ludwig's.

36. Claimant has not proven her current condition is causally related to either or both of her prior accidents. She carries that burden and has not met it. Her argument that she cannot meet her burden of proof because Defendants refuse to authorize a repeat MRI is not legally persuasive.

37. Claimant also relies on the Commission's Order Granting Reconsideration in *Davis v. U.S. Silver-Idaho, Inc.* IC 2008-031273 (July 3, 2013). This reliance is misplaced. In *Davis*, the claim was determined, based upon persuasive medical testimony, to be a *compensable* accident which *produced an injury*. The threshold finding that Claimant suffered a new injury in January 2013 is lacking in the present case. Claimant's treating physician, Dr. Ludwig, did not feel Claimant's fall in January 2013 resulted in a new injury. Dr. McNulty can not opine until he sees a repeat MRI.

38. While it is true that in both the current case and *Davis*, the claimant suffered a sudden increase in pain overlaid on a pre-existing condition, that fact is not dispositive. Claimant still must establish to a reasonable medical probability that her increase in pain in January 2013 was the result of an injury, which resulted in violence to the physical structure of her body. Idaho Code § 72-102(17)(a). The occurrence of pain alone, without evidence of damage to the physical structure of Claimant's body, is insufficient to constitute an injury. *See, Perez v. J.R. Simplot Company,* 120 Idaho 435, 816 P.2d 992 (1991).[4]

[4] Claimant argues the Commission found in *Davis* that once a compensable accident occurs, it is implicit that an injury of some type occurred as a consequence of the accident. While technically a *compensable* accident *must* have resulted in an injury by definition, the Commission did not find that every "accident" comes with an implied injury. Further, the Commission did not rule that a sudden and significant increase in pain following an "accident" establishes the existence of an injury caused by the "accident".

39. Claimant cites to a passage in Dr. Ludwig's deposition wherein, while discussing his office notes of January 9, 2013, he stated:

> Q. Now, on January 9th your chart note indicates that - - and documents, on page 45, that she fell on January 2nd and it occurred when she was leaving work to get into her car, falling on the ice in the parking lot. You see that?
>
> A. Yes.
>
> Q. Did you report that to her employer or her insurance company, the surety?
>
> A. I don't remember doing a separate injury report.
>
> Q. Okay. And when she saw you on that day, at page 46, that same day, you state, under Plan at page 46, that in your opinion, "I feel that Amber has reached the point of maximum medical improvement with conservative care." Do you see that?
>
> A. Yes.
>
> Q. Now, when you wrote that, were you viewing it as with regards to her August 2012 accident injury?
>
> A. Within the context of, yes, the projective recovery, that she was still quite a ways off of where she would need to be at the job of injury at that point.
>
> Q. Were you separating - - when you say in the context of the August 2012 injury, were you separating that from the effect and impact of her slip-and-fall in the parking lot on January 2nd, 2013?
>
> A. I guess the January 2nd event was not a separate event. It appeared to rekindle a lot of the same symptoms that she had with the August injury, so with that respect, it was a continuation of a lot of the same symptoms. So a maximum medical improvement at that time stated was referencing her accepted injury of August.
>
> Q. Okay. But it wasn't necessarily representative of her condition as of the 9th following the fall on January 2nd, 2013, correct?
>
> A. Correct.

Ludwig Depo. p. 58, l. 22 – p. 60, l. 5.

Claimant's interpretation of that dialog is that Dr. Ludwig never declared Claimant at MMI with regard to her January 2, 2013 fall, and thus she is still in a period of recovery from that event, and entitled to an MRI, which both Dr. Ludwig and Dr. McNulty feel is currently reasonable.

40. The Referee disagrees with Claimant's interpretation of this testimony. Dr. Ludwig did not consider the January 2, 2013 incident to be a "separate" injury. On the whole, Dr. Ludwig's records and testimony reflect that he arrived at this conclusion because he did not feel that the event of January 2, 2013 caused any clinically significant change in the nature of Claimant's condition. Dr. Ludwig's chart note of January 9, 2013 unambiguously conveys his opinion that Claimant was medically stable as of that date and that he held this opinion notwithstanding his knowledge of mishaps/events occurring subsequent to August of 2012:

> It is my opinion she is at a point of MMI at this time, and would caution against surgery in this case. The falls have altered her level of reported pain, but have not objectively changed her examination. If surgery is contemplated or recommended in the future by another provider, I would strongly recommend a psychological profile to assist in projection of outcome.

