BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHANI KILBY, Claimant, v. TRINITY MISSION HEALTH & REHAB OF HOLLY, LP, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2011-015117** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 24, 2014

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 September 19, 2013. Clinton Miner represented Claimant. Andrew Waldera represented Defendants Employer and Surety. The parties presented oral testimony and documentary evidence. One posthearing deposition was taken. After multiple extensions were granted to allow briefs, the case came under advisement on September 2, 2014. This matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

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

2. Whether and to what extent Claimant is entitled to benefits for:

a) Temporary disability (TTD/TPD),
b) Permanent partial impairment (PPI),
c) Permanent partial disability in excess of impairment,
d) Medical care; and
e) Attorney fees.

The parties did not address the issue of attorney fees in posthearing briefing. Claimant did not present evidence to suggest a basis for such an award under Idaho Code § 72-804. This issue is deemed waived.

Posthearing, Defendants filed a Motion to Strike portions of the deposition testimony of Richard Radnovich, D.O., alleging that Claimant failed to respond to discovery requests about Dr. Radnovich's opinions. Defendants rely upon JRP 7 as it relates to IRCP 26. This motion will be addressed below.

CONTENTIONS OF THE PARTIES

Claimant contends she suffered a compensable accident and injury on June 7, 2011 while assisting a nursing home resident. She injured her knee. She needs further medical care. In the alternative, she is entitled to PPI and PPD.

Defendants contend they have paid all benefits due Claimant. She sought noncompensable medical treatment outside the chain of referral after she had reached medical stability.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits 1-4, admitted at hearing;
3. Defendants' exhibits 1-24; and
4. Posthearing deposition of Richard Radnovich, D.O.

Defendants objected timely during the posthearing deposition and filed a Motion to Strike. They acknowledge having received through discovery requests only a single document – a letter dated January 10, 2012 – pertaining to Dr. Radnovich. Defendants object and move to strike all aspects of Dr. Radnovich's posthearing testimony outside the scope of that letter. Defendants' argument is well taken. Claimant initially responded to discovery by identifying Dr. Radnovich and producing that one letter. Claimant did not identify the substance of the opinions about which Dr. Radnovich might testify. Claimant promised additional supplementation, but never provided it. Despite questioning at hearing, Claimant's testimony did not raise a reasonable inference that she had seen Dr. Radnovich more than once. At his posthearing deposition, Dr. Radnovich testified about a second examination in November 2012. Defendants had no knowledge of this second examination. Also at deposition, Dr. Radnovich was asked to critique Dr. Friedman's opinions which were issued in July 2012; he was asked to estimate PPI although he opined in the January letter that Claimant was not yet stable; he was asked to give an opinion about causation, aggravation, or exacerbation. None of these opinions were disclosed by Claimant. Claimant has offered no showing of good cause for the failure to supplement discovery as required by JRP 7 and IRCP 26 before the deadline imposed by JRP 10, indeed, not even before the posthearing deposition itself. Claimant cites *Veenendaal v. Fish Breeders of Idaho, Inc.*, 2013 IIC 0075 (2013), in support of her argument that the testimony of Dr. Radnovich is admissible because Dr. Radnovich did nothing more than offer an opinion based on evidence introduced at hearing or in the post-hearing depositions of other experts. Accepting this assertion as true, *Veenendaal*, nevertheless supports exclusion of Dr. Radnovich's testimony. In *Veenendaal*, as in the instant matter, Claimant failed to supplement his discovery responses with the substance of his expert's anticipated testimony, and

for that reason the expert's testimony was excluded. *Veenendaal* supports the same outcome in the instant matter. Defendants' objections, including continuing objections, raised during the deposition are SUSTAINED.

FINDINGS OF FACT

The Accident

1. Beginning about March 17, 2011, Claimant worked as a certified nurse's assistant (CNA) for Employer at its long-term nursing care facility.

2. On May 25, 2011, St. Al's Nampa ER provided Claimant a three-day work release.

3. On June 7, 2011, Claimant was disciplined in writing for absenteeism.

A nurse's note indicates that Claimant was reminded that her lunch break was only 30 minutes, not one hour on June 11, 2011. The same nurse noted that on June 17, 2011, Claimant asked for ibuprofen "before lunch, before she had even transferred" the patient Claimant alleged had injured her knee. This nurse's note is undated; it does not indicate when these notes were prepared.

4. On June 17, 2011, Claimant assisted a resident in his bed, cleaning and dressing him, when he pushed or struck her knee with his hand. She dropped backward into a chair and felt immediate pain.

5. Claimant reported the incident to a supervisor. She wrote a note to the director of nursing at 2:09 p.m. and finished her shift work that day.

