BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH, Claimant, v. THE HOME DEPOT, INC., Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Surety, Defendants.	**IC 2005-011806** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND** **Filed 10/19/17**

INTRODUCTION

On February 28, 2017, the Idaho Supreme Court issued an opinion in the above-referenced case. Claimant had appealed a single issue of the Commission's decision dated September 23, 2015, namely, whether and to what extent Claimant was entitled to continuing medical care after August 9, 2007. The Court vacated, but did not reverse, the Commission's decision as to this issue. The Court held that the Commission erred in its analysis and remanded the issue back for further proceedings. It ruled that the date of maximum medical improvement ("MMI" or "medical stability") is not relevant to a determination of reasonableness of continuing medical care and that focus, in hindsight, on the effectiveness of such treatment contravenes the holding in *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015). The Court instructed, "palliative care may be, but is not necessarily, reasonable, even if it is ineffective."

Pursuant to Idaho Code § 72-506, the Industrial Commission re-assigned this matter to Referee Douglas A. Donohue. After a telephone conference with the Referee on June 12, 2017, the parties jointly elected not to submit additional briefing. Referee Donohue submitted

proposed findings of fact and conclusions of law on remand to the Commission for review. The undersigned Commissioners disagreed with the treatment given to the evaluation of what constitutes reasonable medical care, and hereby issue their own Findings of Fact, Conclusions of Law, and Order on Remand.

ISSUE

The issue to be considered on remand is whether Claimant's continuing medical care, including palliative narcotics, is reasonable.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and her mother;

2. Claimant's Exhibits ("CE") 1 through 23 and B1 through B16 admitted at hearing;

3. Defendants' Exhibits ("DE") A through P admitted at hearing;

4. Depositions of physiatrist Gary Walker, M.D., pain management physician Jason Poston, M.D., neuropsychologist Carol V. Anderson, Ph.D., and vocational experts Mary Barros-Bailey, Ph.D., and Kent Granat.

Objections in post-hearing depositions were OVERRULED; EXCEPT the following objections were SUSTAINED:

Dr. Walker's deposition at pages 33-35; and
Mr. Granat's deposition at page 15.

Claimant's proposed exhibits 24 through 31 were acknowledged by the parties to be merely duplicative and were not admitted.

FINDINGS OF FACT

1. Findings of Fact 1 through 89 as enumerated in the September 23, 2015 Commission decision are incorporated by reference as if set forth in full. The following additional Findings of Fact are particularly relevant to the issue on remand.

2. Claimant suffered a soft-tissue knee strain when she slipped but did not fall at work in 2005.

3. Claimant previously complained to a physician of intermittent, chronic knee pain as early as April 13, 1994. A knee immobilizer was prescribed. Physicians treating Claimant for her industrial accident did not know of these records until after they were obtained in preparation for a 2008 IME performed by Drs. Gussner and Friedman. Claimant repeatedly denied a prior history of knee pain when asked by her treating physicians.

4. On November 8, 2005, Dr. Huntsman recorded Claimant's statement that her knee "gets worse with bending the knee and walking and twisting. It gets better with Hydrocodone." CE 3, p. 1.

5. On January 24, 2006, treating physician Casey Huntsman, M.D., released Claimant to full-duty work. As temporary restrictions, he recommended she avoid kneeling and that she take a 15-minute break every two hours. About January 25, 2006 Claimant returned to work until May 16, 2006. She has not worked since.

6. Gregory Biddulph, M.D., noted on December 18, 2006, "Again, she has pain out of proportion to physical findings in the posterior, medial, and lateral compartments as well . . . . I think one of Channel's biggest problems is her smoking. The smoking has been proven to perpetuate inflammation in the joint and cause persistent inflammation. However, in addition to

this I also think she does have patellofemoral pain . . . I think the first thing we have to do before any further surgeries are accomplished, that she does have to stop smoking." CE 3, pp. 9-10.

7. On January 18, 2007, Dr. Huntsman's nurse noted Claimant reported she had been taking Mobic as directed, but the pharmacy reported she had not refilled the prescription since October.

8. Dr. Huntsman attempted to cut off Claimant's narcotic medications on June 28, 2007. He noted his assistants "have given her the last Hydrocodone prescription today." CE 3, pg. 21.

9. On July 18, 2007, Claimant first visited Holly Zoe, M.D., for pain management on referral from Dr. Huntsman. Dr. Zoe prescribed narcotic analgesics in response to Claimant's reports of continuing pain. When a spinal stimulator was being considered for pain management later in 2007, she referred Claimant to Carol Anderson, Ph.D, for psychological evaluation. Dr. Zoe opined the spinal cord stimulator would not likely help.

