BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KRISTINE CAMPAGNI, Claimant, v. THE WALT DISNEY COMPANY, dba, THE DISNEY STORE, Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Surety, and HOOP RETAIL STORES, LLC, dba, THE DISNEY STORE, Employer, and ZURICH NORTH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2004-506690** **IC 2006-003561** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed February 22, 2013**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Michael E. Powers, who conducted the hearing in Boise, Idaho, on July 29, 2011 for one full day, and on August 12, 2011, for one half day. John Greenfield represented Claimant. E. Scott Harmon represented Walt Disney Company dba the Disney Store and Liberty Mutual Fire Insurance Company. Alan K. Hull represented Hoop Retail Stores dba The Disney Store and Zurich North American Insurance Company. The parties presented oral and documentary evidence at the hearing, and subsequently submitted post-hearing depositions and briefs. The case came under advisement on April 23, 2012. The matter was reassigned to the Commissioners. It is now ready for decision.

ISSUES

After due notice and by agreement of the parties at hearing the issues are:

1. Whether Claimant is entitled to additional medical care and, if so, from which Employer/Surety;

2. Whether Claimant is entitled to Total Temporary Disability (TTD) benefits and, if so, for what periods and from which Employer/Surety;

3. Whether Liberty is entitled to reimbursement from Zurich for benefits paid following the 2006 industrial event occurring at The Children's Place; and

4. Whether Claimant is entitled to attorney fees, and if so, from which Surety and in what amount.

INTRODUCTION

Claimant suffered two separate accidents in 2004 and 2006 while working at the Disney Store. In the first accident, Claimant alleges that she was placing merchandise on a display shelf when she struck her left buttock on the sharp corner of a display table. Claimant treated conservatively and was pronounced stable in 2005. Although she reduced her work hours, Claimant did not seek treatment for left buttock/back or left leg pain after her release. In Claimant's second accident, Claimant stepped down onto a piece of plastic with one foot on the bottom rung of the ladder, slipped, and fell landing directly onto her left buttock/low back area. Prior to the 2006 accident, the Disney Store changed ownership and workers' compensation coverage from Liberty Mutual Fire Insurance Company ("Liberty") to Zurich North American Insurance Company ("Zurich"). Zurich paid for Claimant's initial medical care from the 2006 accident. After conservative treatment failed, Claimant's treating physician recommended surgery. Prior to surgery, Claimant's treating physician reversed his causation opinion, and assigned responsibility to the 2004 injury (Liberty). Liberty authorized Claimant's requested surgery. Unfortunately, Claimant's first back surgery was unsuccessful, necessitating a second

back surgery (fusion). The second surgery was also unsuccessful at relieving her complaints. After the second surgery, Liberty denied responsibility for further medical care after additional investigation persuaded Liberty that Zurich was in fact responsible for all treatment needed after the 2006 accident. At this point, both Sureties deny responsibility for Claimant's medical care.

CONTENTIONS OF THE PARTIES

Claimant argues that the 2006 accident (Zurich) caused her need for medical care, and that once surgery was indicated, Zurich adjusters cajoled her treating physician into reversing his causation opinion. Zurich's denial has caused Claimant great financial and emotional stress. Claimant requires further medical treatment, perhaps even a third surgery, to appropriately resolve her orthopedic pain and injuries. Zurich should also reinstate TTD benefits. Because Zurich has acted unreasonably, Claimant requests attorney fees.

Liberty also argues that the 2006 accident (Zurich) caused Claimant's need for medical care. Therefore, Zurich bears all responsibility for Claimant's post-2006 medical care and TTD benefits. Liberty requests reimbursement for medical benefits it mistakenly paid.

Zurich argues that Claimant's 2004 complaints continued before and after her 2006 accident. At most, the 2006 accident temporarily aggravated the 2004 injury and Zurich owes nothing further to Claimant. Given Claimant's symptom magnification and psychological issues, Liberty inappropriately authorized two back surgeries resulting in a disastrous outcome for Claimant. Liberty's missteps are not Zurich's responsibility, as Zurich did not have any opportunity to contemporaneously review these procedures. Zurich argues that Claimant is not entitled to attorney's fees.

