BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LETICIA SALINAS, Claimant, v. BRIDGEVIEW ESTATES, Employer, and OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2011-014120** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 4, 2016

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 Twin Falls, Idaho, on August 6, 2015. Claimant was represented by Patrick Brown, of Twin Falls. Alan Gardner, of Boise, represented Bridgeview Estates ("Employer") and Old Republic Insurance Company ("Surety"), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 13, 2016.

ISSUES

The issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition; and

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

    a. Medical care, past and future;
    b. Permanent Partial Impairment (PPI);
    c. Permanent Partial Disability in excess of impairment (PPD); and
    d. Attorney fees.

CONTENTIONS OF THE PARTIES

On or about May 5, 2011, while in the course and scope of her employment as a registered nurse for Employer, Claimant injured her back while conducting a patient transfer. Claimant asserts that while she was still treating, Surety informed her that the claim was being "temporarily denied" while it investigated Claimant's medical background. The temporary denial in effect became permanent when Surety stopped communicating with Claimant, and she lacked funds to continue her back treatment.

By April 2013, Claimant had the personal funds to begin treating for her continuing back issues. Claimant then hired an attorney, and pursued her previously-denied benefits.

Claimant argues she is entitled to reimbursement of all medical costs associated with her industrial accident incurred after Surety refused to provide further medical treatment, as well as future palliative care. She is also entitled to a two percent (2%) impairment rating, and permanent disability benefits. Claimant is entitled to attorney fees.

Defendants argue Claimant has been paid all benefits to which she is entitled. She discontinued her medical care after her sprain/strain injury from a work accident, and did not resume treatment for over eighteen (18) months. She continued to work during this time. Her current condition is not the result of the industrial accident.

Claimant has no permanent impairment or disability from the accident. Claimant has failed to prove she is entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. Claimant's Exhibits (CE) A through L, admitted at hearing;

3. Defendants' Exhibits (DE) 7 through 15, admitted at hearing;

4. The post-hearing deposition transcript of Anthony Sirucek, D.C., taken on September 23, 2015; and

5. The post-hearing deposition transcript of Michael Hajjar, M.D., taken on September 25, 2015.

Post-Hearing Deposition Objections and Conduct

Defense counsel lodged forty-five (45) objections during the deposition of Dr. Sirucek, and fifty-three (53) objections during Dr. Hajjar's deposition cross-examination. Additionally, defense counsel moved to strike a non-responsive statement of Dr. Sirucek at page 93 of his deposition. Defendants' ninety-eight (98) objections are overruled; the motion to strike is granted. (Counsel's multiple "asked and answered" objections, which may have been sustained at hearing, are overruled on the grounds that the legitimate goal of such an objection is to promote the flow of testimony, but by the time the objections are read and considered after-the-fact, its legitimate purpose is moot.)

Claimant's counsel lodged five (5) objections during Dr. Hajjar's deposition. He also moved to strike a non-responsive answer from Dr. Hajjar at page 9 of his deposition. The five (5) objections are overruled; the motion to strike is granted.

Due to the behavior of both attorneys, reviewing the deposition transcripts was an exercise in frustration, and provides the opportunity to remind all practitioners of the standards expected during depositions in the workers' compensation arena.

To begin with, the "no-holds-barred" mentality which is often a part of civil litigation has no place in workers' compensation proceedings. Unlike civil litigation, which is truly an adversarial-based process, the goal of workers' compensation – to provide an injured employee with those statutory benefits to which the worker is entitled – should be shared by all parties. While honest differences of opinion may well exist when seeking to determine benefit entitlement, attempting to gain an advantage through gamesmanship, hyper-technical application of the procedural rules, subterfuge, harassment in any form, production delay, and similar tactics, will not be tolerated.

Post-hearing depositions are a part of the hearing process, and should be conducted with the same professionalism as would be expected if the interrogation was taking place at hearing. Incessant interrupting with objections, speaking objections, and comments seemingly geared toward disrupting the flow of testimony would not be tolerated at hearing and are likewise inappropriate during depositions. Counsel arguing with each other, making snide comments, telling anyone to "shut up," or making belittling remarks, is unprofessional and incredibly rude. The deponent, as well as the opposing attorney, deserves more respect than to be subjected to this type of conduct. It is also beyond debate that intimidating behavior, such as standing over a deponent or opposing counsel, yelling and gesturing, or stomping about the room is also impermissible. Repeating the same question *ad nauseam*, and disparaging or arguing with a witness is also not tolerable.