10. On August 9, 2007, Dr. Huntsman persuasively opined Claimant was medically stable. He continued to recommend that Claimant see Dr. Zoe for her pain management and agreed to see her on a p.r.n. basis.

11. Defendants continued to pay medical benefits to April 2009. After a records review and examination of Claimant, Christian Gussner, M.D., opined on January 9, 2008 that he opposed a stimulator trial or opioid pump. He opined that no additional medical treatment was indicated.

12. After reviewing Claimant's older medical records, both Drs. Gussner and Robert Friedman, M.D. opined that three unnecessary knee surgeries had been performed because Claimant had given inaccurate information about her pre-accident knee condition.

13. In November 2008, Claimant requested stronger narcotics.

14. On December 4, 2008, Dr. Zoe noted "Pain seems to be more nociceptic rather than neuropathic." CE 6, pg. 58.

15. In January 2009, Michael McClay, Ph.D., evaluated Claimant at Surety's request. His involvement, Dr. McClay states, was part of the IME by Drs. Gussner and Friedman. Dr. McClay opined she "has the elements of a Chronic Pain Syndrome" and noted symptom magnification and secondary gain issues. DE M, pg. 318. He questioned whether Claimant was "forthright" with him. *Id.* His major recommendations were that "This patient needs to be out of the worker's [sic] compensation process as quickly as possible. Functional restoration can be considered as one component of this approach." *Id.*

16. On February 5, 2009, Dr. Zoe decreased Claimant's Fentanyl patch dosage.

17. On August 25, 2009, Claimant visited Eastern Idaho Regional Medical Center Emergency Room (EIRMC ER). She was out of narcotics, seeking more. The ER physician administered two Hydrocodone but refused to provide more.

18. In August 2009, Gary Cook, M.D., recommended discontinuation of narcotics, substituting appropriate use of over-the-counter analgesics and possibly an in-patient chronic pain management program. He also recommended a home exercise program, weight loss, and work hardening.

19. Claimant went through a series of new doctors with varying diagnoses who tried different treatments. Whenever a physician expressed reservations about Claimant's narcotic usage, she changed doctors. Claimant eventually found Dr. Jason Poston, M.D., who commenced treatment on September 2, 2010. Dr. Poston recommended a spinal cord stimulator, which was implanted on January 19, 2011 by Dr. Marano. Medical records indicate that Claimant showed no objective improvement in function.

20. On August 22, 2011, Michael O'Brien, M.D., reviewed records and performed a neurological exam at Claimant's request. Dr. O'Brien noted, "This pain seems totally out of proportion to the type of injury that she sustained." CE 13, pg. 1. He noted swelling in the knee "without any real pathology." *Id.*

21. Upon Claimant's November 2, 2011, request for a diagnosis of fibromyalgia, Dr. Poston advised her that opioids do not help fibromyalgia.

22. On January 8, 2013, Claimant presented to Dr. Poston's office without a limp. Dr. Poston's office refused to prescribe medications unless Claimant agreed to random drug monitoring. Claimant was advised that her function, not her self-reported pain score, would be the basis for additional opioids. On January 31, she limped.

23. On February 24, 2014, Gary Walker, M.D., reviewed records and examined Claimant at Surety's request. He opined Claimant's pain complaints were out of proportion to objective evidence of her knee condition. His examination could not pinpoint a cause or source for her pain complaints. He opined that no objective basis existed for imposition of restrictions.

24. On April 18, 2014, Dr. Walker responded to correspondence from Teresa Nolen at Helmsman Management Services regarding his IME report. He opined she showed no

objective findings which would support being off work. When asked about ongoing treatment, Dr. Walker opined that Claimant did not need treatment beyond weaning her off narcotics. In deposition, Dr. Walker retracted his written opinion that the narcotics and stimulator were "not work related" because these were prescribed in response to her complaints of knee pain. Walker Deposition, pp. 29-32. He did not change his opinion that both should be discontinued in Claimant's situation. Dr. Walker opined that one basis for his medical recommendation against continued use was that these modalities did not increase her function.

25. Claimant's regular visits to Dr. Poston's office continued. By June 2014, an issue arose once again of Claimant's compliance with opioid prescriptions. He testified in deposition that Claimant tested positive for narcotics which he had not prescribed for her. Dr. Poston's notes discontinue by the end of June 2014. He testified in deposition that continued prescriptions for narcotics are based, in part, upon whether a patient's function improves.