EVIDENCE CONSIDERED

The Record in this case consists of the following:

1. Oral testimony at hearing from Claimant,

2. Claimant's Exhibits 1 through 25 admitted at hearing;

3. Defendants' (Liberty) Exhibits A through X admitted at hearing;

4. Defendants (Zurich) joined in both Claimant's and Co-Defendants' Exhibits admitted at hearing;

5. Depositions from Drs. R. Tyler Frizzell, Timothy Doerr, Robert Calhoun, Vivek "Vic" Kadyan, Paul J. Montalbano, and Samuel Jorgenson;

6. Depositions from Ms. Tami Hill, Ms. Katie Liehe (Wilson), Ms. Annette Anderson (Yorgason), and Ms. Marsha Gregory; and,

7. The Commission's legal file.

FINDINGS OF FACTS

1. Claimant was born on August 7, 1965 in Pico Rivera, California. Claimant left high school before graduating and moved to Idaho in 1989. At the time of her 2004 accident, Claimant was a sales clerk and assistant manager at The Disney Store in Boise, Idaho.

2. Claimant's first relevant industrial accident occurred on March 8, 2004. Claimant was placing merchandise on a display shelf when she, without stepping or falling back, struck her left buttock on the sharp corner of a display table. Claimant and Employer dispute the mechanism of Claimant's 2004 accident, whether Claimant had radicular symptoms following the 2004 injury, and whether such were ongoing. Claimant argues that the 2004 injury was only to her left buttock, and that Employer mislabeled it as a low back injury because Employer's computer-generated form did not allow for the word "buttocks". For reasons discussed below, the Commission finds that Claimant's 2004 accident injured her left buttock and left low back

area. In 2004, the Disney Store maintained insurance through Liberty Mutual Fire Insurance Company (Liberty). Liberty accepted and paid for Claimant's medical treatment.

3. Claimant first treated at Primary Health West Boise on March 23, 2004, before she transferred to Howard Shoemaker, M.D. Dr. Shoemaker opined that Claimant suffered a bruise/trauma over her sciatic nerve, and released Claimant to five hours of work per day. C. Exh. 5. Claimant treated conservatively without missing substantial amounts of work.

4. On June 8, 2004, Claimant had an MRI, the only radiographic film made between the two industrial accidents. Diane Newton, M.D., radiologist, found a bulge at L4/5 producing a "mild intrusion of disc material into the right L4 neural foramen," but stated that "L4 nerve roots exit without evidence of impingement." C. Exh. 5, pp. 20-21.

> Findings:
>
> Sagittal sequences demonstrate very slight L4-5 retrolisthesis with discogenic endplate changes at the L45 disk level. Lumbar vertebral bodies are otherwise within normal limits in sagittal alignment, stature and signal intensity. Of note, the L5 segment is somewhat transitional in morphology, with partial sacralization on the right. The conus medullaris is normal in position, terminating at the L1 level. No lumbar intraspinal pathology is seen.
>
> L1-2: Viewed in the sagittal plan only, this level is unremarkable.
>
> L2-3: Within normal limits.
>
> L3-4: There is slightly reduced T2 signal of the nucleus pulposus. Vertical disk height is well maintained. There is no evidence of disk protrusion, central canal stenosis or neural foraminal compromise.
>
> L4-5. There is reduced T2 signal pulposus with mild loss of vertical disk height. *Circumferential annulus bulge is present with minor accompanying endplate hypertrophic spurring and bilateral facet arthropathy. There is mild intrusion of disk material into the right L4 neural foramen, but L4 nerve roots exist without evidence of impingement.*
>
> L5-S1: Mild bilateral facet arthropathy without additional significant abnormality. Of note, the L5 level appears transitional in morphology, partially sacralized on the right.

C. Exh. 5, pp. 20-21; D. Exh. X, pp. 534-535 (emphasis added).

5. On July 19, 2004, Claimant complained to David Price, chiropractor, of pain radiating from her left low back/buttock area to the back of her left knee. After an unsuccessful trial of chiropractic care, Claimant returned to Dr. Shoemaker. Although Dr. Shoemaker suspected psychological factors, he referred Claimant to Nancy Greenwald, M.D., a physiatrist, for further treatment. C. Exh. 5, pp. 42-43.

