

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BARBARA WOLT,

Claimant,

v.

IDAHO NATIONAL LABORATORY, and
BATTELLE ENERGY ALLIANCE,

Employer,

and

EMPLOYERS INSURANCE OF WAUSAU, and
LIBERTY MUTUAL INSURANCE,

Surety,
Defendants.

IC 2009-015383

IC 2013-007342

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

Filed February 4, 2015

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 Idaho Falls, Idaho on January 15, 2014. Claimant, Barbara Wolt, was present in person and represented by Dennis Petersen, of Idaho Falls, Idaho. Defendant Employer, Idaho National Laboratory (INL) and Battelle Energy Alliance (BEA), and Defendant Sureties Employers Insurance of Wausau and Liberty Mutual Insurance, were represented by Susan Clark, of Boise, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted.¹ The matter came under advisement on September 19, 2014. The undersigned

¹ Claimant objected to Defendants' discussion of Claimant's 2009 knee injury in Defendants' Post-Hearing Brief because issues relating to this injury were not noticed for hearing. Claimant's objection is well taken. No issues regarding the 2009 accident were noticed for hearing and Defendants' argument thereof at this time is inappropriate. Transcript, pp. 2-3. However, some knowledge of the circumstances surrounding Claimant's 2009 knee injury is relevant to understanding her actions following the 2012 accident. Those portions of Defendants' Post-Hearing Brief arguing issues relating to Claimant's 2009 accident are stricken. Defendants filed a brief in excess of 30 pages without seeking prior approval of the Commission. The filing of an over length brief without prior approval is specifically disallowed by JRP 11(A). Strangely, although such a brief "shall" not be filed, the rule also states that if filed, such a brief "may" be stricken. Why the rule would prohibit the filing of an over length

Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

By agreement of the parties at hearing, the issues to be addressed presently are:

1. Whether Claimant suffered an accident causing injury;
2. Whether Claimant gave timely notice of the accident;
3. Claimant's entitlement to past medical benefits,² including whether the condition for which Claimant seeks benefits was caused by the industrial accident;
4. Claimant's entitlement to temporary disability benefits;
5. Claimant's entitlement to attorney fees; and
6. Retention of jurisdiction.

CONTENTIONS OF THE PARTIES

Claimant asserts she injured her low back on October 25, 2012, moving boxes at work. She alleges she gave timely notice of her accident to her supervisor, her acting supervisor, her supervisor's assistant, and a BEA-designated physician. Claimant maintains that her subsequent need for medical care of her low back is related to her accident and that she is entitled to temporary disability benefits from October 29, 2012, through the date of hearing. Lastly, Claimant asserts Defendants have unreasonably disputed receiving timely notice of Claimant's accident. She requests attorney fees for having to litigate the issue of notice.

brief, yet give the Commission discretion to consider the prohibited filing is unclear. Here, since Claimant has not objected to the Commission's consideration of Defendants' 42-page brief, and since the Referee elected to consider it, we will not strike the brief at this time. Parties should be cautioned, however, that over length briefs, filed without prior approval of the Commission, are subject to being stricken, in their entirety.

² Claimant underwent lumbar surgery on May 22, 2014. By express agreement of the parties during a telephone conference conducted June 9, 2014, and as memorialized by the Commission's June 17, 2014 Order on Motion to Reopen Record and Order Establishing Briefing Schedule, Claimant's entitlement to additional medical care after the date of hearing, as recommended by Dr. Bates, is not presently before the Commission.

Defendants maintain Claimant sustained no work accident on October 25, 2012, and failed to give timely notice of any accident. Defendants argue that Claimant's need for low back treatment is due to her pre-existing conditions which have also precluded her from working since October 29, 2012, and that no temporary disability benefits or attorney fees are owing.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits A-O, V-Z, and AA-BB admitted at the hearing;
3. Claimant's Exhibits P-U and CC which are hereby admitted;³
4. Defendants' Exhibits 1-31, admitted at the hearing;
5. The testimony of Claimant, Edmond Schuebert, Marjorie Owens, Stephen Gamache, Kristine Staten, Ann Vandel, and Loran Kinghorn, taken at the January 15, 2014 hearing;
6. The post-hearing deposition testimony of James H. Bates, M.D., taken by Claimant on February 2, 2014;
7. The post-hearing deposition testimony of Michael Enright, Ph.D., taken by Defendants on April 4, 2014; and
8. The post-hearing deposition testimony of Paul Johns, M.D., taken by Defendants on April 10, 2014.

All objections made during the depositions are overruled, including Defendants' renewed objections initially made during Dr. Bates' Deposition.

³ At the commencement of the hearing, the Referee withheld ruling on the admission of Claimant's Exhibits P-U and CC (containing copies of medical bills) pending determination of threshold issues. The threshold issues having been determined herein, said Exhibits are relevant and are admitted. The Commission finds no reason to disturb the Referee's evidentiary rulings.

FINDINGS OF FACT

1. Claimant was born in 1962. She is right-handed. She was 51 years old and lived in Idaho Falls at the time of the hearing. BEA is an employer working at the INL site, which is located approximately 45 miles from Idaho Falls.

2. **Background.** Claimant graduated from high school in Los Angeles in 1981. She then attended Citrus College in California where she obtained a degree in business accounting. In 1988 she worked for the Census Bureau. In approximately 1989, she commenced working with her husband's property maintenance business. For the next 11 years she handled payroll, ordered supplies, and kept maintenance records for the company's trucks. In approximately 2000, her husband died of polycystic kidney disease and Claimant then closed the business.

3. In 2000, Claimant began working for Murphy Explosives Company where she accounted for the inventory of explosives in and out of the plant. She worked for Murphy for five years. In 2005, Claimant moved to Idaho Falls and began working for Red, Inc., a temporary employment agency in Idaho Falls providing employees to companies working at the INL. Claimant was assigned to the Advanced Test Reactor site and worked for Red until 2007.

4. In 2007, Claimant began working directly for BEA as an office manager administrative assistant and move coordinator at the Advanced Test Reactor site at the INL.