JRP 16 is broad enough to sanction such abusive conduct. Additionally, Idaho Code § 72-715 addresses misbehavior and obstruction of the hearing process, and provides penalties therefore. Attorneys might consider asking for a brief recess to regain their composure when they feel their professionalism slipping. No one should risk sanctions because they let themselves get carried away with the moment.

Having considered the evidence and briefing of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Accident and Post-Accident Medical Care

1. On or about May 5, 2011, Claimant, a registered nurse working for Employer in Twin Falls, injured her low back during a patient transfer while in the course and scope of her employment.

2. Defendants directed Claimant to Douglas Stagg, M.D., at St. Luke's Clinic – Occupational Medicine in Twin Falls.

3. At her initial visit on June 1, 2011, Claimant complained of diffuse low back pain with intermittent radicular pain into the right groin area. She claimed no prior back problems.

4. Dr. Stagg diagnosed low back strain and imposed temporary restrictions of no lifting, pushing or pulling greater than ten (10) pounds, and no transfers. These restrictions were to remain in place until Claimant's next appointment on June 6. Dr. Stagg prescribed stretching exercises, walking, ice and heat to the low back, together with ibuprofen.

5. On her June 6, 2011 visit, Claimant's right-sided radicular discomfort had subsided, but she had developed a similar pain into the left groin and hip area. Her movements, such as gait and flexion, were improving. Dr. Stagg reduced her ibuprofen regimen, and left her work restrictions intact until her next scheduled visit of June 9, 2011.

6. On June 9, 2011, Claimant reported very little discomfort in her low back, but still had occasional radicular-type paresthesias and pain into her left groin. Dr. Stagg prescribed five (5) physical therapy treatment sessions and left her restrictions in place until his next scheduled appointment on June 21, 2011. On the June 9 visit, Dr. Stagg noted Claimant had been seen by fellow physician David McClusky, M.D., on June 7 for emotional and sleep issues unrelated to the industrial accident. In response, Dr. McClusky took Claimant off work for two (2) weeks.

7. When Claimant returned on June 21, 2011 with no improvement in her symptoms in spite of not working for the preceding two (2) weeks, Dr. Stagg requested and obtained authorization for an MRI of the lumbosacral spine. He also reiterated Claimant begin physical therapy, which she then had yet to start. He kept Claimant's temporary restrictions in place.

8. At her July 6, 2011 doctor's appointment, Claimant continued to complain of mild, intermittent pain in her left groin, mainly while sitting. She also complained of new-onset left parascapular discomfort. During this time frame she was also treating

with another physician for right Achilles tendonitis, and wearing a walking boot.[1] She still had not begun physical therapy. Claimant's low back MRI was scheduled for July 11, 2011.

9. Claimant's July 11, 2011 MRI showed mild degenerative disc disease and facet arthropathy in the lumbar spine, but no evidence of acute traumatic changes, spinal stenosis, or neural foraminal narrowing.

10. Dr. Stagg next saw Claimant on July 13, 2011. Her complaints were similar to previous visits, although subjectively she complained of a bit more pain. She had missed her first physical therapy appointment, so it was rescheduled for July 18. Dr. Stagg noted the MRI showed nothing acute. His notes contain no reference to any ongoing upper back complaints. He scheduled a follow up visit for July 20, and kept Claimant's temporary restrictions unchanged until then. Claimant did not return to Dr. Stagg after this July 13 visit, as discussed below.

11. Claimant attended her initial physical therapy session on July 18, 2011. She was scheduled to return for treatment on July 21, 2011, but did not keep that appointment. The physical therapy records reflect that this appointment was cancelled by Claimant. (Claimant's Exhibit D, 164.)

12. Claimant saw Dr. McClusky in April and July 2012 for specific issues unrelated to this claim. Claimant's medical record from her July visit noted that she denied any pain at that time. Claimant did not mention any low back issues.