6. Dr. Greenwald oversaw Claimant's care through the following months, including localized physical therapy, injections, and prescription pain medication. Physician and patient did not always see eye to eye on the appropriate course of treatment. Dr. Greenwald admonished Claimant to adhere to prescribed dosages of medications; Claimant declined, finding Dr. Greenwald dismissive and unsympathetic to her pain complaints. C. Exh. 25, p. 29. As early as November 10, 2004, Dr. Greenwald predicted Claimant would soon be at MMI, and encouraged Claimant to focus on her recovery rather than her pain. By the end of 2004, Claimant's physical abilities improved, yet her complaints continued. Because Claimant's complaints continued through January 27, 2005, Dr. Greenwald recommended EMG testing.

7. Claimant's scheduled EMG did not go smoothly. Claimant's complaints forced Dr. Greenwald to abandon the EMG. At hearing, Claimant accused Dr. Greenwald of being "extremely violent" and "angry" and disparaged Dr. Greenwald's treatment and credentials. Hr. Tr., pp. 170-171. Dr. Greenwald's contemporaneous notes, professional without embellishment, are more persuasive.

8. On March 3, 2005, Dr. Greenwald released Claimant to work with a 5% whole person PPI rating, and permanent restrictions against lifting more than 50 pounds occasionally,

25 pounds frequently, and 10 pounds continuously. Following Dr. Greenwald's release, Claimant did not seek or receive any medical treatment for her low back.

Claimant's 2006 Accident

9. Claimant sustained her second injury on March 5, 2006, almost exactly one year since being last seen by Dr. Greenwald. With one foot on the bottom rung of the ladder, Claimant stepped down onto a piece of plastic, slipped, and fell with her full body weight directly onto her left buttock/low back area. Claimant was close to ground level when she fell. Claimant promptly sought medical care, and presented with complaints of sharp, burning pain that radiated from her left hip to her left foot and toes. C. Exh. 12, p. 1.

10. Store ownership and insurance carriers changed after Claimant's first accident. Employer's new insurance carrier, Zurich, accepted Claimant's initial medical treatment. Based on Claimant's reported history, Claimant's initial providers recorded an aggravation of sciatica from the 2004 accident. C. Exh. 12; C. Exh. 13, p. 3. However, Claimant testified her symptoms increased in intensity because she could not successfully return to work. C. Exh. 14, p. 6.

11. On March 22, 2006, J. Gary Brandecker, M.D., noted back pain with left leg radiation and a possible herniated disk. C. Exh. 14, p. 7. That same day, Michael A. Fuchs, M.D., found six lumbar type vertebral bodies with partial sacralization of L6 on the right, marked disk space narrowing at L5-L6, and degenerative joint disease from L3 through L6. D. Exh. X, p. 299. Dr. Brandecker suggested follow-up with Dr. Greenwald; Claimant declined.

12. Claimant saw Matthew Paul Hulquist, M.D, who thought Claimant might have a disk herniation, nerve impingement or sacroiliac joint pain, and referred her to Samuel Jorgenson, M.D., an orthopedic surgeon. C. Exh. 15, p. 1.

13. Prior to Dr. Jorgensen's evaluation, Katie Wilson contacted Dr. Jorgensen with questions about his diagnosis and causation opinion. Ms. Wilson's letter represented that Claimant had a previous injury of the "same nature" in 2004 and that her pain has "continued . . . from her buttocks down her left leg since that previous injury," merely becoming worse after the 2006 accident. C. Exh. 25, p. 1.

14. At the time of his April 3, 2006 evaluation of Claimant, Dr. Jorgensen recorded the following concerning Claimant's history of injury and symptomatology:

> HISTORY: Kristine Campagni is a 43-year-old female who sustained two separate industrial injuries. The first was two years ago with date unknown. She injured her back at the lumbar spine at that time and had some ongoing pain. The reason for her visit today is an injury sustained on March 5, 2006, when she fell off of a three step ladder landing onto her left buttock while working in her normal customary capacity at the Disney Store as an assistant manager. She presented to the emergency room and is now referred for further evaluation and treatment recommendations.
>
> Her current complaints are of pain to the lumbar spine extending to the left buttock, leg, and to the ankle and feet and left sacroiliac area. She states that this pain is the same distribution of pain prior to her most recent fall after her first injury two years ago. The pain is more severe however and now rated as 10 out of 10. She also has increased low back pain, which she had minimal back pain prior as it was mostly in her leg.
>
> Currently her symptoms are aggravated by almost all activities and alleviated only lying down. She rates her back pain and leg pain as 10 out of 10, both are severe and are significantly impacting her quality of life. She requires the use of medications including Vicodin, Flexeril, Norflex, Lodine, and occasional Norco. She is currently taking 10 to 12 Tylenol per day.