Ludwig Depo., Exh.1, p. 47.

41. The crux of the issue is that Claimant wants Defendants to pay for a diagnostic MRI which will allow Claimant to further investigate whether she has a right to further treatment under her consolidated worker's compensation claims. Claimant's treating physician has determined such a repeat MRI is not necessary with regard to treating Claimant's worker's compensation injuries, although he concedes that the January 2, 2013 accident appears to have "rekindled" a lot of Claimant's prior symptoms. Still, Dr. Ludwig never wavered in his opinion that as of January 9, 2013, there was no basis to

order a repeat MRI. (Ludwig Depo., p. 14, ll. 14–15, 18; p. 64, l. 25 – p. 65, l. 7.) Dr. Ludwig acknowledged that if Claimant's symptoms persisted as of the time of his September 4, 2014 deposition, it would not be unreasonable to conduct another MRI study. (Ludwig Depo., p. 66, ll. 14-17.) However, this does nothing to denigrate Dr. Ludwig's opinion that another study is not needed due to the January 2, 2013 accident. Because Dr. Ludwig was in the best position to assess whether there had been a significant change in Claimant's clinical presentation immediately following her January 2, 2013 accident, this Referee deems Dr. Ludwig's testimony more persuasive on the question of whether Claimant requires a repeat MRI as a result of the January 2, 2013 accident. While Claimant may benefit from such an evaluation at this time, the evidence is insufficient to link the need for such a study to the January 2, 2013 accident.

42. Claimant at this time has failed to prove she is entitled to additional medical care, particularly in the form of a repeat MRI.

Temporary Disability Benefits

43. Idaho Code § 72-408 provides for income benefits for total and partial disability during Claimant's period of recovery. The burden is on Claimant to establish through expert medical testimony 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). Once Claimant reaches medical stability, she is no longer in a period of recovery, and temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001).

44. Claimant put forth the following arguments in favor of temporary benefits. Claimant was still in a period of recovery when she fell on January 2, 2013. In fact, earlier that day, Dr. Ludwig authorized additional work conditioning sessions due to her progression in the

program. Her slip-and-fall of that date aggravated her symptoms and pain stemming from the August 19, 2012 industrial accident. When, on January 9, 2013, Dr. Ludwig declared Claimant medically stable, he did so only regarding her August 19, 2012 industrial accident. He did not consider the effects of Claimant's January 2, 2013 accident when reaching his MMI conclusion. Dr. Ludwig agreed with Dr. McNulty that an MRI would be appropriate at this time, given Claimant's continuing limitations. Claimant argues she entered a period of recovery after each of her work-related accidents. However, due to Defendants' refusal to provide Claimant with a repeat MRI, it is impossible to determine whether she has reached MMI from either of her previous accidents. Therefore, Claimant is entitled to time loss benefits from August 19, 2012 through the time she is declared at MMI *after* a repeat MRI, and any required subsequent medical treatment, or until Defendants satisfy the criteria identified in *Malueg v. Pierson Enterprises,* 111 Idaho 789, 727 P.2d 1217 (1986). Claimant also claims she is entitled to partial disability benefits for deductions Surety took when she missed work for medical or therapy appointments during the time Claimant was working for Employer after her initial accident. Those arguments are addressed below.

45. Claimant was originally scheduled for work conditioning through December 31, 2012. By then she was able to perform three or four circuits of lift-and-carry exercises with fifteen pound weights. Her physical therapist felt she could continue to improve, and requested Dr. Ludwig to authorize an additional nine sessions of conditioning. Dr. Ludwig did so. Claimant did not progress, but instead regressed after the first of the year. She first complained of additional back and left leg pain due to increased activity (moving to a new residence), which limited what she could do in therapy. Then she fell on the evening of January 2, 2013, which impacted her ability to do her exercises. Dr. Ludwig, seeing no progress,

determined Claimant had plateaued at a fifteen pound lifting limit, and was not likely to progress further. He therefore declared her medically stable on January 9, 2013. Claimant has presented no medical testimony to refute Dr. Ludwig's findings and opinions. Claimant has the burden of proving she is still in a period of recovery. There is no obligation upon Defendants to assist her in developing her case by providing a repeat MRI when her treating physician determined such was not medically necessary as part of her treatment related to her industrial accidents. Claimant has failed to prove she is entitled to temporary income benefits after January 9, 2013.