5. Claimant's personal medical provider was Victoria Blair, N.P., at Family First Medical Center.

6. In April 2008, Claimant was anxious and depressed because her 12 and 15 year old sons had both been diagnosed with polycystic kidney disease, the same disease that took her husband's life. Her 15 year old son began dialysis.

7. On June 3, 2008, Claimant presented to Nurse Blair with low back and leg pain after working in her yard. Claimant reported pain in her back, buttocks, and down her right leg. Defendants' Exhibit 11, p. 223. Nurse Blair's notes specified left—but not right—leg pain; however, Claimant testified that reference to left leg symptoms was an error and she only suffered pain down her right leg at that time. Claimant received prescription Ultram and Flexeril, and a Toradol injection. Her back symptoms improved and she continued working.

8. In the summer of 2008, Claimant struggled to maintain her work performance while using all her available resources for treatment of her son at Mayo Clinic. Nurse Blair prescribed medications for Claimant's depression.

9. On February 9, 2009, Claimant presented to Nurse Blair for low back pain and pain radiating down her right leg. While seated, Claimant had turned and then noted pain down her right leg. A lumbar MRI taken March 6, 2009, revealed mild L4-5 annular bulging and mild to moderate L5-S1 central disk extrusion. Defendants' Exhibit 13, p. 274. Nurse Blair prescribed Vicodin and Flexeril, and another Toradol injection. Claimant's back symptoms improved and she continued working.

10. On April 28, 2009, Claimant suffered an accident when exiting the bus that transported BEA employees to and from the INL site. She caught her foot between the bus seats and fell, twisting her right knee. Claimant reported the accident and injury. Defendants required Claimant to seek medical treatment with a site doctor who, after x-raying her knee, concluded she had suffered no significant injury and released her to return to her usual work duties. Claimant continued to report right knee instability and requested examination by her usual medical provider. On May 1, 2009, Claimant presented to her personal medical provider, Nurse Blair, who recorded:

[Claimant] presents today after being treated at INL medical clinic after falling on the bus. She has been to the medical clinic and they have put her on NSAID's. She is not tolerating the NSAID's and has been nauseated and vomiting ever since starting. She has told the medical staff, but no changes made. She finally told the Nurse on Thursday that she needed to be seen by her primary provider and was very concerned about the unstable condition of the right knee. When walking the right knee will twist and then collapse. She was given crutches, but they were too small. When she told the medical staff about the crutches, they told her that was the only pair left and she needed to try and make it work. She is concerned that the right knee is seriously hurt and has requested a MRI numerous times.

Defendants' Exhibit 11, p. 235.

11. Upon examining Claimant, Nurse Blair found moderate to severe right knee swelling and tenderness and a positive anterior drawer sign. She ordered a right knee MRI which showed complete right ACL tear and meniscus injuries requiring surgical repair. Defendants did not file any report of Claimant's fall and knee injury and denied surgical treatment and other workers' compensation benefits. On May 15, 2009, Claimant underwent right knee surgery by Casey Huntsman, M.D., for ACL reconstruction and meniscus repair. Claimant was forced to go on short term disability, retain an attorney, and file a Complaint to pursue workers' compensation benefits for her knee injury.⁴ After recovering from knee surgery, she returned to work at BEA. Defendants ultimately paid for her knee surgery and Claimant eventually received temporary disability for the period of her recovery. Nurse Blair stopped Claimant's prescription medications for her low back condition as they were unnecessary. She continued working.

12. On November 24, 2009, Claimant presented to Nurse Blair with sinusitis and return of low back and sciatic pain. Nurse Blair indicated Claimant's prior epidural steroid injection had provided six months of relief, but her pain had returned. Nurse Blair prescribed Vicodin and another epidural steroid injection. On December 28, 2009, Claimant received

⁴ Complaint IC 2009-015383, one of the two cases consolidated herein.

another lumbar/sacral epidural steroid injection and her back pain improved. She continued working.

13. On September 14, 2010, Claimant presented to Scott Coleman, PA-C, at Family First Medical Clinic, complaining of recurring sciatica on the right. Claimant testified at hearing that she experienced back and right leg pain while moving chairs and desks at work. However, she did not report to Mr. Coleman that her symptoms commenced at work nor did she file a notice of injury with BEA. She was treated with Flexeril and Mobic and her back pain improved. She continued working.

14. On June 29 and September 28, 2011, Claimant presented to Nurse Blair for other health concerns. There was no report of any back or leg complaints on either occasion.

15. On December 10, 2011, Claimant fell on the ice by her garage and landed on her dominant right arm. She presented to the hospital and was diagnosed with a non-displaced radial head fracture of the right elbow. Dr. Huntsman treated her fracture conservatively. By January 30, 2012, x-rays showed a loose fragment of the radial head fracture that had not healed. On February 1, 2012, Dr. Huntsman performed right elbow surgery and Claimant was off work for several weeks thereafter. She returned to work in March 2012 and was restricted to lifting no more than five pounds with her dominant right arm. Dr. Huntsman's notes of May 31, 2012, document Claimant's continued right elbow symptoms and consideration of radial head replacement.

16. On August 3, 2012, Claimant presented to Nurse Blair complaining of low back and right leg pain for the prior two weeks. Nurse Blair documented moderate bilateral paraspinal muscle tenderness, worse on the right. There was no report of left leg pain or symptoms. Claimant was struggling with depression and afraid to miss work. Defendants' Exhibit 11,

pp. 253-254. Nurse Blair prescribed Vicodin and Flexeril and Claimant's back pain improved. She continued working.

17. On September 24, 2012, Claimant presented to Nurse Blair with headaches which Claimant attributed to poor air quality. At that time the INL site was overcast with smoke from wildfires and Claimant believed the smoke caused her headaches. She did not report back or leg symptoms.

18. On October 19, 2012, Claimant presented to Nurse Blair with concerns of elevated blood pressure and blood pressure medications. Claimant did not report back or leg symptoms.