[1] At her first physical therapy session, the therapist questioned if some of Claimant's ongoing low back complaints could stem from her wearing the walking boot, which Claimant wore until five (5) days before starting physical therapy.

13. In April 2013, Claimant treated twice with Joshua Olsen, D.C., for low back symptoms she attributed, on her case history update form, to the 2011 industrial accident. However, she told Dr. Olsen her mid and low back discomfort had been present for the past few weeks, getting unbearable in the past week.

14. On June 20, 2013, Claimant sought treatment with Twin Falls chiropractor Jill Adepoju, D.C., known locally and referred to by counsel, and herein, as "Dr. Jill". Claimant wrote on her intake form that she was not sure if her current complaints were due to transferring a patient at work in 2010. Dr. Jill's typed notes of that date indicate that Claimant reported hurting her back at work in 2010 and had back pain since then.[2] Claimant's pain had been ongoing for a week at the time of this visit. Sitting or lying too long aggravated Claimant's pain; walking and moving lessened it.

15. Claimant next saw Dr. Jill on August 28, 2013. Claimant rated her pain at 7/10, and noticeable 75% of the time. Her pain was worse in the afternoon and aggravated by lifting, pulling, pushing, carrying, working, changing positions, sitting, and bending. Rest, ice, heat, chiropractic, massage, and Tylenol reduced her discomfort. Dr. Jill found subluxations, spasms, and inflammation in Claimant's cervical, thoracic, lumbar, sacral, sacroiliac, left pelvic, left buttock, left posterior leg, and left posterior knee. Dr. Jill diagnosed spinal segmental dysfunction and encouraged Claimant to continue with the suggested treatment plan, which included more regular and frequent visits to Dr. Jill. Claimant expressed doubts if she could afford that level of treatment.

[2] While the records reference "2010", it is assumed Claimant was referring to her industrial accident of 2011.

16. Claimant saw Dr. Jill again on December 23 and 27, 2013. By the December 27 visit, Dr. Jill noted Claimant was in a lot of pain, and it was starting to get to Claimant because it seemed like the pain was never going away.

17. On Claimant's January 20, 2014 visit with Dr. Jill, Claimant complained of pain from her low back into her left leg. Dr. Jill adjusted the ever-present multiple subluxations and noted the never-changing inflammation throughout Claimant's spine.[3] Dr. Jill stressed the importance of treating two or three (2 or 3) times per week to reduce Claimant's back pain.

18. Claimant also saw Dr. McClusky for a wellness check in January 2014, at which time she complained of some neck pain from lifting, and continuing low back pain from her 2011 industrial accident. Dr. McClusky was more concerned with Claimant's liver enzymes than any other finding that day. He did not suggest any follow up care for Claimant's neck and low back complaints.

19. Claimant did not return to Dr. Jill until November 17, 2014. Thereafter, she treated with Dr. Jill on November 26 and December 1, 2014. Her complaints and Dr. Jill's findings were unchanged through this time frame.

20. Dr. Jill wrote a report to Claimant's attorney on March 8, 2015, in which she outlined her findings, proposed management plan, diagnosis, and prognosis. It was Dr. Jill's opinion that Claimant's 2011 industrial accident resulted in lumbar facet syndrome. She opined that without frequent chiropractic, electrical muscle stimulation, and intersegmental traction treatments, Claimant's condition would continue to deteriorate,

[3] It appears portions of Dr. Jill's notes may be "canned" in that they are identical from visit to visit. If they are not, it is interesting that the treatments made no progress in relieving Claimant's continued acute symptoms such as hot, inflamed muscles throughout the length of her spine.

but with such treatments there was a "fair" chance Claimant could obtain some long term pain relief.

21. Thereafter, Claimant treated on eleven (11) occasions between March 20 and July 7, 2015. Claimant's subjective improvement began almost immediately after Dr. Jill's report. On just her second post-report visit, March 30, 2015, Claimant's pain had gone from 7/10 and noticeable 90% of the time when she last treated in December 2014, to 5/10 and noticeable 70% of the time. When Claimant came in the next day, March 31, her pain was only noticeable 65% of the time. Dr. Jill's objective findings had not changed from previous treatments; the inflammation throughout Claimant's spine was still noted, as were the multiple subluxations.