C. Exh. 16, p. 9.

15. On exam, Claimant's sensation was diminished in the left posterior calf to pin prick evaluation. Based on the suggestion of the left lumbar radiculopathy, Dr. Jorgensen recommended MRI evaluation of the lumbar spine to assess the degree of neurologic

impingement pathology. MRI evaluation of Claimant's lumbar spine was completed on 5-16-06. That study was read in relevant part as follows:

> L4-5: There is decreased disc height, disc desiccation, degenerative endplate signal changes, endplate spondylosis, diffuse annular bulging, accentuated towards the left, with resultant mild to moderate lateral recess stenosis and only minimal spinal stenosis. Facet arthropathy contributes to mild bilateral neural foraminal stenosis.
>
> L5-S1: As above, there is apparent partial sacralization of L5 on the right. There is normal disc hydration, no focal disc protrusion or spinal stenosis. Facet arthropathy is present but there is no neural foraminal stenosis.
>
> . . . .
>
> IMPRESSION: Lumbosacral junction is designated at L5-S1 in this report. There is apparent partial sacralization of L5 on the right. Recommend correlation with plain films prior to instrumentation.
>
> L3-4 degenerative disc disease, noncompressive disc bulge, without significant spinal or neural foraminal stenosis.
>
> L4-5 degenerative disc disease, decreased disc space height, disc bulge accentuated on the left, mild to moderate bilateral lateral recess stenosis, mild spinal stenosis, facet arthropathy and mild neural foraminal stenosis.
>
> L5-S1 facet arthropathy, no spinal or neural foraminal stenosis.

C. Exh. 16, pp. 12-13.

16. Dr. Jorgensen met with Claimant on May 31, 2006 to review with her the results of the MRI. As is his practice, Dr. Jorgensen reviewed the actual films of the study, and did not rely on the radiologist's report alone. Dr. Jorgensen read the May 16, 2006 MRI somewhat differently than the evaluating radiologist:

> IMAGING STUDIES: The MRI scan was reviewed. It does document a sacralized S1 segment. The first mobile segment above, labeled L4-5, shows extensive degeneration. There is mild spondylolisthesis and anterolisthesis. There is severe disc space collapse. There are modic changes to the endplates above and below the disc space. There is a posterior disc bulge and resultant significant spinal stenosis.

C. Exh. 16, p. 15.

17. Dr. Jorgensen testified that his review of the films led him to conclude that Claimant's findings were somewhat more severe in degree than proposed by the radiologist. Jorgensen Depo. pp. 37, L. 11 - 38, L. 20. Dr. Jorgensen felt that the MRI study correlated well with Claimant's subjective complaints and clinical findings. He recommended conservative modalities to include epidural injections and physical therapy.

18. By letter dated June 12, 2006, Dr. Jorgensen responded to Ms. Wilson's March 29, 2006 inquiries. Based on Claimant's history, as he then understood it, Dr. Jorgensen proposed that the 2006 accident was responsible for permanently aggravating Claimant's low back condition:

> As you stated in your letter the patient does give a history on her initial examination of having an initial industrial injury approximately two years ago when she had significant pain into her back and left leg. She notes that she was released by her physician as stationary. However, she did have ongoing symptoms to her back and leg. These symptoms were relatively tolerable. Also as stated in your initial letter she sustained a new injury on March 5, 2006, when she fell off of a three step ladder landing on her left buttock while performing her normal customary duties for the Disney Store.
>
> Based on this information it is my opinion that the patient had a preexisting condition with back pain and left leg pain. This preexisting condition was aggravated by the fall on March 5, 2006. The patient was stationary and functional prior to the fall. The current need for treatment is due to the March 5, 2006, industrial injury. If there is permanent disability some apportionment may be indicated to the initial injury.