19. On October 22, 2012, Claimant presented to Erich Garland, M.D., for her persisting headaches which had become severe within the prior six weeks. Dr. Garland also recorded Claimant's report of chronic low back pain, worsening over the prior several weeks. Upon examination, Claimant's sensory perceptions, reflexes, and gait were all normal. There was no report of radiating leg pain. Dr. Garland prescribed several medications for Claimant's variants of migraine condition and Hydrocodone-Acetaminophen for her chronic back complaints. Claimant continued working.

20. By October 24, 2012, Claimant was working Monday through Thursday from 7:00 a.m. to 5:15 p.m. at BEA. Claimant caught the bus from Idaho Falls to the INL site at 5:40 a.m., arriving at her work site at 6:53 a.m. She caught the bus back to Idaho Falls at 5:30 p.m. As the Advanced Test Reactor operations administrative assistant, Claimant supported five BEA managers, including her direct supervisor, Edmond Schuebert, who was then the Advanced Test Reactor manager, and 10-15 other individuals. She answered the phones, managed calendars,

wrote and formatted letters, took meeting minutes, indexed completed records, and boxed and sent records to long term storage.

21. Claimant's recurring back symptoms, right elbow fracture and eventual surgery, depression, several bouts of MRSA, and her sons' kidney disease resulted in her marginal attendance at work. Prior to 2012, BEA placed Claimant on an employee performance improvement plan. By October 2012, Edmond Schuebert had expressly warned her that if she missed any more work her employment at BEA would be terminated.

22. On October 24, 2012, BEA management convened a meeting to consider terminating Claimant's employment. Because Claimant had authorized access to Schuebert's electronic calendar to accept meeting invitations for him, Defendants assert it is very possible that Claimant was aware the meeting was being convened. Claimant denied knowledge of the meeting. At the meeting, BEA decided to terminate Claimant's employment effective October 31, 2012. Schuebert was away on personal leave from October 25 through November 4, 2012. Loran Kinghorn, Claimant's acting supervisor during Schuebert's absence, was assigned to conduct the final interview and terminate Claimant's employment on October 31, 2012.

23. **Alleged industrial accident and treatment.** On Thursday, October 25, 2012, Claimant was working for BEA at the INL site. Towards the end of her shift, Claimant was sorting and filling standard sized banker boxes with data record sheets for the plant. Claimant filled each box and then scooted it with her foot or lifted and stacked it on other boxes in preparation for transport to storage. The boxes were to be filled with no more than 25 pounds of records. Moving the loaded boxes was challenging given her five-pound dominant right arm restriction. At almost 5:00 p.m., she was loading three boxes near her computer and chair. She lifted the boxes one at a time with her left arm and thigh. To avoid having to lift and carry the

boxes any more than absolutely necessary; she often placed closed boxes on the floor and slid them with her foot. As she moved a box she felt pain in her low back and down her left leg. The pain was sufficiently intense to cause her to sit down. She noted that it was nearly 5:00 p.m., her back was hurting, and she knew she would need to leave shortly to catch the 5:30 bus to Idaho Falls. If she missed the 5:30 bus, she would have to wait for an hour and a half for the next bus. Claimant's direct supervisor, Edmond Schuebert, was then absent on personal leave. Claimant's acting supervisor, Loran Kinghorn, had already left work for the day. Claimant did not report her injury that day. She left without completing her time sheet and caught the 5:30 bus home. Her back and left leg pain worsened. She iced her back at home and took some prescription medications that she had on hand. Claimant never returned to work at BEA.

24. Claimant was not scheduled to work Friday through Sunday (October 26-28, 2012) and she did not attempt to contact anyone at BEA over the weekend.

25. Claimant's back and left leg pain worsened and on Monday, October 29, 2012, she was unable to work. She placed a call to Loran Kinghorn, but he did not answer and Claimant left a message. She then called Advanced Test Reactor operations controller Marjorie Owens and said her back was really hurting and she would not be in to work that day and needed to talk to Loran. Claimant called Marjorie again about 4:00 that same afternoon, advising her that Loran had not yet called back. Loran did not return Claimant's call that day.

26. On Tuesday, October 30, 2012, Claimant attempted to call Loran at 7:00 a.m., but he did not answer. Claimant then called Marjorie and said she would not be in for work that day. Claimant called Marjorie again at 5:00 p.m. that day saying she had hurt her back moving boxes by her desk the prior week.

27. Claimant's back and left leg pain continued and she scheduled an appointment to see Nurse Blair.

28. On Wednesday, October 31, 2012, Claimant called Marjorie and informed her that Claimant had scheduled an appointment with her personal doctor. Marjorie asked Claimant if she had talked to Dr. Johns, the INL occupational medical director. Claimant then called Paul Johns, M.D., and told him about her accident moving boxes the prior week and the appointment she had scheduled to see her own doctor. Dr. Johns testified in his post-hearing deposition that Claimant called him at 8:17 a.m. on October 31, 2012, and told him she hurt her back moving records at work three days earlier. She indicated her back hurt too much to work and having missed work since her accident, she was afraid she would be fired.

29. Marjorie testified at hearing that she spoke with Claimant on the phone on October 31, 2012, and Claimant indicated she had hurt her back from moving boxes in her office at work. Transcript, pp. 203-204. Claimant was distraught because she was unable to work but had no leave time, including family leave time, available. Marjorie testified she told Claimant "that even though she didn't have family leave, she could still apply for short-term disability" Transcript p. 205, ll. 9-11. Marjorie believed she told Loran Kinghorn about Claimant's report of hurting her back moving boxes at work. Transcript, pp. 207-208.

30. On October 31, 2012, Stephen Gamache, industrial safety engineer at the Advance Test Reactor, took pictures of Claimant's work area and the hallway nearby. Gamache investigates pipe failures, alleged incidents, and accidents. At hearing Gamache testified that while he was in Claimant's work area on October 31, 2012, he lifted three boxes stacked one on top of another. He estimated the top box weighed 10 pounds and the other two boxes weighed 20 pounds each. Interestingly, Gamache also initially testified that he did not recall who or when

he was asked to take pictures of Claimant's work area. On cross-examination Gamache admitted that his supervisor, Tim Carlson, directed him to take the pictures, but did not explain the reason for the pictures. Carlson is also Edmond Schuebert's supervisor. Schuebert testified at hearing that he knew of no reason why Gamache would take photos of Claimant's work area on October 31, 2012, except to investigate an alleged accident.