22. By her April 1, 2015 treatment, Claimant's subjective pain was at 4.5/10. She apparently did not treat for the next four (4) weeks, and when Claimant next treated on April 28, her pain was back to 7/10, noticeable 90% of the time. For the remainder of her treatment regimen with Dr. Jill, Claimant's pain continued to hover between 5 and 6/10, often depending on the number of days between doctor visits. Dr. Jill's findings stayed constant.

Relevant Pre-Accident Low Back Issues and Care

23. Claimant treated sporadically with David Long, D.C. in Twin Falls since October 2006. While her initial complaints consisted of cervical and thoracic pain, by December 2006 Claimant was also treating with Dr. Long for pain in her low back which Claimant described as severe enough to make daily activities difficult.

24. Claimant sought treatment after she injured her lumbar and lumbo-sacral area in a work-related accident while attempting to pick a patient up from the floor in January 2007.

25. In December 2010, Claimant again treated with Dr. Long for pain and decreased motion in her lumbopelvic area. She described her pain as being so intense that it caused her difficulty in standing, sitting, and functioning throughout her day.

IME Expert Witness Testimony

Dr. Sirucek

26. Anthony Sirucek, D.C., a Twin Falls chiropractor and Dr. Jill's father, was hired on Claimant's behalf to perform an IME and prepare a causation report. As part of that assignment, he reviewed medical records and examined Claimant prior to June 29, 2015, the date of his report.

27. Dr. Sirucek concluded that Claimant's 2011 industrial accident was directly and causally related to her current complaints, and further opined that:

- Claimant's injury was permanent;
- Claimant's injury was responsible for her referred pain into her lower extremity;
- Claimant's injury was magnified by her pre-existing "risk factors" of arthritic degenerative disc and lumbar facet joints;
- Claimant's injury was medically stable by the time of Dr. Sirucek's examination;
- Claimant's pain management (palliative) care by Dr. Jill was reasonable and necessary as a result of Claimant's industrial accident in question;
- Claimant would require regular palliative care into the future for her industrial injury;
- Claimant's injury has limited her socially and in her employment;
- Claimant's injury resulted in a two percent (2%) whole-person permanent impairment.

Dr. Hajjar

28. In or around May 2015, Michael Hajjar, M.D., a neurosurgeon from Boise, was hired by Defendants to examine Claimant, review medical records, and prepare an IME report.

29. Dr. Hajjar determined that Claimant's 2011 industrial injury, which he felt was correctly diagnosed as a lumbar strain, had completely run its course within six (6) months of the injury. Claimant would have reached MMI by November 2011. Her injury resulted in no permanent impairment.

30. Dr. Hajjar opined that Claimant's current back complaints stem from 2013, as evidenced by medical records. Claimant's ongoing treatment with Dr. Jill focusing on overall wellness was appropriate, but unrelated to the workers' compensation injury. Claimant should avoid heavy lifting, twisting, stooping, prolonged standing, exposure to vibrations, and participating in difficult patient lifts, due to her pre-existing back issues of spondylosis and facet arthropathy, unrelated to her industrial accident in question.

DISCUSSION AND FURTHER FINDINGS

31. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery on her claims. *Evans v. Hara's, Inc.,* 123 Idaho 473, 849 P.2d 934, (1993). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

Causation

32. The threshold issue is whether Claimant's current low back symptoms are causally related to her industrial accident of May 5, 2011. Related to that issue is whether

Claimant's low back complaints are due in whole or in part to pre-existing or subsequent injuries or conditions. These two issues will be discussed concurrently.

Credibility

33. When analyzing the competing arguments, Claimant's credibility, and ability to accurately recall information and events, is critical. Credibility is bifurcated into two categories, "observational credibility" and "substantive credibility". As noted in *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003), "observational credibility" goes to the demeanor of the claimant on the witness stand, while "substantive credibility" may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require personal observation at the hearing.

