BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID B. HALL, Claimant, v. FENICE CORPORATION, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2013-016822** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed August 25, 2017

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on March 16, 2016. Clinton Miner represented Claimant. James Ford represented Defendants Employer and Surety. The parties presented oral and documentary evidence. Inability to promptly obtain the post-hearing deposition of Dr. Manos and requests for extended briefing schedules delayed the opportunity to resolve this matter. The case came under advisement on March 27, 2017. The Commissioners have chosen to give different treatment to the issues of the case and therefore issue their own findings of fact, conclusions of law, and order.

ISSUES

The following issues are to be decided at this time:

1. Whether and to what extent Claimant is entitled to benefits for:
    a) temporary disability benefits and
    b) medical care.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he is entitled to surgery because his preexisting lumbar condition was permanently exacerbated by a compensable accident.

Defendants contend that in the first four months after the date of the accident, contemporaneously-involved physicians opined Claimant was not a surgical candidate. Claimant's description of the accident changed after those opinions. At six months post-accident, physicians opined Claimant was medically stable. Claimant's subsequent opinion of those physicians soured. Claimant's current basis for claiming entitlement to additional medical care is unrelated to the original accident. Opinions to the contrary from physicians arriving late to this matter are based upon an incorrect description of the original accident and a degenerative condition which has worsened through age, unrelated to a compensable accident.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony of Claimant and Employer's owner Ronald Potter;
2. Claimant's exhibits 1 through 12;
3. Defendants' exhibits 1 through 28; and
4. Post-hearing depositions of physiatrist and pain medicine specialist Christian Gussner, M.D., and of orthopedic/neurological spine surgeon Richard Manos, M.D.

FINDINGS OF FACT

(The issues in this matter have been bifurcated, therefore not all medical records are addressed herein. Those addressed below are deemed most relevant to the issues at hand. No findings herein are intended to be applicable to any potential future issues not identified above. Nevertheless, the record has been analyzed in its entirety.)

1. Mr. Hall prefers to be called by his middle name, "Benjamin," also, informally, "Benj" or "Benjie."

2. In April 2013, Claimant worked for a stonemason manhandling 400-500 pound granite countertops. There is no substantial evidence to show this affected his low back.

3. In June 2013, Claimant worked for Employer as a baker. Employer produces bread, rolls, and buns under the Alpicella Bakery brand name. Claimant characterized his work as "light duty." Claimant was injured in an unwitnessed accident on June 14, 2013. He had been employed for four days.

4. Claimant finished his shift. He rode his bicycle home from work as usual. Claimant's pain and stiffness increased overnight. When he sought medical care and informed Employer of his claim, he described an incident in which he slipped and twisted his back but did not fall.

5. After a few days off work, Claimant returned. Employer was aware of his workers' compensation claim and accommodated his return to work with lighter duty. Claimant worked until July 18, 2013. Claimant was instructed to go on temporary disability after Employer discovered that he was taking prescription painkillers at work. Claimant did not return to work for Employer again. He has not worked elsewhere.

Medical Care 2013

6. Claimant sought medical care through Primary Health on June 17. Upon examination, Darryl Barnes, PA, observed left lumbar muscle spasm without other acute findings. He diagnosed back sprain, which he opined was work-related, and prescribed a muscle relaxer.

7. On June 24, Claimant returned to Primary Health for a follow-up with Steven Martinez, M.D. Claimant reported the muscle relaxer was not helpful. Upon examination Dr. Martinez noted paraspinal muscle tenderness bilaterally throughout the lumbar spine, positive bilateral SI joint tenderness, and "severely limited" range of lumbar motion, but no muscle spasm. He also diagnosed a back sprain. He changed the prescription from a muscle relaxer to a narcotic analgesic. Claimant was allowed 20 pills, one or two to be taken at bedtime as needed, with ibuprofen for pain during the day.

8. On July 2, Claimant reported he had been taking the narcotic analgesic at work and was out of pills. PA Barnes found no acute signs or symptoms upon examination. He prescribed more narcotic analgesic, "strongly advised" against taking it while at work, and started Tramadol and Etodolac for Claimant's complaints of continuing pain during the day. Defendants' Exh. 5.