31. On November 1, 2012, Claimant sought treatment from Nurse Blair who recorded: "[Claimant] presents today with severe low back pain on the left side that is causing radiation down to leg and she is having numbness in the leg. She continues to have right side pain, but nothing like the left presently." Defendants' Exhibit 11, p. 262. Nurse Blair noted bilateral lumbar tenderness, worse on the left, with moderate to severe left lumbar muscle spasm. She ordered an MRI and recommended an epidural steroid injection. Nurse Blair noted "will need prior authorization." Defendants' Exhibit 11, p. 262. Claimant received an epidural steroid injection.

32. Claimant testified that later that day Loran Kinghorn called Claimant indicating that Marjorie had advised him Claimant hurt herself at work. Claimant responded affirmatively and told him she had seen her personal doctor earlier that day. Claimant testified that Loran told her he would have to prepare an Initial Notification Report of the accident for BEA. Claimant understood that Loran would file the required notice. There is no indication Defendants ever filed notice of the alleged accident with the Industrial Commission.

33. At hearing, Loran Kinghorn admitted that within approximately two weeks of October 25, 2012, he understood that Claimant was alleging she got hurt at work sliding one of the record boxes with her leg. Kinghorn could not recall Marjorie ever telling him that Claimant alleged she hurt her back moving a box at work.

34. On Monday, November 5, 2012, Claimant talked with Edmond Schuebert and told him she did not submit her time card on October 25, 2012, as was expected. Claimant testified she also advised Schuebert of her accident, that she had received an injection, that her doctor was sending her to a specialist, and that she would be off of work until November 14. Claimant testified she told Schuebert that she reported her accident to Loran and asked whether Schuebert had talked to Loran. Schuebert testified that he heard nothing from Claimant until either November 1 or 7, 2012.

35. When Claimant realized that she would be off work for over a week, she followed through with Marjorie's suggestion and on November 6, 2012, Claimant called Kristine Staten, a benefits specialist for BEA, seeking information about short term disability benefits. Claimant explained she would be off of work for over a week and received contact information for BEA's short term disability insurer. Kristine Staten testified at hearing that Claimant said she woke up on October 26, 2012, with back pain and had not worked since. Staten testified that short term disability would only cover non-work related conditions. Staten was aware Claimant had been on short term disability several times previously and gave Claimant contact information for BEA's short term disability carrier. Claimant contacted the carrier, completed the application, and her period of short term disability commenced October 26, 2012, with benefits starting November 4, 2012.

36. On November 12, 2012, Claimant presented to Nurse Blair with continued low back and leg pain. Nurse Blair recorded: "She stated that she was doing so good until she had to move some heavy boxes at work She was not able to lift and so resorted to pushing with her foot across the room. That night was when she started the LBP again." Defendants' Exhibit 11, pp. 264-265. Nurse Blair recorded right leg weakness, low back pain and shooting pain down

the right leg. She released Claimant from work and referred her to neurosurgeon Stephen Marano, M.D.

37. On November 15, 2012, Claimant presented to Dr. Marano who provided conservative treatment.

38. On December 17, 2012, Edmond Schuebert received an email from Claimant. At hearing Schuebert testified the email described her job requirements and then stated: “this is really hard to do with the five-pound weight restriction on her [sic] right arm and is the reason I injured my back.” Transcript, p. 177, ll. 9-12. The text of the email, which Claimant apparently sent to both Mr. Schuebert and Dr. Johns provided in part:

I am still in a lot of pain with my back and legs.

The Dr [sic] has asked for a physical description of my job to see if I can be released [C]an you please send me a statement with your signature or please fax to Dr [sic] Marano 208-523-5342 (I will be home with no means of correspondence [sic] stating that I:

Lift 30-40 lbs as this is the weight of some of the boxes that are sent to me to log and send to document control ...

Stairs as I climb them every day

Bending/stooping ... stack paper ... logging each page in the box requires me to have the boxes around my desk and printing area longer and am always moving them out of the way to get in the files and moved back when whomever needs to get them at that time.

This is really hard to do with the 5lbs weight restriction on my right arm and is the reason I injured my back—not being able to move them correctly and using my left arm/thigh.

Claimant’s Exhibit BB, pp. 4-5.

39. On January 14, 2013, Dr. Johns sent an email, ostensibly to Edmond Schuebert, stating:

As to the workers [sic] compensation (WC) claim, she called myself on the phone in late November or early December and told me that she had hurt her back moving boxes in her work. (She called Marjorie Owens that same day and said similar things.) I asked if OMP had ever seen her for this problem and she told me that they had not seen her for this problem. To my knowledge, she has never been seen by OMP for this problem, and she has not completed a claim form for WC on this medical problem. So at this point, there is a possible WC injury notification to myself (the phone call), but there is no WC claim or event.

Claimant's Exhibit BB, p. 9.

40. Claimant did not return to work at BEA after October 25, 2012. Dr. Marano referred Claimant to Dr. Poston, a pain specialist. Claimant was subsequently seen by Dr. Poston's partner, Jake Poulter, M.D. Dr. Poulter examined Claimant on January 15, 2013, and found her unable to work. He treated Claimant with periodic injections over the ensuing months, with minimal benefit. Anti-anxiety medication helped her not worry about the persisting discomfort which she described as a "fire" in her leg. Claimant applied for and received short term disability from approximately November 1, 2012 until April 2013.

41. On April 14, 2013, BEA terminated Claimant's employment because she had used up all her family medical leave act time. Claimant has not returned to any work since her accident. Her medical treatment was largely suspended after her employment was terminated and she had limited access to further medical care.