34. On several occasions at hearing, Claimant's direct examination was dramatically different than what was established on cross examination. For example, Claimant testified she had no prior low back treatment or problems. She testified she had not seen a chiropractor for any back problem. She modified that to say she went once for her upper back when she was pregnant. She thought it was for her rib cage. On cross examination, she allowed that maybe she went to Dr. Olsen once – perhaps for a massage. When the doctor's records were read to her, she changed her response to indicate that she went to Dr. Olsen only for upper back issues. When pressed further, she acknowledged the accuracy of his records showing that he also treated her for low back pain. The same basic scenario unfolded concerning Claimant's treatment with Dr. Long, who also treated Claimant for low back issues several times over the years, including just months before the subject accident. Claimant also exaggerated other testimony, as noted in Defendants' briefing.

35. Claimant did not appear to be scheming to deceive with her testimony. Part of the issue is the fact she is a poor historian. Part of the issue appears to be that Claimant seemed willing to say whatever sounded good and assisted her case, not necessarily with a contriving intent but rather with an almost casual indifference toward accuracy. Perhaps her nerves made it difficult to focus and affected her responses. Also, it is not beyond consideration that over time her memory of events may have modified to place more emphasis on her industrial accident as being the root of all her medical and emotional problems. Perhaps the tendency toward exaggeration is simply part of her personality. While she came across as likeable, hard working, and basically honest at hearing, her testimony, blatantly inconsistent with the medical records, coupled with her poor memory for time frames and details, diminishes the weight of her contested testimony when not corroborated.

Medical Benefits Suspension

36. Claimant's initial post-injury history is undisputed. However, controversy arises about the time she began physical therapy. Claimant asserts Surety prevented her from further medical or therapy care by "temporarily" suspending her benefits pending review of her past medical history. Claimant asserted Surety sent her a letter on this subject. Dr. Sirucek claimed to have seen it; he even cited the date it was prepared – August 3, 2011. Yet the letter is not in the record. Likewise, none of Surety's adjusting notes are in the record. No Industrial Commission records, including any specifically noting a change of status for this temporary suspension of benefits, are in the record.

37. Claimant's version of events is that after she was "cut off" from further workers' compensation coverage she was informed by Dr. Stagg's office staff that she could not receive additional treatment without first making arrangements for payment. She then persisted

through numerous attempts to talk with Surety's adjuster, and finally made contact with a gentleman named Chris. He told Claimant the Surety needed a medical release, which she promptly executed and sent back by September 2011. Thereafter, she was unable to get anyone from Surety to return her calls. In October or November she gave up trying to speak with Surety. By then, Claimant was no longer working for Employer, and had no money to obtain care for her low back. She was also putting her husband through school at that time, further straining her finances.

38. Defendants counter by noting neither Dr. Stagg's nor the physical therapist's records make note of any insurance issues. Rather they simply state that Claimant was a "no show" for appointments. Also, Claimant had the money to see other doctors during this time for issues unrelated to her low back, including Drs. McClusky and Howar. Claimant testified to seeing an O.B. P.A. for issues as well.

39. In correspondence from Dr. Stagg to Surety dated November 16, 2011, the doctor noted that when he last saw Claimant on July 13, 2011, she was starting a new job at St. Luke's Home Health. (Actually, Claimant's new job was at Idaho Home Health, where she worked for less than three (3) months. Thereafter she was unemployed and receiving unemployment benefits until February 2012, when she took a position at St. Luke's Home Health where she worked until July 2012. She left St. Luke's Home Health due to the lack of hours she was provided.)

40. Records from the physical therapy office indicate Claimant was scheduled for additional sessions but she cancelled them and did not reschedule. Defendants point out this would correlate with Claimant's testimony that the therapy was "ridiculous" since it focused on flexibility exercises which did not address her back problem.

41. While Dr. Stagg's records do not include a notation that Surety was suspending coverage, that fact is not dispositive. It could well be as Claimant testified, that the doctor's front desk personnel notified Claimant she would need to arrange for payment if she wanted an appointment. This discussion might not have made its way to Dr. Stagg, so that he had no idea why Claimant did not show up for her scheduled appointment. He acknowledged Claimant was still having low back pain when he last saw her. There is little reason why Claimant would "no show" her appointment with him absent some intervening circumstance. Coverage denial with no way to pay for the appointment is a strong intervening circumstance.

42. Regarding physical therapy, Claimant testified she was told to come back as needed, and she felt the therapy exercises were not useful for her back problems. She also knew she had no workers' compensation coverage at that time. It was reasonable for her to not go back to physical therapy in light of her understanding.