9. On July 8, Claimant saw Becky Wells, PA, after missing his earlier follow up appointment with Dr. Martinez. Claimant reported that the Norco and Tramadol were not helping with his pain and declined additional prescription medications. Examination revealed mild paraspinal tenderness and bilaterally positive straight leg raising test at 30° on left and 45° on right. PA Wells ordered an X-ray which showed narrowing at L5-S1 consistent with degenerative disc disease throughout Claimant's lumbar spine. "No significant interval change compared to the previous study dated June 15, 2007." Defendants' Exh. 5. Claimant requested an MRI of his lumbar spine, which Surety authorized.

10. On July 13, Claimant called Dr. Martinez for a refill of his prescriptions.

11. On July 16, a lumbar MRI showed degenerative disc disease L2 through S1, less at L1-2 and L3-4 than elsewhere, with a disc protrusion contacting the left L2 nerve root

without stenosis, a central "focal annular tear" at L4-5 which did not appear to be clinically related, and moderate degeneration with mild, broad-based, disc bulge at L5-S1. Defendants' Exh. 5.

12. On July 17, Claimant reported to Dr. Martinez episodic shooting pains in his legs and occasional sacral numbness. His examination and diagnosis remained unchanged and his prescriptions were refilled.

13. On July 22, Primary Health referred Claimant to a neurosurgeon for back sprain with degenerative disc disease. Claimant saw Thomas Manning, M.D., on July 26. Claimant described the June 14 slip and twist and reported that he "did exacerbate it in July again." Defendant's Exh. 5. The incident causing the exacerbation is not further described. Examination noted only a mild limp. Dr. Manning recommended a CT scan to explore his suspicion of a "congenital anomaly at L5-S1" and comprehensive lumbar physical therapy. Claimant's Exh. 2.

14. On July 29, X-rays and a lumbar CT scan were taken. The radiologist reported it showed abnormal curvature and alignment of the vertebrae along with the degenerative conditions previously identified.

15. On August 14, Dr. Manning noted that Claimant reported physical therapy helped his mobility but not his pain. Dr. Manning viewed the CT scan and opined that in addition to the previously demonstrated degenerative disc disease, it showed "an abnormality involving the right S1 pedicle, perhaps a chronic fracture" and spina bifida occulta. Dr. Manning noted Claimant's resistance to a possible epidural steroid injection, but referred Claimant to Christian Gussner, M.D. for that treatment. Defendants' Exh. 7.

16. On August 27, Dr. Gussner examined Claimant. He found 80% range of motion with pain and tenderness, but a negative straight leg raising test and no limp. Dr. Gussner hypothesized that the cause of Claimant's back pain "could be aggravation of the lumbar degenerative changes including the L4-5 annular tear and/or the S1 pedical fracture." He agreed with Dr. Manning that left L5-S1 ESI would be a reasonable next step in addressing Claimant's pain, and discussed the procedure at that appointment. Defendants' Exh. 9.

17. Dr. Gussner performed the injection on September 9. On a zero-to-ten pain scale, with the postoperative instructions indicating that a "10" represented "the worst imaginable pain", Claimant rated his pain at "9" before the procedure and "11" and "11+" at four and six hours after the injection, respectively. Claimant rated his pain as a "9" seven days after the injection. Defendants' Exh. 9.

18. Dr. Manning referred Claimant for a discogram consult with Dr. William Binegar. Claimant presented to Dr. Binegar's PA, Fred Friel, for the procedure on September 20, but became agitated during the explanation of the procedure. Claimant informed PA Friel that he would not return to either Drs. Binegar or Manning and left.