42. None of the Defendants herein filed a notice of Claimant's alleged injury with the Industrial Commission. On April 15, 2013, Claimant, through her attorney, filed notice of her October 25, 2012 back injury.⁵

43. **Condition at the time of hearing.** At the time of hearing Claimant continued to treat periodically with Dr. Poulter. She testified that she has pain at the belt line just left of the middle of her back, which extends through her left buttock into her left leg. Her left leg is numb

⁵ IC 2013-007342, one of the consolidated cases herein.

with burning sensations down the calf and to the middle toes of her left foot. After her employment was terminated at BEA, she had to file an appeal and was awarded continued short term disability and thereafter long term disability for which she received \$1,940 per month at the time of the hearing.

DISCUSSION AND FURTHER FINDINGS

44. 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).

45. **Accident.** The first issue is whether Claimant suffered an accident in the course of her employment. Idaho Code § 72-102(18)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(17)(a).

46. Occurrence of an untoward event. Defendants dispute the occurrence of an industrial accident on October 25, 2012. They first question Claimant's credibility, noting she received short term disability and asserting the alleged accident was unwitnessed and Claimant's accounts thereof are inconsistent.

47. Defendants argue that Claimant's receipt of short and long term disability benefits after October 25, 2012, indicates she sustained no work accident. Claimant indeed applied for

and received short and long term disability benefits; however, she did so at Marjorie Owens' suggestion. Given Claimant's prior experience with Defendants' repeated denial of medical treatment and delayed payment of temporary disability benefits after her 2009 industrial right knee injury, it is not altogether surprising that she acted on Ms. Owens' suggestion.

48. While Claimant's accident was indeed unwitnessed, its occurrence is corroborated by other evidence. Marjorie Owens confirmed that one of Claimant's work duties was to load records into boxes for storage. Moreover, on October 31, 2012, Stephen Gamache examined and photographed Claimant's work area and several of the record boxes Claimant later described. The photographs show several stacks of two boxes and one of three boxes stacked on top of each other, tending to corroborate Claimant's testimony that she lifted and moved boxes, and while doing so suffered back and leg pain prior to leaving work on October 25, 2012. Gamache's visit to Claimant's work area, photographing, hefting, and estimating the approximate weights of the three stacked boxes—one of 10 pounds and two of 20 pounds each—was likely requested by a supervisor after learning that Claimant reported injuring herself while moving boxes in her work area the previous week. The photographs corroborate Claimant's account of her accident.

49. Claimant's accounts of her accident are further corroborated by Defendants' own witnesses. Claimant testified that on October 30, 2012, she called Marjorie at 5:00 p.m. and told her that Claimant had hurt her back moving boxes by her desk the prior week. Marjorie testified she spoke with Claimant on the phone on October 31, 2012, and Claimant indicated she had hurt her back from moving boxes in her office at work. Transcript, pp. 203-204. Claimant testified she then called Dr. Johns and told him about her accident the prior week and the appointment she had scheduled to see her own doctor. Dr. Johns testified that Claimant called him on October 31, 2012 at 8:17 a.m. and told him that she had hurt her back three days prior moving records at

work. Johns Deposition, pp. 19-20. Nurse Blair's notes indicate Claimant's injury occurred moving boxes at work. Loran Kinghorn admitted Claimant reported a back injury from moving boxes at work. Dr. Enright recorded Claimant's report of her accident as follows:

I was lifting a box that weighed 25 to 30 pounds off of a desk. I stood up to lift it onto two stacked boxes. I believe I hurt myself then when I lifted it up to stack it. My back was cramping. I picked up the box again and walked eight steps and dropped it on top of another box. The pain was shooting down my left leg. I sat down.

Defendants' Exhibit 28, p. 379. Dr. Enright opined Claimant was a poor historian; however, he did not testify that she fabricated her account of the accident.

50. Defendants also contest the occurrence of an accident because Claimant alleges an accident merely from performing her regular job tasks. Indeed Claimant alleges that her usual work activity on October 25, 2012, specifically moving a relatively light box, constitutes an accident. While moving a box weighing perhaps only 10 to 20 pounds may seem minimal, this is sufficient to satisfy the statutory definition of an accident if it causes personal injury. In Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983), the Idaho Supreme Court declared:

If the claimant be engaged in his ordinary usual work and the strain of such labor becomes sufficient to overcome the resistance of the claimant's body and causes an injury, the injury is compensable. Whipple v. Brundage, 80 Idaho 193, 327 P.2d 383 (1958); Lewis v. Dept. of Law Enforcement, 79 Idaho 40, 311 P.2d 976 (1957).

"To constitute an 'accident' it is not necessary that the workman slip or fall or that the machinery fail. An 'accident' occurs in doing what the workman habitually does if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place."

Wynn, 105 Idaho at 104-105, 666 P.2d at 631-632. An accident was established in Spivey v. Novartis Seed Inc., 137 Idaho 29, 33, 43 P.3d 788, 792 (2002), when an employee felt a pop and burning in her shoulder while performing her normal work duty of reaching across a conveyor belt.

51. While there is some variation in the description of the untoward event, there is a reasonably consistent account of the onset of low back and left leg pain while moving boxes of records, principally with her left arm and thigh and also scooting them with her foot, on October 25, 2012. Having observed Claimant and all of the other witnesses at hearing, and compared the testimony of each with other evidence in the record, the Referee finds that Claimant is generally a credible witness and that the untoward event she alleges of moving boxes at work on October 25, 2012, and experiencing back and left leg pain actually occurred. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility. Whether this untoward event caused personal injury must next be determined.

52. Causing injury. As previously noted an accident is an untoward event causing personal injury. 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). A preexisting disease or infirmity does not preclude a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).

53. In the present case, Defendants assert that no objective medical evidence substantiates Claimant's alleged back pain from an industrial cause. Several medical experts have opined regarding this issue.