C. Exh. 16, p. 18.

19. Dr. Jorgensen's opinions in this regard were arrived at without the benefit of medical records generated between the 2004 and 2006 accidents. In a follow-up letter dated November 7, 2006, Ms. Liehe, ńee Wilson, provided Dr. Jorgensen with medical records generated in connection with the 2004 accident, and asked him whether those records would cause him to amend any of the opinions that he stated in his June 12, 2006 letter. By letter dated

December 20, 2006, Dr. Jorgensen responded to Ms. Liehe's inquiry by first itemizing all the earlier medical records provided to him by Ms. Liehe. Those records include, *inter alia,* records from Dr. Greenwald, Dr. Shoemaker and Dr. Price. Dr. Jorgensen's review of these additional records did cause him to amend his views on causation:

> DISCUSSION: After review of records from Dr. Schumacher [sic] and Dr. Greenwald, as well as Dr. Price it appears that the patient's current symptoms are essentially the same as she was being treated for following the 2004 injury. Therefore, I feel on a medically more probable than not basis that her need for current treatment is due to the March 2004 injury.

C. Exh. 25, p. 8.

20. Dr. Jorgensen expanded on this opinion at the time of his deposition:

> Q. (by Mr. Hull): And after reviewing that what was your conclusion in regard to which of the two injuries should be responsible for the surgery?
>
> A (Jorgensen).: I felt that the need for surgery was mostly due to –more due to the March 2004 injury.
>
> Q. And could you explain for us, please, why that was?
> A. I put a lot of emphasis on –well, first of all, the need for surgery was due to the radicular pain. Pain going into her left leg. As opposed to axial low-back pain. And it appeared that the left leg pain began following—in the interim following the 2004 injury. And the records indicated that her symptoms were quite similar to the symptoms she had while I was treating her.
>
> Q. And did you feel that once she had the condition of the disk shown in the '04 MRI, that the Bertolotti syndrome she had made that worse?
>
> Mr. Harmon: I'm going to object. Leading.
> Mr. Hull: I'll stand by my question
>
> A. I believe that she had the existing Bertolotti syndrome. And both of the injuries seemed to make that syndrome more symptomatic.
>
> . . . .
>
> Q. (by Mr. Harmon) Yes. I believe I understood that correctly. And I'm just wanting to make sure. Your testimony was that both the 2004 and 2006 events would have made the Bertolotti's syndrome and degeneration more symptomatic. The 2004 more so than the 2006.

> A. I don't believe I said that they would have. I don't think I'm opining which one is more significant. I would have to read it back. It is in the record. But what my testimony would be is based on the records the patient developed back and leg pain following the 2004 injury which persisted throughout. And the back and leg pain were the need for the surgical intervention.
>
> . . . .
>
> Q. Do I understand your opinion, Doctor, to be that stepping down off that step stool, foot hitting Lucite, dropping to her left buttock and left side, did not permanently alter her symptomatology or pathology in her low back? That is your opinion?
>
> A. I'm not stating my opinion. I'm relying on the records. I'm saying the records indicate that her symptoms immediately before the 2006 injury, and the time she was done doing ongoing conservative care, were essentially the same.

Jorgenson Depo., pp. 31, Ll. 2-13; 49, Ll. 8-19; 49, L. 25 - 50, L.9.

21. From the foregoing, it is clear that Dr. Jorgensen reached the opinion that he did based on his understanding and belief that Claimant's relevant symptoms of low back and left lower extremity radiculopathy were essentially unchanged both before and after the subject 2006 accident. He acknowledged, in a number of exchanges, that if his foundational assumptions about the location and severity of Claimant's symptomatology both before and after the 2006 accident are incorrect, then this might cause him to further amend or revise the opinion expressed in his letter of December 20, 2006. For example, Dr. Jorgensen acknowledged that in considering the issue of whether the 2006 accident permanently aggravated Claimant's underlying condition, it would be significant that Claimant was able to return to work following the 2004 accident, but unable to return to work following the 2006 accident. Jorgensen Depo. p. 37, Ll. 4-10. Further, Dr. Jorgensen acknowledged that if, following the 2006 accident, Claimant experienced a change in the distribution of her radicular complaints, this would suggest

that the 2006 accident is implicated in aggravating Claimant's underlying condition. Jorgensen Depo. pp. 61, L. 2 - 63, L. 3.

22. Dr. Jorgensen also acknowledged that as compared to the 2004 MRI, the 2006 MRI depicts a significant worsening of Claimant's objective findings. Jorgensen Depo. p. 44, Ll. 19 – 24. Dr. Jorgensen acknowledged that as between the mechanism of the accidents of 2004 and 2006 the 2006 accident is more likely to have aggravated or exacerbated Claimant's pre-existing sacralization at L5-S1. Jorgensen Depo. pp. 47, L. 20 - 48, L. 19.