19. On September 23, Claimant told Dr. Gussner that his pain was spreading into his upper back and abdomen since the injection. Based on his personal research, Claimant requested a referral to R. Tyler Frizzell, M.D., for surgery and stated he did not want to return to Dr. Manning. He again reported no pain relief from the prescription dose of Norco, with pain at "best "8/10, worst 11/10" on the pain scale. Dr. Gussner opined that his condition "could be" an exacerbation of degenerative changes. Dr. Gussner and Dr. Manning considered a possible neuropsychological referral to Robert Calhoun, Ph.D. Dr. Gussner agreed with Claimant that

Dr. Frizzell "is an excellent neurosurgeon" for a second opinion and made the referral. Defendants' Exh. 9.

20. An October 1 bone scan showed the degeneration but no evidence of acute injury. In deposition, Dr. Gussner well explained that if Claimant had an acute problem, like a fracture or an inflamed joint, the bone scan would have revealed this as abnormal activity. Even a chronic inflammation like arthritis would show up if present. Claimant's bone scan showed the degenerative discs at L4-L5 and L5-S1, but no other abnormal activity.

21. On October 10, Claimant visited Dr. Frizzell. He reviewed the diagnostic imaging and examined Claimant. He opined Claimant's lumbar sprain represented an exacerbation of his degenerative condition and was a direct result of the June 14, 2013 slip and twist accident. He opined that Claimant was not medically stable and prescribed three days of fentanyl patches. Dr. Frizzell opined Claimant was not a surgical candidate, recommended immediate light-duty full-time work, and four to eight weeks of work hardening with Dr. Kevin Krafft. Dr. Frizzell also requested a second opinion from Dr. Krafft.

22. On October 28, Dr. Calhoun saw Claimant. His notes contain the first written report of Claimant's story about the garbage can incident which allegedly also occurred on June 14. Claimant was non-cooperative during the appointment and left early. Absent a full opportunity for a history and testing, Dr. Calhoun tentatively opined Claimant showed an antisocial personality disorder and that he may use his claims of pain to manipulate his environment. Dr. Calhoun stated:

> [T]here do appear to be significant psychological and behavioral factors impacting Mr. Hall's pain problem and ongoing level of debilitation. [He] is certainly very cynical and hostile. It is his opinion that the doctors are giving him the runaround to extend his insurance claim. […] He does appear to resent

> authority figures. He does hold resentment and cynicism toward his physicians. He is very psychologically defensive.

Defendants' Exh. 12, p. 618. Dr. Calhoun opined Claimant was a poor candidate for work hardening or invasive medical treatment.

23. On October 30, Claimant visited Dr. Krafft. Claimant reported both the slip and twist and the garbage can incident, stating that the garbage can incident occurred one hour before the slip and twist. A thorough examination revealed positive axial load, prone leg extension, FABER's, and piriformis tenderness. Urinalysis was positive for THC but showed no opiates in Claimant's system. Dr. Krafft noted, "He does not want to return to manual labor." He recommended weaning from medications, smoking cessation, and a work hardening program. Defendants' Exh. 14.

24. On October 30, Claimant underwent a work hardening evaluation with Peggy Wilson, PT, CEAS. She recorded both the garbage can incident and the slip and twist under Claimant's history, noted Claimant's refusal to attempt or complete several activities, and concluded that Claimant had barriers to recovery that removed him as a candidate for work hardening.

25. On November 7, Dr. Krafft examined Claimant and recommended case closure without work hardening. Dr. Krafft noted Claimant's October 30 urinalysis showed none of the prescribed opiates in Claimant's system despite Claimant's representations that he had been taking them, and recommended repeated urinalysis.

26. About 10:30 p.m. on November 13, Claimant visited St. Luke's ER with increased back pain. He attributed his back pain to the garbage can incident and his current

worsening back pain to the epidural injection. Claimant admitted to marijuana use. After intravenous pain medication and by about 12:30 a.m., he asked to be released from care.

27. On November 15, Dr. Krafft examined Claimant. He recommended against chronic narcotic pain treatment, and opined Claimant was medically stable and entitled to a 2% whole person impairment presumptively related to his described accident. He recommended a 50-pound occasional lifting limit.