43. Defendants presented no evidence to rebut Claimant's assertion that Surety suspended her medical benefits other than the lack of such notation in the contemporaneous medical records.

44. It is very curious why Claimant did not produce the August 3, 2011 letter from Surety. However, the evidence on the whole, including Dr. Sirucek's notation that he saw the letter coupled with Claimant's testimony, supports the proposition that Claimant was cut off from workers' compensation medical benefits in late July/early August 2011.

Expert Opinions

45. Simply because Claimant's medical care was suspended in 2011 does not prove she was still having low back pain associated with her industrial accident in 2013 when

she resumed treatment. It does cut against the notion that Claimant did not return to Dr. Stagg and physical therapy because her injury had resolved and she was no longer symptomatic by August 2011.

46. Dr. Hajjar based his opinion on several factors, including Claimant's history with her medical providers. Had his opinion simply rested on the fact of her "no shows", it would carry little weight in light of the fact Claimant's abrupt cessation of treatment was due in large part to Surety's behavior. However, Dr. Hajjar also noted that the type of injury Claimant sustained typically heals within six (6) months, and by November 2011 should have resolved with no lasting impairment. He based his opinion on the MRI and medical records, and his experience in the practice of helping people with back pain.

47. Dr. Sirucek, who also helps people with back pain, highly disputed Dr. Hajjar's opinion. Dr. Sirucek opined that Claimant suffered a permanent industrial injury in May 2011 which remained symptomatic as of the time of hearing. There is little to support that opinion other than Claimant's testimony. While Claimant argues her "unrebutted" testimony must be taken at face value unless inherently improbable, the Referee need not determine if her testimony is improbable since it is not truly unrebutted.

48. Rebuttal may come not just from testimony of a competing witness but also from other evidence such as contrasting medical records, as in this case. It may also come from the Claimant herself by proving her testimony unreliable through impeachment from the witness stand. Once the Claimant has shown her testimony is untrustworthy, the Referee is not bound to accept it even if no competing witness testimony stands against it. *See e.g., Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). (The rule applicable to all witnesses is that a court must accept as true the positive,

uncontradicted testimony of a *credible* witness, unless the testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing; the court may not arbitrarily disregard the testimony of a witness *unimpeached by any of the modes known to the law*, if such testimony does not exceed probability.) (Emphasis added.)

49. In the present case, Dr. Hajjar's opinion is given more weight than those of Dr. Sirucek and Dr. Jill for reasons explained below.

50. First, either Dr. Sirucek was not shown or chose not to consider Claimant's full history of low back complaints when forming his opinion. Since he ascribes to the theory that strains and sprains are permanent injuries, he should have explained why Claimant's previous low back injuries could not have been responsible for her current condition. More importantly, by ignoring or being in the dark about Claimant's true history of low back complaints, Dr. Sirucek's opinion is based on incomplete information which could skew his outcome. The same defect afflicts Dr. Jill's opinions on causation. While it is understandable that when a patient presents with pain which she links to a past event, the physician may rely on that history to form an opinion on causation; if the information is inaccurate, then the causation opinion may also be inaccurate.

51. The fact that Dr. Sirucek is Dr. Jill's father does not help his appearance of impartiality. He testified he got involved to help out his daughter. His testimony that Claimant should continue to treat with Dr. Jill for the indefinite future based upon Claimant's need for palliative relief of a permanent injury certainly does help his daughter, assuming she is paid for her continuing services. One way to ensure payment is to causally link the need for such treatment to a workers' compensation claim, and not to Claimant's pre-existing back issues.

52. Claimant is critical of Dr. Hajjar's opinion that Claimant was at MMI by November 2011 due to the fact Dr. Stagg's last medical record in August showed she was still symptomatic. Claimant argues it is pure speculation for the doctor to rate her at MMI by November. In reality, all experts, when expressing an opinion, rely to some extent on "educated speculation". After all, an opinion is simply a belief formed from the application of known facts coupled with knowledge on the subject. If sprains typically resolve in six (6) months or less, it is more than just speculation for Dr. Hajjar to opine that Claimant's sprain will resolve in six (6) months, where the MRI showed no acute injury and the medical records show mild symptoms. This is not to say no sprain can remain symptomatic beyond six (6) months, but in this case the weight of the evidence suggests it did not.