DISCUSSION AND FURTHER FINDINGS OF FACT

26. 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). But facts 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).

Claimant's Credibility

27. 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 witness on the stand and requires the Commission to be actually present at 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. Claimant did not challenge nor did the Supreme Court discuss the Commission's credibility determinations on appeal. Claimant's lack of both observational and substantive credibility is a factor to be weighed in determining whether physicians' opinions about additional medical care are persuasive. Discussion and Further Findings of Fact 90 through 96 are therefore incorporated in full herein.

28. Claimant has been inaccurate and untruthful with her physicians. She omitted her history of intermittent, chronic knee pain since her teenage years. She has avoided all medical attempts to wean her from the narcotics, including firing her physicians when they recommended such. Urinalysis has shown that she substituted her prescribed opiates for her preferred opiates on two occasions. Her subjective assertions about her opiate use, her function or dysfunction, and her desire to return to work similarly do not correspond with records of physicians or the Idaho Industrial Commission Rehabilitation Division. Consistent with the September 23, 2015 Decision of the Commission, where her testimony conflicts with contemporaneously made written evidence in the record, Claimant's testimony is afforded less weight.

Reasonableness of Future Medical Care on Remand

29. An employer shall provide reasonable medical care for a reasonable time after an injury. Idaho Code § 72-432(1). A "reasonable time" includes the period of recovery before medical stability, but may include a longer period. *Jarvis v. Rexburg Nursing Center*,

136 Idaho 579, 38 P.3d 617 (2001). Reasonable medical treatment benefits may continue for life; there is no statute of limitation on the duration of medical benefits under Idaho Workers' Compensation Law.

30. A claimant bears the burden of showing that medical treatment required by a physician is reasonable. Idaho Code § 72-432(1). A claimant must support his or her workers' compensation claim with medical testimony that has a reasonable degree of medical probability. *Hope v. ISIF*, 157 Idaho 567, 572, 338 P.3d 546, 552 (2014), *citing Sykes v. CP Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980)). The reasonableness of treatment is dependent upon the totality of the facts and circumstances of the individual being treated. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). Totality of the facts and circumstances is a factual determination, but not a retrospective analysis with the benefit of hindsight. *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

31. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

32. Reasonable medical treatment may include palliative measures which are not, of themselves, curative. *Poss v. Meeker Machine Shop,* 109 Idaho 920, 712 P.2d 621 (1985). Palliative opioid treatment is not *per se* unreasonable. *See, Ballard v. WalMart Associates, Inc.*, 2014 IIC 0051 (2014)(claimant entitled to purely palliative opioids for chronic headache pain following a closed head injury). The Commission has previously ordered future palliative treatment—including opioid prescriptions—for an indefinite period after medical stability, subject to the requirement of a treating physician, in at least one other case. *See, e.g.*, *Thomas v. Woodgrain Millwork, Inc.*, Docket No. 2013-023484 (April 7, 2017). The Commission has also ordered palliative opioid treatment for a period after medical stability, but required that such treatment should cease upon a date certain or condition subsequent. *See, e.g., Jarvis v Rexburg Nursing Center*, 2000 IIC 0890, Docket No. 89-640617, (2000)(claimant allowed opioids to a date certain to begin a drug dependence program), reconsideration denied, 2000 IIC 1034 (2000); *Jarvis, supra*., (affirmed). On remand, the Idaho Supreme Court instructed the Commission that although both Drs. Walker and Poston testified that the effectiveness of palliative treatment is a consideration for whether such treatment should be compensable, it should not be the primary factor in that determination.

33. In his special concurrence to the Idaho Supreme Court's Opinion in this case, Justice W. Jones reiterated "a number of red flags in this case that must be considered. Specifically, [Claimant] Rish demonstrated a distinct pattern of seeking opioid pain medication from different physicians, and abandoning those physicians as soon as they took measures to wean her off of opioids." He concluded that it was "up to the Commission to determine whether or not facts other than MMI and the retrospective efficacy of treatment lead it to the same

ultimate assessment of the reasonableness of the treatment provided to [Claimant] Rish."