28. On December 5, Dr. Gussner recorded that Claimant attended his appointment using a cane, was confrontational, exhibited pain amplification behavior, and left before an examination could be performed. Dr. Gussner agreed that Claimant had reached MMI on November 15, 2013 with a 2% whole person impairment. Dr. Gussner did not opine whether this would be related to the industrial accident. He noted "no activity restrictions related to the work comp claim." He recommended against prescription medications related to the worker's compensation claim. Defendants' Exh. 9.

Medical Care 2014 to Hearing

29. On January 13 and February 11, 2014, Claimant sought out Phyllis You, M.D. When she would not treat him in a manner he thought best, he left without allowing an examination.

30. On June 10, 2014, Claimant sought out Richard Radnovich, D.O. He told Dr. Radnovich that Dr. Manning had diagnosed "crushed discs" and that he had constant, daily pain of 15/10. After examination Dr. Radnovich diagnosed lumbar spondylosis. He opined Claimant was not at MMI. After a follow-up visit on July 15, Dr. Radnovich referred Claimant to Richard Manos, M.D., for potential surgical intervention. Claimant's Exh. 10.

31. On July 30, 2014, neurologist Michael O'Brien, M.D. examined Claimant as part of an Idaho Disability Determination evaluation. He reviewed records and examined Claimant. Claimant reported longstanding endogenous depression, "well documented since his early years" and "chronic and unrelenting back pain" since his 2013 industrial accident. He opined Claimant's reported pain originated at the SI joints with a "trace" of sciatic pain of "uncertain […] origin." Dr. O'Brien opined that Claimant's "pain could be stemming from the sacroiliac joint" and that Claimant's "depression needs to be addressed in a separate consultation." Defendants' Exh. 18.

32. On August 28, 2014, Richard Sonnenberg, Ph.D. evaluated Claimant as part of an Idaho Disability Determination evaluation. Dr. Sonnenberg noted dysphoria which had waxed and waned for 25 years or more. He noted narcissistic tendencies which did not rise to the level of a diagnosable disorder.

33. On October 3, 2014, Dr. Manos first examined Claimant upon referral from Dr. Radnovich. He diagnosed degenerative scoliosis, degenerative retrolisthesis at L5-S1, and left L5-S1 foraminal stenosis. In his treatment notes, Dr Manos opined "it would be very difficult for me to state that his current symptoms are related to his work-related injury. There is no evidence of acute disk herniations. Most of his changes are in fact degenerative. I do feel though that this was a work aggravated condition." Dr. Manos also opined that Claimant seemed "very disgruntled with the healthcare system" and likely would not benefit from an anterior lumbar interbody fusion at L5-S1. Claimant's Exh. 11. Dr. Manos clarified his position via correspondence to Defense Counsel on October 21, 2015, wherein he states "I did feel that his symptoms were significant enough to warrant a possible surgery of an anterior lumbar interbody

fusion at L5-S1 with a posterior approach but this would not be the responsibility of the workers' comp system." Defendants' Exh. 20.

34. In his October 25, 2016 deposition, Dr. Manos opined that the presence of spina bifida increased the likelihood that Claimant's degenerative spinal condition is congenital. In reference to the letter he wrote on October 21, 2015, Dr. Manos testified that he was still of the opinion that Claimant's symptoms were an aggravation of his preexisting condition, and that the aggravation was related to the industrial accident. Claimant would need "to have psychological evaluation and treatment for his anger issues" prior to any surgical intervention. Manos Deposition, p. 29, ll. 22-23. Dr. Manos clarified his opinions that while Claimant's symptoms were work related, insofar as the current symptoms have been consistent since the work accident, his condition was not. Surgery, if performed, would be related to the degenerative condition and not to the aggravation. He opined Claimant's anger issues have hindered recovery from the aggravation of a preexisting condition. Dr. Manos testified that he observed and documented Waddell's signs and nonorganic physiological findings upon examination. These are related to Claimant's anger issues and other psychological conditions which would hinder an optimum surgical outcome. Without psychological counselling to ameliorate these issues, he would not recommend surgery. He testified that patients with psychological issues need "to have treatment for that to maximize their ability to cope with a stressor such as surgery." Manos Deposition, p. 15, ll.18-19.