23. Therefore, whether the opinion expressed by Dr. Jorgensen in his letter of December 20, 2006 is well founded depends in large part on ascertaining whether the severity and distribution of Claimant's low back and lower extremities symptoms was permanently changed following the 2006 accident.

TIMOTHY E. DOERR, M.D.

24. Claimant was first seen by Dr. Doerr on April 17, 2007. Dr. Doerr testified that Claimant gave him the following history concerning the etiology of her presenting complaints:

> A. She reported to me that she injured her back on March 8 of 2004. She was bending over and bumped her low back and buttock against the table. She had an MRI after that injury which showed a disk protrusion at L4-5. She then stated that she had a second injury on March 5 of 2006 where she fell off a three-step ladder landing on her left buttock. She had a repeat MRI revealing the L4-5 disk which had dried out somewhat from her previous MRI two years ago. With some endplate inflammatory changes with the increased size of her disk protrusion with left lateral recess narrowing in the area of the nerve into her left leg.
>
> Doerr Depo. p. 8, Ll. 8-19.

At the time of his initial evaluation of Claimant, Dr. Doerr opined that Claimant's condition related back to the 2004 accident, with an exacerbation related to the 2006 accident. This opinion was based on Claimant's statement to Dr. Doerr that her low back and leg pain never

resolved following the 2004 accident, but got worse following the 2006 accident. Doerr Depo. pp. 8, L. 20 – 9, L. 9.

25. As is his usual practice, Dr. Doerr reviewed the films from the 2004, 2006 and 2007 MRI studies. It was his opinion that the L4-L5 disc herniation present on the 2004 study was larger on the 2006 study. Doerr Depo. pp. 12, L. 19 - 13, L. 2. By letter dated April 24, 2007, Dr. Doerr requested authorization from Liberty to perform a microdiscectomy and/or fusion at Claimant's L4-5 segment.

26. The April 24, 2007 letter to Liberty also addressed the issue of causation. Dr. Doerr stated:

> Based on Kristine's history and review of her previous MRI's, there is no question that her left L4-5 disk protrusion was present initially after her 03/08/2004 injury, therefore I do believe that her need for left L4-5 microdiscectomy is due to her left L4-5 disk protrusion which is medically more probable than not secondary to her 03/08/2004 injury which was subsequently exacerbated by a 03/05/2006 injury.

C. Exh. 19, p. 10.

27. Inexplicably, Liberty did not ask for additional elaboration on Dr. Doerr's observation that the 2006 accident "subsequently exacerbated" the condition from which Claimant suffered as a result of the 2004 accident. Rather, Liberty authorized the surgery recommended by Dr. Doerr which was performed on or about May 30, 2007. Per Dr. Doerr, the surgery was uneventful, and involved removal of a left-sided L4-5 disc herniation. Though Claimant initially did well, by August of 2007, she was experiencing symptoms consistent with a recurrent disc herniation at L4-5. An MRI study of October 4, 2007 demonstrated a small recurrent disc herniation on the left at L4-5. A second surgery was performed on or about January 3, 2008 at which time the offending disc was removed and the L4-5 level fused.

28. Claimant did poorly following the second surgery.

29. After having paid for the two low back surgeries and attendant care, Liberty finally revisited Dr. Doerr's April 24, 2007 letter, and made further inquiry of Dr. Doerr concerning the contribution of the 2006 accident to Claimant's need for surgery. In response to Annette Anderson's letter, Dr. Doerr stated his opinion that the 2006 accident permanently exacerbated Claimant's low back condition and accelerated her need for surgical treatment. In fact, Dr. Doerr stated that Claimant was not a surgical candidate prior to the 2006 accident. Doerr Depo. pp. 22, L. 8 – 23, L. 14. Dr. Doerr continued to adhere to this opinion as of the date of his deposition. However, as did Dr. Jorgensen, Dr. Doerr based his conclusions on the certain understanding concerning Claimant's symptomatology after the 2006 accident, as compared to her symptomatology prior to the 2006 accident. Informing Dr. Doerr's opinion is his belief that Claimant's symptoms were significantly worsened as a result of the 2006 accident. However, Dr. Doerr testified that at the time he came to his conclusions concerning the significance of the 2006 accident, he had not reviewed any of Claimant's medical records generated in connection with the 2004 accident. Doerr Depo. p. 37, Ll. 18 – 23. To the extent that Dr. Doerr's opinion on the question of causation is informed by changes in Claimant's symptomatology before and after the 2006 accident, Dr. Doerr obtained that history from Claimant, not from contemporaneous medical records. Doerr Depo. pp. 37, L. 24 – 38, L. 5. Although Dr. Doerr did point out that the serial MRI's performed in this matter do demonstrate interval worsening at Claimant's L4-5 level subsequent to the 2006 accident, he, like Dr. Jorgensen, deems it important to correlate such studies with Claimant's subjective history and clinical findings. It is clear from Dr. Doerr's testimony that his opinion concerning the significance of the 2006 accident is based in significant part on his belief that Claimant's symptomatology significantly worsened following the 2006 accident. Moreover, it is clear that different assumptions