6. Claimant completed paperwork about the accident the following day.

7. Employer completed a Form 1 on June 21, 2011. It indicates Claimant returned to work on that date.

Medical Care 2011

8. Claimant first sought medical treatment for this injury on June 18, 2011. Stephen Martinez, M.D., and Jeff Robins, FNP, at Primary Health recorded a hyperextension of her knee and a normal X-ray. On examination "no swelling" was expressly recorded. They allowed an immediate return to work with temporary restrictions not to kneel or squat, avoid excessive weight bearing and operating foot controls, and no high impact activities. They gave her a knee brace.

9. A June 30, 2011 follow-up by Nurse Robbins was consistent with the initial treatment and recommendations. His examination noted "slight edema."

10. A July 7, 2011 MRI indicated a possible meniscal tear with chondromalacia of the patellofemoral compartment.

11. On July 11, 2011, Dr. Martinez diagnosed Claimant's condition as a "knee sprain." He released Claimant to work with temporary restrictions including no kneeling or squatting. He recommended use of ice, a knee brace, and medications as needed.

12. On July 15, 2011, Claimant first visited George Nicola, M.D. By history Dr. Nicola recorded, "She . . . did not feel a distinct pop, but had immediate pain." This contradicts her hearing testimony, "I heard the loudest pop I had ever heard." He recorded that she described "no prior problems besides bursitis." Upon the MRI suggestion of a meniscal tear, he recommended physical therapy, and injection, and if necessary, surgery. He opined her condition was industrially related.

13. On September 17, 2011, Dr. Nicola operated arthroscopically. He reported severe degenerative changes but, despite the MRI and upon careful observation, he saw no tear in the meniscus.

14. Dr. Nicola noted in follow-up visits that Claimant reported swelling in her knee; his examination notes do not confirm swelling was present. He ordered more physical therapy. On December 15, 2011, he opined her knee condition on that date was "non-industrially related." He opined she was at MMI with no PPI and released Claimant to return to full work without restrictions.

Medical Care 2012 - Hearing

15. On January 10, 2012, Richard Radnovich, D.O., evaluated Claimant at her attorney's request. He reviewed some records and examined Claimant. He opined Claimant was not at MMI. He did not opine about causation.

16. Robert Friedman, M.D., evaluated Claimant at Surety's request on June 21, 2012. Clamant denied prior knee symptoms or injury. Dr. Friedman opined that her knee condition was unrelated to the reported industrial accident; that she was MMI as reported by Dr. Nicola on December 15, 2011. He diagnosed preexisting knee degenerative arthritis with PPI of 3% of the lower extremity, unrelated to industrial accident. Upon review of the November 2012 MRI, Dr. Friedman opined on January 8, 2013 no change from the July 2011 MRI; both suggested a possible meniscal tear which Dr. Nicola observed was not torn in arthroscopic surgery. No change in his opinions was warranted.

17. The second MRI was performed November 30, 2012. It described "complex tearing/maceration involving the posterior horn medial meniscus" as well as degenerative changes and noted, "Overall no significant interval change compared to previous outside MRI dated July 7, 2011."

18. On December 26, 2012 Claimant visited Ronald Kristensen, M.D., at her attorney's request. Dr. Kristensen equivocated in response to a specific question about causation

in a March 25, 2013 letter: "Based upon the history and results of MRI, I suspect she did sustain a tear of the posterior horn medial meniscus." He further equivocated about additional medical care and possible surgery.

Post-Accident Employment

19. Claimant testified she was fired on July 15, 2011. The stated reason was failure to follow Employer's written "no-lift" policy when dealing with another resident.

20. About one month after surgery, Claimant obtained work at Nampa Care Center. She worked there for "four or five months." She was fired for poor attendance. Claimant blamed transportation issues for her poor attendance.

21. Claimant relocated to Alabama to nurse a friend through chemotherapy.

22. While in Alabama, she later worked at a skilled nursing facility for about six weeks.

23. Claimant returned to Idaho and worked at Beehive, an assisted living facility in Star. Eventually, she was suspended and told she needed to provide a doctor's release to work. Claimant testified that she received an e-mail which iterated this requirement; she believes her attorney has it. No such e-mail is in evidence.

24. Claimant began work for MultiCare, a home health agency, but was informed during training that she needed to provide a doctor's release to work. She never did so. She did not continue with MultiCare.

25. Claimant worked "about a week and a half" for Idaho Home Healthcare.

26. At the time of hearing, Claimant was working at The Cottages of Emmett as a cook. She performs some incidental duties similar to a CNA as well.

27. Claimant continues to wear one or another knee brace out of personal preference.

No current doctor's prescription requires a knee brace.