35. Claimant visited the St. Luke's ER on November 7 complaining of back pain. Claimant reported the original injury happened 17 months prior but that he had re-injured it while moving. Claimant also reported that he was very upset with his prior back and pain management specialists and that anti-inflammatory medication worsened his pain. Claimant was

given a small amount of pain medication to help him through moving out of his apartment and released.

36. A December 10, 2014 visit to St. Al's ER shows Claimant's anger issues and the ER physician's belief that Claimant is not a reliable historian. Although voluminous, it is unrevealing about any relevant possible injury or physical condition not already explored in previous medical records.

37. Claimant sought no medical care between December 2014 and his deposition on October 27, 2015.

38. Treatment and medical evaluations thereafter do not materially assist Claimant in establishing entitlement to temporary disability or medical care benefits.

DISCUSSION AND FURTHER FINDINGS OF FACT

39. 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

40. The Idaho Supreme Court has affirmed the bifurcation of Commission credibility findings into "observational" and "substantive" credibility. *Painter v. Potlatch Corp*., 138 Idaho 309, 63 P.3d 435 (2003). Observational credibility goes to the demeanor of the appellant on the witness stand and requires the Commission to be actually present for the hearing to judge it.

Substantive credibility may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at hearing. The Referee found that Claimant appeared intelligent and generally credible in his testimony, and that his demeanor left a much better impression than comes across from reading Claimant's testimony in transcripts. However, the Referee did not find Claimant to be substantively credible. He does not have significant medical training and relies upon self-guided internet searches as the primary basis for his medical opinions. He expressed a perception that each of his early treating physicians was unconcerned with his condition or was incompetent to treat him. He emphasized that Dr. Calhoun is a "liar," and Dr. Krafft a "deviant," and Dr. Gussner a "fraudulent huckster" whose medical license should be revoked. Claimant said he felt "manhandled" and "assaulted" by a PA., and has, on more than one occasion, been noted to demonstrate anger towards medical providers. He ignored or refused treatment with which he disagreed. Moreover, he appears manipulative and inconsistent with physicians regarding his injury, accident, and current symptoms. Claimant's perceptions and lack of cooperation in treatment limit the weight assigned to his recollections of his condition. The Referee concluded that contemporaneously made medical records are afforded more weight than Claimant's testimony. The undersigned Commissioners see no reason to disturb the findings of the Referee regarding Claimant's credibility.

41. Claimant's insistence upon his belated story of a mishap involving a garbage can is misplaced. He initially reported only a slip on a wet floor. However, to physicians in late 2013 Claimant reported the garbage can incident preceded the slip and twist incident by about an hour. In deposition Claimant clearly testified the slip and twist incident happened first. These facts, that he failed or declined to report and describe the garbage can incident until months later

and that he has reported inconsistently which occurred first, are two among many relevant factors in weighing the opinions of various physicians who evaluated or treated him at various times.

42. Physicians who treated Claimant in the days and weeks immediately following the date of accident accepted at face value Claimant's description of having slipped on a wet floor at work and twisted his back as the cause of his reported symptoms. The medical opinions do not support a finding that the described slip was inconsistent with his condition at that time. The Commission is well familiar with instances in which a minor slip has caused significant injury. A determination of Claimant's entitlement to TTDs and medical care does not turn on causation being related to one or the other alleged incident.

43. On October 10, 2013 Dr. Frizzell opined Claimant was not yet medically stable. Only after the October 30, 2013 urinalysis showed physicians that Claimant was not taking his narcotic analgesic despite regularly refilling his prescription did physicians more closely evaluate Claimant's subjective complaints. Dr. Krafft's examinations in October and November offer ample support for his opinion about medical stability. Per the opinions of Drs. Krafft and Gussner, the preponderance of evidence supports an MMI date of November 15, 2013.