54. *Dr. Bates.* James Bates, M.D., is board certified in physical medicine and rehabilitation. He examined Claimant on November 4, 2013. She reported injuring her back moving boxes at work. Claimant described moving boxes with limited use of her right arm due to her prior right elbow fracture. She described holding a box on her lap, thigh, and arm and

leaning forward and noting low back pain and leg pain. Bates Deposition, p. 6. Dr. Bates diagnosed mechanical lumbar strain with exacerbation of the underlying degenerative changes, related to the October 25, 2012 industrial accident. Bates Deposition, p. 20, Claimant's Exhibit N, p. 6. Dr. Bates observed that Claimant's history and medical records show a consistent pattern since the industrial accident injury and consistent with the physical examination he performed. Bates Deposition, p. 21.

55. *Dr. Enright.* Michael Enright, Ph.D., testified for Defendants via post-hearing deposition. He is board certified in counseling and clinical psychology, licensed in Idaho and Wyoming, and has prescriptive authority in Wyoming. Dr. Enright interviewed Claimant in December 2013 and conducted a psychological assessment. He recorded Claimant's description of her accident lifting a box that weighed 25 to 30 pounds off of a desk, and feeling pain as she stood up, lifted, carried, and stacked it. He noted inconsistencies in some of Claimant's responses and that she had difficulty recalling what medications she took after arriving home the day of the accident and the source of those medications. She initially denied treatment for depression prior to her accident, but then acknowledged she had received prior treatment for depression. Dr. Enright found Claimant to be an unreliable historian and opined she exaggerated her physical symptoms. He diagnosed Somatic Symptoms Disorder with Predominant Pain, persistent; Rule out Conversion Disorder; and Rule out Histrionic Personality Disorder. He opined that Claimant's industrial injuries "did not serve as the predominant factor above all other factors combined that account for her current level of distress. Other psychological, cognitive and emotional factors contribute to and are impacting Ms. Wolt's report of pain, which include

somatization responses, fear of pain, and ongoing reinforcement for her perceived debility.” Defendants’ Exhibit 28, p. 397.⁶

56. *Dr. Johns.* Dr. Johns testified via post-hearing deposition on behalf of Defendants. He is both the medical director and the occupational medical program director at the INL. Dr. Johns never examined Claimant after her October 25, 2012 accident. Dr. Johns testified that Claimant called him on October 31, 2012, and told him she had hurt her back three days prior moving records at work. Johns Deposition, pp. 19-20. He testified that all employees are required to immediately report any work injuries to their supervisor and that Claimant had not done so. Dr. Johns testified he subsequently spoke to Claimant several times on the phone regarding her accident. He encouraged Claimant to come into the INL medical facilities for an examination, but she responded that she could not come because, having missed work after the accident, if she came she would be fired. Johns Deposition, p. 35.

57. Dr. Johns testified that Claimant’s 2012 lumbar MRI showed only degenerative interval changes as compared to her 2009 lumbar MRI. He concluded Claimant’s October 25, 2012 accident did not cause any new or acute pain process. Johns Deposition, p. 57. However, considering Claimant’s account of her injury, Dr. Johns acknowledged that: “maybe she could have hurt herself doing some of those things.” Johns Deposition, p. 62, ll. 23-24. He opined any injury from the box moving incident Claimant described would have most likely been a muscle strain which would have healed with time. He concluded:

What my opinion is is that, with looking at everything there is a possibility that she did hurt herself on October 25th moving boxes in an office. It’s a possibility. I tend to think it’s a small possibility. If we’re going to do the more probable than not, I would tend to be on the not side.

⁶ Claimant makes no claim for psychological treatment benefits pursuant to Idaho Code § 72-451.

My basis for saying that is because we have a lot of evidence of a preexisting back problem with sciatic pain, a lot of treatment, a lot of narcotic treatment. A lot of things have gone on that precede that date.

And so, you know, the OSHA people would press and say, “Well, could there be an aggravation?” Well, of course there could be. How do you spell “aggravation”? A little one? A big one? You know, what are we really saying? And that’s difficult.

So there is a possibility. But really, she’s had this thing going on a long time. What’s different? And there I find myself lacking.

Johns Deposition, p. 79, l. 13 through p. 80, l. 8. Dr. Johns acknowledged that a relatively minor incident can cause an asymptomatic preexisting degenerative back condition to become symptomatic. Johns Deposition, pp. 85-86, 88.

58. *Nurse Blair.* Nurse Blair’s notes indicate Claimant presented on November 1, 2012, with “severe low back pain on the left side that is causing radiation down to leg and she is having numbness in the leg. She continues to have right side pain, but nothing like the left presently.” Defendants’ Exhibit 11, p. 262. Nurse Blair documented moderate to severe left lumbar muscle spasm. On November 12, 2012, Nurse Blair recorded Claimant’s description of the accident thus: “she had to move some heavy boxes at work She was not able to lift and so resorted to pushing with her foot across the room. That night was when she started the LBP again.” Defendants’ Exhibit 11, pp. 264-265.

59. *Evaluating the medical opinions.* Dr. Enright attributed the persistence and severity of Claimant’s back symptoms to her pre-existing psychological condition. Dr. Johns acknowledged Claimant could have suffered an aggravation of her pre-existing lumbar condition.

60. Defendants argue that Claimant had left leg pain prior to her industrial accident. They point to Nurse Blair’s notes of August 3, 2012, wherein Claimant complained of low back and right leg pain for the prior two weeks. Nurse Blair documented moderate bilateral paraspinal

muscle tenderness, worse on the right; however there was no report of bilateral or left leg pain or symptoms. Defendants' Exhibit 11, pp. 253-254. The only report of pre-accident left leg pain in the medical records appears to be Nurse Blair's note of June 3, 2008, when Claimant presented with low back and leg pain after working in her yard. Defendants' Exhibit 11, p. 223. However, Claimant testified that she only suffered right leg pain at that time and that the notes were in error. Acknowledging without determining the possibility that the June 3, 2008 note may be mistaken as to left versus right leg symptoms, it is undisputed that Claimant performed her work duties at BEA for more than four years thereafter with no report of left leg symptoms until her accident on October 25, 2012. Claimant's accident produced radiating left leg pain for the first time, or at least for the first time in more than four years, and resulted in such back pain that she could no longer continue working. Claimant does not assert her accident caused her L5-S1 disc bulge, but rather caused lumbar strain and caused her preexisting disc bulge to become symptomatic. Nurse Blair's November 1, 2012 notes record moderate to severe left lumbar muscle spasm. Dr. Bates' opinion that Claimant sustained mechanical lumbar strain with exacerbation of her underlying degenerative lumbar changes, due to the October 25, 2012 industrial accident is most consistent with the credible evidence as a whole and is persuasive.