28. During periods of unemployment since the accident and exclusive of worker's compensation benefits, Claimant testified she has received back child support as her only means of income.

Prior Medical Care

29. The earliest mention of knee complaints in Claimant's medical record is March 25, 1997. The physician noted intermittent knee pain, primarily around the knee cap, and "very mild" crepitus. The physician suspected early patella-femoral chondromalacia and recommended ibuprofen and exercise.

30. Claimant had received compensation for a thumb injury from a California worker's compensation claim filed in July 1997 before she moved to Idaho.

31. A June 2008 note records complaints of fatigue and joint discomfort expressly including Claimant's knees. After work-up the diagnosis was hyperlipidemia and arthritis.

32. Presenting for a right heel injury in September 2008, Claimant reported a history of pain in hips and knees.

33. In November 2010, Claimant sought treatment for knee pain. She alternately alleged she began feeling knee pain in October without an injury, but also alleged she had suffered a knee injury in a non-industrial accident while shoveling snow. At hearing, she testified she hit her knee with a snow shovel. She testified she also fell and injured her hip in that incident. Diagnosed as patellar bursitis and chondromalacia patella, a substantial knee brace was prescribed. Claimant's testimony about this event being more about her hip than her knee is unsupported by the records; they do not mention hip symptoms. Significantly, Claimant's major complaints were swelling and pain on the back side of the knee—the same

major complaints with which she describes her current knee condition.

34. In mid-December 2010, Claimant visited a McCall ER and reported right hand pain from a work accident. The note does not indicate any knee symptoms.

35. In testimony, Claimant denied other knee injury until presented with contradictory medical records.

DISCUSSION AND FURTHER FINDINGS OF FACT

36. 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).

37. Claimant inconsistently testified about whether she had pre-accident knee injury or pain, about the extent of swelling in her knee post-accident, about her knee recovery, and about residual effects of her thumb injury in her deposition and at hearing. Her testimony showed some incompleteness of memory about a 2010 knee injury. Overall, Claimant's demeanor was equivocal as to credibility. On balance, Claimant is considered credible. However whenever inconsistency arises, where records were made contemporaneous to any event or treatment, these are given greater weight than Claimant's testimony. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

Causation

38. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of

physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

39. Here, Dr. Nicola's opinion is based upon the surest foundation. Although he was initially suspicious that Claimant had suffered a meniscal tear, Dr. Nicola found no such injury, or evidence of any other acute injury or aggravation, at the time of surgery. The supporting opinions of Dr. Friedman and the contradictory opinions of Dr. Radnovich, if accepted, would not change the preponderance of the evidence of record. Dr. Radnovich's opinions are suspect because they were formulated without knowledge of Claimant's pre-injury knee problems and medical treatment for the same. Dr. Kristensen's statements were insufficient to show he held any relevant opinion to the requisite standard of medical probability.

40. Medical care for Claimant's knee condition to the date of MMI was related to the accident. Claimant failed to show her knee condition after she reached MMI on December 15, 2011 was related to the industrial accident. She failed to show any permanent aggravation or exacerbation of her preexisting degenerative condition.

Medical Care

41. An employer is required to provide reasonable medical care for a reasonable time as recommended by an injured worker's treating physician. Idaho Code § 72-432(1).

42. The evidence of record shows Employer paid all medical care benefits for which Claimant was entitled. Claimant failed to show she is entitled to future medical care for this accident.

43. Claimant sought additional treatment outside the chain of referral. The evidence is insufficient to show that treatment is compensable under the *Sprague* standard.

Temporary Disability

44. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code § 72-408, *et. seq*. Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001). An injured worker who is unable to work while in a period of recovery is entitled to temporary disability benefits under the statutes until he has been medically released for work and Employer offers reasonable work within the terms of the medical release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217, (1986). The statute requires a five-day waiting period before temporary benefits become payable but once exceeded benefits are payable for that time. Idaho Code § 72-402.

45. Claimant failed to establish that she is entitled to TTD benefits beyond amounts paid by Surety.

PPI and Permanent Disability

46. Permanent impairment is defined and evaluated by the statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

47. Again, Dr. Nicola's opinions carry the greater weight. Claimant suffered no PPI as a result of the industrial accident.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered an industrial accident which caused a knee injury or temporary exacerbation of a preexisting knee condition;

2. Claimant failed to show she is entitled to medical benefits not already paid by Defendants, to future medical benefits, or to medical benefits for treatment outside the chain of referral;

3. Claimant failed to show she is entitled to TTD benefits not already paid by Defendants; and

4. Claimant failed to show she is entitled to PPI or PPD benefits;

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

DATED this 24th day of December, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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_/s/_____