Temporary Disability

44. Temporary disability entitlement is evaluated according to statute. Idaho Code §72-408. It is payable throughout the period of recovery to the date of maximum medical improvement. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P.3d 617 (2001). Once a claimant has established by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to TTDs unless and until evidence is presented that the claimant has been medically released for light work and that (1) his 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 the claimant has reasonable opportunity in securing and which employment is consistent with the terms of his light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). A refusal of an offer of suitable employment may curtail temporary disability benefits. IC § 72-403.

45. A few days after the accident, Claimant returned to work for Employer. A July 24, 2013 Job Site Evaluation performed by Greg Herzog of the Industrial Commission Rehabilitation Division ("ICRD") indicated that "Light-duty is available to work in packaging area putting individual products into bags for distribution, provided the worker can stand for the entire shift and not be taking narcotics in order to work around machinery." Defendants' Exh. 15. The Norco prescribed by Dr. Martinez was to be taken at bedtime, with Tramadol and Etodolac during the day for pain. Claimant admitted at his July 2, 2013 follow-up appointment that he had been taking his Norco at work because the Etodolac was not relieving his pain. PA Barnes "strongly advised patient NOT to continue to work while taking Norco." Defendants' Exh. 5. Dr. Martinez and PA Barnes continued to issue light-duty work restrictions through July 17, 2013, when they transferred his care to Dr. Verska.

46. Whether Employer offered suitable employment is a close case. The physical requirements of the work offered to Claimant were within his restrictions. Employer represented to ICRD that Claimant's full-time position would be available to him once he was medically released to return to it. Claimant worked the offered light-duty position from June 20, 2013 through July 15, 2013. Defendants' Exh. 25. Claimant was sent home from work on July 12,

2013 when Employer found out he had taken his prescription narcotics that day. At hearing, owner Ronald Potter testified that another employee had informed him that Claimant was taking medication in the break room, and Mr. Potter subsequently informed Claimant "I can't have you -- with all the moving parts that are in the facility, I cannot have you on any type of medication. I mean you could hurt somebody else. You could further hurt yourself." Transcript, p. 93, ll. 3-6. Claimant told Mr. Potter that he was in too much pain to not take his prescription narcotics during the workday. Claimant testified at hearing that he was fired under amicable terms, saying "I didn't want to work in the facility if I was going to be in intense pain and [the owner] didn't want me there if I was going to be on narcotics." Transcript, p. 67, ll. 1-4. Absent Claimant's decision to take the narcotic analgesic other than as prescribed, the record indicates that Claimant could have continued to work the job as accommodated by Employer and could have returned to his time of injury position once he was medically released to do so. Employer had a valid safety reason for firing Claimant. Claimant's last day of work is not clear in the record; his timecards indicate it was July 15, 2013, at hearing, Mr. Potter testified it was around July 18, 2013, and Claimant listed it as July 7, 2013 on his SSDI application. The timecard carries the most evidentiary weight regarding Claimant's last day of employment, and consequently the day Claimant can be said to have refused Employer's offer of suitable employment following his industrial injury.

47. Claimant is entitled to temporary disability benefits from June 14, 2013, the date of his accident, to July 15, 2013, when he refused Employer's offer of suitable employment.

Medical Care

48. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). The claimant must prove, however, that the treatment sought is

reasonable. "One of the facts essential to the recovery of medical expenses is that the expenses were incurred as a result of an industrial accident." *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). "The fact that an employee suffered a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable." *Id.*, at 563, 1101. A claimant, who has previously received benefits and is seeking benefits for additional medical care allegedly caused by the industrial accident, still has the burden of proving that the need for the additional medical care was caused by the accident. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012); *Waters v. All Phase Const.*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014). A reasonable time includes the period of recovery, and may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also*, *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* may have suggested its articulated factors were exclusive.) Recently in *Rish v. The Home Depot, Inc.*, 161 Idaho 702, 390 P.3d 428 (2017), the Idaho Supreme Court examined the reasonability of purely palliative medical care. The Court reaffirmed the "totality of the circumstances approach" for evaluating whether or not medical care is reasonable under IC § 72-432(1).