61. The occurrence of an accident causing injury is not assumed merely with the onset of pain at work. However, we believe that Dr. Bates' testimony establishes that the accident exacerbated Claimant's underlying back condition. Therefore, Claimant has proven she suffered an accident causing personal injury at work on October 25, 2012.

62. **Notice.** The next issue is whether Claimant gave timely notice of her industrial accident. Pursuant to Idaho Code § 72-701, a claimant must give notice of an accident within 60

days and make her claim for compensation within one year. The notice required is written notice. See Idaho Code § 72-702.

63. Here, the evidence does not reveal that the written notice required pursuant to Idaho Code § 72-701 was received within sixty days following the occurrence of the accident. However, pursuant to Idaho Code § 72-704, in an appropriate case, “want or delay” in giving the notice required pursuant to Idaho § 72-701 can be excused. That section provides:

A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice.

64. In the present case, Claimant testified she gave repeated notice of her industrial accident to several BEA supervisors and agents. Several of Defendants’ witnesses readily acknowledged Claimant notified them of her industrial accident. Dr. Johns testified that Claimant called him on October 31, 2012 at 8:17 a.m. and told him that she had hurt her back moving records at work just days before. Johns Deposition, pp. 19-20. Marjorie Owens testified she spoke with Claimant on the phone on October 31, 2012, and Claimant indicated she had hurt her back moving boxes in her office at work. Transcript, pp. 203-204. Marjorie believed she told Loran Kinghorn about Claimant’s report of hurting her back pushing boxes at work. Transcript, pp. 207-208. Edmond Schuebert testified that on December 17, 2012, he called Claimant and she informed him of her back pain. He also acknowledged receiving an email from Claimant that day describing her job requirements and stating: “this is really hard to do with the five-pound weight restriction on her right arm and is the reason I injured my back.” Transcript, p. 177, ll. 9-12.

65. On January 14, 2013, Dr. Johns sent an email, ostensibly to Schuebert, stating:

As to the workers [sic] compensation (WC) claim, she called myself on the phone in late November or early December and told me that she had hurt her back moving boxes in her work. (She called Marjorie Owens that same day and said similar things.) I asked if OMP had even seen her for this problem and she told me that they had not seen her for this problem. To my knowledge, she has never been seen by OMP for this problem, and she has not completed a claim form for WC on this medical problem. So at this point, there is a possible WC injury notification to myself (the phone call), but there is no WC claim or event.

Claimant's Exhibit BB, p. 9.

66. At hearing Schuebert testified regarding the above email from Dr. Johns:

Q. (by Mr. Petersen) Okay. Now, who is Dr. Johns?

A. (by Mr. Schuebert) He's the lead doctor for the lab.

....

Q. Okay. But if—he's a doctor for the site or for the INL or for Battelle. And if somebody gets hurt, they're supposed to go to some doctor; and he's one of those persons, is he not?

A. He is.

Q. And if she tells that person, Dr. Johns, for instance, that she was hurt on the job, has she done the right thing of giving notice to—of the injury?

A. Yes.

Q. Okay. If you look at this January 14th note from Dr. Johns, do you see that there?

A. Yes.

Q. And is this taken from an email from Dr. Johns?

A. Yes.

Q. And it appears to me, as I read this, that she told Dr. Johns in mid November she had hurt herself on the job.

A. Yes. Dr. Johns stated that as far as the workman's comp claim, she called myself on the phone in late November or early December and told me she had hurt her back moving boxes in her work.

Q. So she did give notice to a doctor at the site; is that correct?

A. In late November or early December.

Transcript, p. 187, l. 8 through p. 188, l. 14.

67. Defendants' own witnesses and documentary evidence repeatedly confirmed that Employer had actual knowledge of Claimant's accident well within the statutory period. Schuebert, Owens, Kinghorn, and Dr. Johns readily confirmed they knew of Claimant's accident within 60 days thereof. Dr. Johns' notes and post-hearing deposition testimony establish he had knowledge of the accident within six days and that he relayed this information to Schuebert within 60 days thereof. Moreover, the record establishes that, at the very least, Schubert and Johns qualify as agents or representatives of Employer, whose knowledge is attributable to Employer.

68. The record clearly establishes that Employer had actual knowledge of the alleged accident within 60 days. Therefore, even if written notice may have been untimely, the fact that Employer had actual knowledge of the accident within 60 days excuses written notice pursuant to Idaho Code § 72-704.

69. **Medical treatment.** The next issue is whether Claimant is entitled to medical treatment due to her industrial accident. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. An "employer and surety are only liable for medical expenses incurred as a result of 'an injury' An employer cannot

be held liable for medical expenses unrelated to any on-the-job accident or occupational disease.” Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus a claimant must provide medical testimony that supports his 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). 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. The physician, not the Commission, 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. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

70. In the present case, Claimant asserts that her industrial accident caused her need for treatment by Nurse Blair, Dr. Marano, and Dr. Poulter. Defendants dispute the causation of Claimant’s persisting back pain, arguing that Claimant’s lumbar condition is due to her pre-existing condition and any need for treatment is a result of her longstanding degenerative lumbar disc disease: They maintain: “The accident, if it happened, is merely an example of the continuing exacerbation of symptoms Claimant occasionally feels with ordinary activity like gardening, turning wrong or getting up wrong as her medical records describe.” Defendants’ Post Hearing Brief, p. 26.

71. It is undisputed that Claimant suffered degenerative lumbar pathology prior to the industrial accident. However, “An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker’s compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought.” Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002). Thus, if an

industrial accident hastens the need for medical treatment, including surgery, the treatment is compensable. Zapata v. Lignetics of Idaho, Inc., 2010 WL 3947991; Smith, 1989 IIC 0626.