concerning Claimant's post 2004 symptomatology could cause him to change his opinion. For example, he testified that if Claimant's pain was "excruciating" following the 2004 accident and never relented, then this would cause him to believe that the 2004 accident is, in some respect, implicated in causing the need for surgery. On the other hand, however, if Claimant's pain following the 2004 accident returned to tolerable levels prior to the 2006 accident, then it would be his view that Claimant was probably not a surgical candidate prior to the 2006 accident. Doerr Depo. p. 52, Ll. 7-24. That Claimant was able to return to work following the 2004 accident suggested to Dr. Doerr that Claimant's pain complaints were not excruciating immediately prior to the 2006 accident.

30. In summary, whether Dr. Doerr's opinion is more likely than not to be correct turns on whether the assumptions he made concerning the evolution of Claimant's symptomatology following the 2006 accident is an accurate reflection of what actually transpired in this case.

31. On April 25, 2008, Liberty notified Claimant of Dr. Doerr's opinion and denied her care. D. Exh. X, pp. 531-532. With both Sureties denying care, Claimant could not afford much further medical care. By June 2, 2008. Dr. Kadyan authorized a final 30-day narcotics refill to allow her to find a new healthcare provider. D. Exh. H, p. 47. Since that time, Claimant has received sporadic treatment for her low back pain and has yet to return to work.

32. Claimant's second surgery was unsuccessful at alleviating her symptoms. However, Claimant's reported symptoms were not readily correlated to her post-operative findings. On December 7, 2007, Richard Radnovich, D.O., found "no evidence of epidural hematoma or other structural pathology to account for the patients (sic) symptomatology" and "mild effacement of the exiting left L4 nerve root secondary to facet hypertrophy."

C. Exh. 24, p. 207. Claimant's follow-up CT scan also showed good surgical results, and Dr. Doerr recommended work hardening. After this point, most of Claimant's providers observed psychological issues influencing her presentation.

33. Vivek "Vic" Kadyan, M.D., clinical physician, has practiced at the Boise Physical Medicine and Rehabilitation Clinic since 2004. Dr. Kadyan oversaw Claimant's post-surgery recovery and observed Claimant's unsteady emotions, and mood reactions to pain. Kadyan Depo. p. 24; D. Exh. H, p. 9. Although Dr. Kadyan suspected adhesive arachnoiditis, an inflammation around the nerve roots and irritation of the nerve roots, he could not find organic causes of Claimant's pain. Kadyan Depo., p. 43. If Claimant has arachnoiditis, she is unlikely to benefit from further surgery. Dr. Kadyan referred Claimant to work hardening and physical therapy, and emphasized the value of cooperating with Dr. Calhoun's treatment.

34. On February 14, 2008, Claimant, accompanied by her spouse, met again with Dr. Calhoun. Dr. Calhoun opined that Claimant was a high risk for poor functional recovery without psychological treatment. C. Exh. 20, p. 4. Dr. Calhoun strongly encouraged psychological treatment, but Claimant resisted, evincing extreme sensitivity to having physicians dismiss her pain as psychological. Dr. Calhoun also observed Claimant's spouse enabling Claimant's pain behavior, despite his good intentions. Calhoun Depo. pp. 20-21, 25. Dr. Calhoun doubts Claimant's commitment to psychological treatment. Calhoun Depo. p. 41.