53. Claimant did not treat or even mention to a physician any complaints of back pain from July 2011 until April 19, 2013 when she was seen by Chiropractor Olsen. On the occasion of that visit, Dr. Olsen recorded the following history from Claimant:

> **Subjective:**
> Letty says that she has been having some discomfort in her mid back and low back for the past few weeks. In the past week the pain has been getting worse and becoming more unbearable. Letty says that the discomfort has been keeping her from being able to work. She has had some trouble with her lower back in the past and responded well to chiropractic care. She has also been having pain traveling down the back of her left leg to her knee.
>
> Claimant's Exhibit F, 239.

This note does not lend support to Claimant's current insistence that her low back complaints between July 2011 and April 2013 were unrelenting. Given the fact Claimant had periodic low back issues pre-dating 2011 for which she sought treatment and that she treated for other medical issues between 2011 and 2013, it is more likely than not that Claimant did not continue

to suffer low back pain related to the 2011 injury through the time of hearing. If anything, the record supports the notion that Claimant suffers from periodic low back pain and has since at least 2006.

54. When considering the record as a whole, Claimant has failed to prove her current low back condition is causally related to her workplace accident of May 5, 2011.

Remaining Issues

55. Claimant seeks benefits for medical care, PPI, PPD, and attorney fees. These issues are discussed in turn.

Medical Care

56. Claimant has not shown she obtained any medical care for her low back during the time immediately after Surety discontinued her claim, to wit, during the last part of 2011 or into the first part of 2012. Her first low back-related treatment came in April 2013. Claimant did not prove this or subsequent treatment was causally related to her May 2011 work injury.

57. Claimant has not proven the right to past unpaid medical care or future medical care, palliative or curative, related to her May 5, 2011 industrial accident.

PPI

58. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods,* 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care,

communication, normal living postures, ambulation, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewisto*n, 133 Idaho 723, 992 P.2d 172 (1999). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

59. Dr. Sirucek is the only doctor in this case to assign an impairment rating. Dr. Sirucek opined that Claimant suffered a two (2%) percent whole person impairment from her industrial accident in question. His rating was based on flawed assumptions, as discussed previously, and thus his rating is afforded no weight.

60. Dr. Sirucek testified that Claimant's industrial injury was magnified by her pre-existing arthritic degenerative disc and lumbar facet joints. He also testified that once injured, Claimant was more susceptible to future injury at that site. Dr. Hajjar testified that Claimant should avoid patient transfers and heavy lifting, not due to her 2011 back strain but rather due to her pre-existing conditions.

61. Claimant testified she sought jobs in the nursing field that did not require patient transfers after her 2011 work injury. All doctors and Claimant herself recognize that she should not seek employment where patient transfers or other heavy lifting are required. However, the issue is not whether Claimant is functionally limited, but whether those limitations are due to her 2011 industrial injury. While her injury may have been magnified by her pre-existing condition, there is no evidence

Claimant suffered a permanent injury in 2011 or that her current and future limitations are due to that accident.

62. When considering the record as a whole, Claimant has failed to prove she suffered a permanent impairment as a result of her May 5, 2011 industrial accident, and thus is not entitled to PPI benefits.

PPD

63. By definition, without impairment there is no disability. Idaho Code § 72-102(11). Since Claimant did not suffer a permanent impairment, she can not have suffered permanent disability. Claimant has failed to prove she is entitled to PPD benefits.

Attorney Fees

64. 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).

65. Under Idaho Code § 72-804, there are three (3) ways in which a surety may incur attorney fees. First, it may unreasonably contest a claim for benefits; that did not happen here. Second, a surety may fail to pay benefits within a reasonable time after receipt of a written claim for compensation; that did not happen here. Third, a surety may discontinue compensation justly due and owing an employee without a reasonable ground; this prong of Idaho Code § 72-804 warrants closer scrutiny.