72. In the present case, several medical experts have opined regarding the causation of Claimant's lumbar symptoms after her October 25, 2012 industrial accident. Dr. Enright and Dr. Johns concluded Claimant suffered no personal injury from her October 25, 2012 accident. As previously explained, their opinions are unpersuasive. Nurse Blair and Dr. Bates found Claimant sustained personal injury from her industrial accident. Dr. Bates concluded Claimant suffered mechanical lumbar strain with exacerbation of her underlying degenerative lumbar changes, due to the October 25, 2012 industrial accident and needed further medical treatment. He opined that physical therapy and epidural injections or selective nerve root blocks, as recommended or provided by Dr. Marano, were reasonable and necessary treatments related to Claimant's industrial accident. Bates Deposition, p. 25-27. Dr. Bates also opined that the epidural and trigger point injections provided by Dr. Poulter were reasonable treatments for Claimant's industrial accident. Bates Deposition, p. 28. Dr. Bates concluded that the treatment Claimant received from Family First, Dr. Marano, and Dr. Poulter was reasonable and necessary and related to Claimant's industrial accident. Bates Deposition, p 34. Dr. Bates recommended facet injections as both diagnostic and therapeutic measures and opined that an MRI would be reasonable to evaluate sources of radiating pain due to Claimant's industrial accident. Bates Deposition, p. 24. The opinion of Dr. Bates is well-explained, consistent with the evidence of record, and persuasive.

73. Claimant has proven her industrial accident caused lumbar injury and that Defendants are liable for reasonable medical benefits for her lumbar injury, including but not

limited to treatment provided and/or recommended by Nurse Blair, Dr. Marano, and Dr. Poulter from October 25, 2012, through the date of hearing.

74. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

75. In the present case, Claimant seeks temporary total disability benefits from October 29, 2012, through the date of the hearing. Claimant completed her shift on Thursday, October 25, 2012, the day of her accident. She was next scheduled to work on Monday, October 29, 2012, but has not worked since the day of her accident. Dr. Bates testified Claimant's condition was still not medically stable at the time of his post-hearing deposition. Nurse Blair

and Dr. Marano restricted Claimant's work activities after her industrial injury. Claimant's Exhibit K, p. 8. Dr. Poulter found her unable to work. Because of Claimant's injuries from her industrial accident, Dr. Bates testified she was restricted to lifting no more than 10 pounds frequently and 20 pounds occasionally, and to sitting, standing or walking no more than 30 minutes continuously. Bates Deposition, pp. 22-23. Her lifting restrictions were not limited to her dominant right hand, but were whole body lifting restrictions. Claimant's duties at BEA required her to regularly pack and lift boxes weighing at least 25 pounds. The restrictions imposed by Dr. Bates precluded her from performing her usual duties at BEA. There is no indication BEA offered Claimant light duty work which she was capable of performing under her restrictions and which employment was likely to continue throughout her period of recovery. Defendants have not shown that there was employment available in the general labor market which Claimant had a reasonable opportunity of securing and which employment was consistent with her restrictions.

76. Claimant has proven Defendants' liability for total temporary disability benefits from October 29, 2012 through the date of hearing.

77. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in 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 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).

78. In the present case, Claimant asserts entitlement to attorney fees for Defendants' contesting timely notice of her industrial accident.

79. As discussed above, Defendants' own witnesses and documentary evidence repeatedly confirmed that Employer had knowledge of Claimant's accident well within the statutory period. Claimant has established that Defendants, through their agents and representatives, had actual knowledge that Claimant suffered an industrial accident. It was unreasonable for Defendants to deny the claim based on lack of notice and require Claimant to prove timely notice through a litigated hearing.

80. Claimant has proven Defendants' liability for attorney fees for unreasonably contesting timely notice of her industrial accident.

81. **Retention of jurisdiction.** The final issue is whether the Commission should retain jurisdiction of the unresolved issues. Whether to retain jurisdiction beyond the statutes of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant's physical disability is progressive, it is appropriate for the Commission to retain jurisdiction. Reynolds v. Browning Ferris Industries, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Retention of jurisdiction may be appropriate in cases where there is a probable need for future temporary disability benefits associated with surgery. Elmore v. Floyd Smith, Jr. Trucking, 86 IWCD 100, p. 1278.

82. In the instant case, Claimant was not medically stable at the time of hearing. Dr. Bates persuasively opined that the lumbar injuries resulting from her industrial accident may require further medical treatment. As noted previously, Claimant underwent lumbar surgery on May 22, 2014. By agreement of the parties and as documented in the Commission's June 17, 2014 Order on Motion to Reopen Record and Order Establishing Briefing Schedule, "The potential issue of the compensability of Claimant's May 22, 2014 surgery, is not presently before the Commission." Furthermore, counsel for the parties agreed at hearing that issues regarding Claimant's 2009 knee injury and issues of permanent impairment and disability regarding her 2012 back injury were reserved. Transcript, p. 5, ll. 10-24.

83. Under these circumstances, Claimant has established that the Commission should retain jurisdiction beyond the statutes of limitations.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven she suffered an accident causing personal injury at work on October 25, 2012.

2. Claimant has proven she gave timely notice of her industrial accident.

3. Claimant has proven her industrial accident caused lumbar injury and that Defendants are liable for reasonable medical benefits for her lumbar injury, including but not limited to treatment provided and/or recommended by Nurse Blair, Dr. Marano, and Dr. Poulter from October 25, 2012, through the date of hearing.

4. Claimant has proven Defendants' liability for total temporary disability benefits from October 29, 2012 through the date of hearing.

5. Claimant has proven Defendants' liability for attorney fees for unreasonably contesting timely notice of her industrial accident. 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. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. See Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

6. Claimant has established that the Commission should retain jurisdiction beyond the statutes of limitations.

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

DATED this 4th day of February, 2015.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2015, 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:

DENNIS PETERSEN
PO BOX 1645
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SUSAN M CLARK
PO BOX 2528
BOISE ID 83701

ka

/s/