46. After her August 19, 2012 accident, Claimant continued to work modified duties for Employer. However, she was not paid for time she took from work for therapy and related medical appointments. Claimant is entitled to temporary disability benefits for the time she spent attending therapy and medical appointments while employed post-accident. *See, Casner v. Woodgrain Mouldings, Inc.* IC 87-569664, February 21, 1992.

Attorney Fees

47. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

48. Claimant's chain of events which she argues results in a right to attorney fees follows this path:

- Claimant fell on January 2, 2013
- She orally told her boss about the fall
- She reported details of her fall to Dr. Ludwig, including how the fall happened while "leaving work to get into her car", which he recorded in his chart notes
- Surety obtained a copy of Dr. Ludwig's January 9, 2013 chart notes
- Surety should have investigated the incident based on the chart notes information
- Surety should have contacted Dr. Ludwig with instructions to evaluate Claimant regarding her new accident (January 2, 2013 fall)
- Presumably Dr. Ludwig would have treated Claimant for new accident injuries instead of declaring her at MMI
- Claimant would have received medical attention she is still waiting for
- Instead, Surety closed its file and ignored Claimant's plight.

49. Contrary to Claimant's argument, Dr. Ludwig did investigate her January 2, 2013 fall. He did not ignore her fall, he just felt it caused no additional injury, and further treatment for it was not warranted. Dr. Ludwig found Claimant was anatomically stable as of January 9, 2013, in spite of her increased pain caused by falling a week earlier. Surety asked Dr. Ludwig to comment on Dr. McNulty's report. Dr. Ludwig did not recommend to Surety that Claimant be given more treatment for her industrial accidents.

50. Given the ruling herein, the Referee declines to recommend an award of attorney fees to Claimant at this stage of the proceedings. Claimant is not precluded from seeking fees, but not costs,[5] once all issues and defenses have been heard. Payment of attorney fees for failure to pay for work missed for medical reasons is included as a reserved issue at this time.

CONCLUSIONS OF LAW

1. Claimant has not established a right to further medical care after January 9, 2013.

2. Claimant has not established a right to additional temporary disability benefits beyond January 9, 2013.

3. Claimant is entitled to additional temporary disability benefits prior to January 9, 2013 for time she missed work to attend medical and related therapy treatment.

4. The issue of attorney fees is reserved until all issues have been heard.

RECOMMENDATION

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

DATED this 4th day of March 2015.

INDUSTRIAL COMMISSION

_/s/_____
Brian Harper, Referee

[5] Claimant makes an argument for inclusion of certain costs under the heading of attorney fees. That argument must be addressed legislatively. Our Supreme Court recently pointed out the Commission has no equitable powers beyond the framework of the worker's compensation statutes and corresponding rules and regulations. *Deon v. H&J Inc. et.al.,* 157 Idaho 665, 339 P.3d 550 (2014).

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2015, 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

JOSEPH WAGER
PO BOX 6358
BOISE ID 83707

__/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMBER M. LAWSON, Claimant, v. ADDUS HEALTHCARE, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	**IC 2012-024774** **2013-031337** **ORDER** Filed March 24, 2015

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 established a right to further medical care after January 9, 2013.

2. Claimant has not established a right to additional temporary disability benefits beyond January 9, 2013.

3. Claimant is entitled to additional temporary disability benefits prior to January 9, 2013 for time she missed work to attend medical and related therapy treatment.

4. The issue of attorney fees is reserved until all issues have been heard.

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

DATED this 24th day of March, 2015.

INDUSTRIAL COMMISSION

Participated but did not sign

_____
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 24th day of March, 2015, 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

JOSEPH WAGER
PO BOX 6358
BOISE ID 83707

_/s/_____

jsk