49. Medical care provided to Claimant from the date of accident to the date of medical stability was reasonable, particularly so given Claimant's uncooperativeness and refusal to follow recommendations. Claimant seeks additional medical treatment he obtained outside

the chain of referral and for future psychological care followed by possible surgical intervention. Claimant relies on the opinion and testimony of Dr. Manos, who suggested that Claimant's congenital / degenerative back conditions could potentially benefit from the placement of a spacer "to help correct his scoliosis, as well as re-create his normal foraminal height." Manos Depo, p. 7, ll. 10-12.

50. Physicians repeatedly described a positive axial load test—a nonorganic report of pain which is one of the Waddell's tests—upon examinations. Claimant's alternating subjective responses resulted in physicians reporting inconsistent results on his straight leg raising tests.

51. Dr. Gussner testified that Claimant's reports of upper back and abdominal pain following the epidural steroid injection were nonorganic findings. He testified that Claimant's reports that significant use of narcotic analgesics did not significantly reduce his pain are nonorganic findings. The testimony of Dr. Gussner and Claimant's repeated overdramatization of his pain and positive axial load tests undercut the weight assigned to his subjective reports of continuing pain. Claimant's prior back injury in 2007, his spotty work history, and the fact that he worked only four days before his alleged accident(s) are considered but do not significantly undercut the weight assigned to his subjective reports of continuing pain.

52. Claimant's refusal to cooperate with his treating physicians and reliance upon self-guided internet searches for his own medical opinions was unreasonable. His testimony that physicians prescribed unapproved or off-label medications was contradicted by Dr. Gussner in deposition and in the medical record. The absence of metabolites of his prescribed narcotic analgesic in his urinalysis further undercuts Claimant's reports of unrelenting pain. Indeed, at the December visit to St. Al's ER he reported his usual pain in the morning was 15 on a scale of

one to ten. The presence of THC in his urinalysis establishes that Claimant was untruthful with physicians when he denied other drug use.

53. Claimant's subjective responses to Dr. O'Brien's examination led Dr. O'Brien to believe Claimant's pain stemmed from his sacroiliac joints and not conditions in his lumbar spinal column.

54. Claimant repeatedly undermined attempts at conservative treatment by leaving appointments and refusing contact with physicians whose opinions he disagreed. No physician of record opined that surgical intervention would have a positive outcome for Claimant. No physician of record recommended ongoing palliative pain medication for Claimant. Future medical care, including psychological treatment and surgery, is not likely related to the work injury. Physicians have, in medical records in 2014 and thereafter, opined that narcotic analgesics are contraindicated given his past inconsistencies and repeated vocalized perceptions about the medical field. Weighing the circumstances as a whole, medical care sought by Claimant outside of the chain of referral and provided after the date of medical stability was not reasonable. Claimant is not entitled to medical care after November 15, 2013.

55. Claimant has requested that Defendants provide psychological counselling to address his anger issues prior to surgical intervention. Dr. Manos has opined that he would not recommend back surgery for Claimant until Claimant make some progress from a mental standpoint sufficient for him to handle the stress of surgery and recovery. There is no evidence that Claimant's psychological condition is work related, yet Claimant still contends that he is entitled to Surety-provided treatment for the same since he cannot obtain surgical treatment for his work-related back condition until his psychological conditions are sorted. The Commission case of *Howard v. Dep't of Health and Welfare*, 2000 IIC 0610 (June 23, 2000) explored a

similar situation where a surgeon refused to perform a procedure to Ms. Howard's back until Ms. Howard lost weight. Ms. Howard sought coverage for her participation in a weight reduction program prior to a repeat surgical evaluation. The Commission found that Ms. Howard was entitled to coverage for her weight reduction program for a temporary period, and retained jurisdiction for Ms. Howard to present her progress. However, as developed above, we need not reach this question in the instant matter, having determined that Claimant is not entitled to further care.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to temporary disability benefits from June 14, 2013, the date of his accident, to July 15, 2013, when he refused Employer's offer of suitable employment.

2. Claimant is entitled to medical care benefits for treatment provided within the chain of referral to November 15, 2013, the date of his medical stability, but not thereafter; and

3. All other issues have been reserved.

DATED this 25th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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