34. Dr. Huntsman's opinion on Claimant's date of medical stability was found most persuasive in the underlying September 23, 2015 Decision, as he "had performed the surgeries and actually observed Claimant's internal knee condition." ¶ 108. The undersigned Commissioners are presented with insufficient evidence on remand to dispute the finding that Claimant had reached MMI as of August 9, 2007. The Idaho Supreme Court did not take umbrage with the Commission's conclusion regarding Claimant's date of medical stability or the medical records upon which it was based. Claimant's date of medical stability remains August 9, 2007.

35. Claimant has seen many physicians since her industrial injury in 2005. The records contain multiple suspected diagnoses and attempted treatment options in an effort to alleviate her complaints of pain. These same medical records contain notes from physicians attempting to find objective findings on scans, tests, and other diagnostic studies corresponding with Claimant's reported severe pain. Multiple times in the record, PA Nelson stated that he and Claimant discussed expectations regarding opiod pain medications, what results such treatment may offer, how the efficacy of treatment would be evaluated, and that opioid therapy alone is unreasonable. CE 11. As testified to by physicians in post-hearing deposition, pain is wholly subjective, and physicians rely upon consistent objective findings and credible patient complaints as two major factors upon which to reasonably prescribe analgesics. The record and physicians' opinions show it likely that Claimant's knee strain resolved, and her pre-accident knee condition returned to baseline well before the date of hearing. These factual findings were not challenged or disturbed on appeal. The majority of treating and forensic physicians have agreed that the soft

tissue injury they described would be unlikely to cause the severe and intense pain alleged by Claimant. The opinions and records of physicians are a significant factor in determining whether or not proposed treatment is reasonable.

36. Beginning with Dr. Huntsman in June 2007, several treating physicians have recommended Claimant discontinue narcotic use. Some treating physicians, new to Claimant's case, have provided narcotics and other modalities of treatment in response to Claimant's reports of extreme continuing pain. Claimant consistently told physicians that palliative treatment such as physical therapy, home exercise programs, injections, nerve blocks, a spinal cord stimulator, and related non-opioid pain reduction options did not help in eliminating or decreasing her pain. The physicians provided prescription painkillers to Claimant for a time. However, as treatment and diagnostics progressed, these same physicians eventually recommended that Claimant should discontinue narcotic use.

37. Dr. Huntsman referred Claimant to Dr. Zoe for pain management, and the two doctors worked in tandem for a brief period. Claimant's treatment with Dr. Zoe, from July 18, 2007 through May 1, 2009, constituted reasonable palliative care. However, the chain of referral in Claimant's treatment was broken upon Claimant's refusal to participate in Dr. Zoe's treatment plan to titrate down her pain medication. As Dr. Zoe recorded in her last medical note, "We advised the patient that there is not much more we can do for her at this point. Patient became very angry and started screaming. Patient was advised that she may follow up with any other physicians that she wishes to for further clinical opinions." CE 6, pg. 75 (emphasis added). It does not appear in the record that Dr. Zoe made a referral to another physician at that time, or that Claimant filed a request to change physicians. Prior to commencing treatment with

Dr. Poston on September 2, 2010, Claimant primarily utilized her longtime regular physician Dr. Christensen and the local ER to obtain prescription painkillers. Treatment obtained after Claimant parted ways with Dr. Zoe primarily relied on Claimant's version of events, and as previously discussed, Claimant is an unreliable historian. Treatment sought and obtained by Claimant after May 1, 2009, when she ceased treatment with Dr. Zoe, is not compensable.

38. The undersigned Commissioners recognize that opioid addiction is a very real consequence of pain management practices. If a claimant can present sufficient evidence that his opiate dependence was caused by her industrial accident and injury, an addiction recovery program may be considered compensable as reasonable treatment pursuant to Idaho Code § 72-432. *See, Nelson v. First Interstate Bank,* 2000 IIC 0914 (Oct. 16, 2000); *Benner v. The Home Depot, Inc.*, 2013 IIC 0002 (Jan. 9, 2013). As a practical matter, Claimant has asserted neither desire nor intent to participate in treatment that would wean her from narcotic medications. The Commission is not presented with sufficient evidence in the record to consider the reasonableness of such in the instant matter.

39. On the totality of facts and circumstances in this record, Claimant has failed to establish that medical care after May 1, 2009 was reasonable pursuant to Idaho Code § 72-432.

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CONCLUSIONS OF LAW AND ORDER

1. Claimant has failed to establish that treatment after May 1, 2009 constitutes reasonable medical care pursuant to Idaho Code § 72-432.

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

DATED this __19th__ day of _October_, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___Recused_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _19th_ day of ____October____, 2017, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON REMAND** was served by regular United States Mail upon each of the following:

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