66. Claimant testified convincingly that while she was still symptomatic and actively treating medically and with physical therapy, Surety "temporarily" discontinued her medical benefits after accepting her claim. Since sureties are encouraged to obtain prompt treatment for an injured employee, the practice of providing such prompt medical care first and then beginning the investigation on causation and other such issues is lauded. Sometimes the investigation leads a surety to change course and deny further coverage as additional facts come to light. That too is permissible in appropriate cases.

67. Here, Surety initially provided Claimant adequate medical care, including an MRI and a referral to physical therapy, on an accepted industrial accident. Surety then decided to conduct a more thorough investigation into Claimant's medical past and asked for a signed medical release to help facilitate such investigation. Claimant provided the requested document.

68. Surety discontinued providing medical treatment on a "temporary" basis while they gathered Claimant's medical records. Claimant was notified orally and by letter of this fact. Claimant was also informed by her treating physician's staff that she would need to arrange for payment of the doctor's charges while her workers' compensation coverage was in abeyance. She testified she could not afford this option.

69. Claimant further testified that after providing the medical release she attempted on numerous occasions for the next month or longer to speak with Surety's adjuster on her claim. She left voice messages but Surety never contacted Claimant back, orally or in writing.

70. Surety owed a duty to Claimant to communicate promptly and keep her informed of the status of her claim in circumstances such as presented herein. Surety also had the obligation to investigate her claim promptly and efficiently. In a case such as this one, where Claimant is actively treating for a symptomatic accepted condition and not at MMI, Surety's responsibility included addressing any coverage concerns as promptly as was reasonable and communicating its findings to Claimant without delay.

71. Surety's actions in leaving Claimant in the dark as to whether or not she had continuing medical coverage at a time when she should have been receiving medical care, and in fact had appointments scheduled, was not reasonable. In effect, Surety discontinued compensation justly due and owing to Claimant without a reasonable ground, not *per se* by temporarily suspending her medical coverage, but by unreasonably delaying its decision on continuing coverage on an accepted claim and/or refusing to communicate with Claimant on her coverage status despite her repeated attempts to speak with the adjuster.

72. Surety's actions led to the uncertainty that helped fuel this litigation. By discontinuing care before a physician declared Claimant at MMI, Surety left the door open for Claimant to more forcefully argue that she never did achieve medical stability after the industrial accident. It is nearly axiomatic that the greater the uncertainty, *i.e.* unresolved issues, the greater the chance for contested litigation. After all, cases with a certain outcome rarely end up going to hearing.

73. In the present case, had Claimant been allowed to treat to MMI, her argument that she never reached MMI would be less of an open question. While there is no guarantee that Claimant would not contest her treater's opinion regarding medical stability, without that opinion Claimant had only an after-the-fact IME doctor's opinion to overcome. While she did not overcome that opinion, Surety's conduct invited this litigation by unreasonably leaving Claimant in a legal and medical limbo.

74. The fact that Claimant did not prevail on her causation claim does not prove Surety acted reasonably. Idaho Code § 72-804 does not speak in terms of a prevailing party. To obtain attorney fees under the statute, Claimant need only prove one of the three (3) prohibited behaviors. For an award of attorney fees in this case, Claimant must, and did, prove (1) an industrial injury, (2) causally-related treatment (prior to November 2011) for such injury, and (3) Surety discontinuing such causally-related treatment without reasonable grounds. Claimant has satisfied her obligation for an award of attorney fees in pursuing this litigation.

75. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum.

If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

CONCLUSIONS OF LAW

1. Claimant has failed to prove her current low back condition was caused in whole or in part by the industrial accident of May 5, 2011.

2. Claimant has failed to prove her right to reimbursement for medical care for her low back after she reached MMI in November 2011.

3. Claimant has failed to prove she is entitled permanent partial impairment (PPI) benefits from her industrial injury.

4. Claimant has failed to prove she is entitled to permanent partial disability (PPD) benefits from her industrial injury.

5. Claimant has proven she is entitled to an award of attorney fees under Idaho Code § 72-804 for Surety's prolonged discontinuation of medical benefits without a reasonable ground.

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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 18th day of February, 2016.

INDUSTRIAL COMMISSION

__/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 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:

PATRICK BROWN
PO BOX 125
TWIN FALLS ID 83303

ALAN GARDNER
PO BOX 2528
BOISE ID 83701

____/s/_____