35. On March 11, 2008, Peggy Wilson, physical therapist, evaluated Claimant for Work STAR, a work-hardening program. Claimant's spouse was present at the evaluation. Significantly, Claimant's pain complaints intensified without objective physical signs. For example, Claimant's heart rate remained at rest . . . "[d]espite the excessive amount of time and effort she spent trying to complete the lifting evaluation. Despite her pain complaints, at 9-10

over 10, and despite the excessive effort demonstrated in the high pain levels reported throughout the evaluation, in particular traversing stairs." D. Ex. T, p. 6**.** Ms. Wilson concluded Claimant was a poor candidate, due to nonorganic pain complaints and behaviors. Ms. Wilson recommended six sessions with Dr. Calhoun before Claimant could reapply for Work STAR. D. Exh. X, p. 510.

36. Claimant followed-up with Dr. Kadyan on April 8th and 23rd, 2008. Dr. Kadyan tapered Claimant's Vicodin use, and continued her Cymbalta for neuropathic pain. Dr. Kadyan again recommended concurrent treatment with Dr. Calhoun.

37. On February 4, 2010, Joel D. MacDonald, M.D., neurosurgeon, evaluated Claimant in Salt Lake City, Utah, at the University Health Sciences Center. Dr. MacDonald diagnosed Claimant with chronic low back pain with left radiculopathy either of L4 or L5 distribution. C. Ex. K, p. 2. Because Claimant's MRI results were inconclusive on whether a solid union had occurred or if Claimant had pseudoarthrosis, Dr. MacDonald recommended a CT scan, a lumbar diskogram to evaluate the L5-S1 level, and an EMG nerve conduction study.

38. In October of 2010, Claimant was evaluated by R. Tyler Frizzell, M.D., a neurosurgeon. Dr. Frizzell has maintained an active practice in Boise since 1995. He has maintained a board certification in neurological surgery since 1997. In connection with his evaluation of Claimant, he had the opportunity to review the actual films from the 2004 and 2006 MRI studies. Commenting on the 2004 study, Dr. Frizzell noted that it showed mild loss of vertical disc height at L4-5, accompanied by a circumferential annular bulge. Further, the study demonstrated minor accompanying endplate hypertrophic spurring and bilateral facet arthropathy, again, at L4-5. Frizzell Depo. pp. 51, L. 16 - 52, L. 21. However, the 2004 study demonstrated that these abnormalities did not impinge on the exiting nerve roots at L4-5. Per Dr.

Frizzell, the abnormalities that were demonstrated by the 2004 study were not significant enough to require surgical intervention. Frizzell Depo. p. 13, Ll. 9-18.

39. Concerning the 2006 MRI, Dr. Frizzell testified that his review of that study demonstrated a significant interval change at L4-5 as compared to the 2004 study. Per Dr. Frizzell, the 2006 MRI showed left-sided disc bulging putting pressure on the left L5 nerve root creating the possibility for a left L5 radiculopathy. Frizzell Depo. pp. 28, L. 13 - 29, L. 8.

40. In determining whether the Claimant's need for surgical intervention is mediated by the 2004 versus 2006 accidents, Dr. Frizzell testified that it is important to correlate the MRI studies he reviewed with Claimant's clinical findings on exam. At the time of his deposition, Dr. Frizzell was questioned about the numerous pain diagrams and other medical records generated in connection with the Claimant's medical care both before and after the 2006 accident. It was noted, for example, that most of the pain diagrams generated prior to the 2006 accident failed to show pain radiating below the back of Claimant's left knee. He acknowledged that a few of the clinical notes/drawings did demonstrate extension of left lower extremity discomfort down the calf and into the top of the foot. However, it was significant to Dr. Frizzell that none of the pain diagrams generated prior to the 2006 accident showed extension of discomfort into the great toe of the left foot, an area enervated by the L5 nerve. Following the 2006 accident however, pain diagrams do show extension of discomfort into the toes, and Dr. Frizzell testified that this extension of Claimant's discomfort correlates well with the 2006 MRI, which strongly suggests impingement of the left L5 nerve root. Frizzell Depo. pp. 27, L. 22 - 28, L. 24; 37, L. 10 - 39, L. 6. Dr. Frizzell testified that the interval change seen between the 2004 and 2006 MRIs, when correlated with Claimant's clinical findings, lead to the conclusion that the 2006 accident is responsible for causing additional permanent injury at

Claimant's L4-5 level, such that the 2006 accident is responsible for the surgical treatments subsequently performed by Dr. Doerr. Frizzell Depo. pp. 38, L. 10 - 39, L. 6.

41. Dr. Frizzell felt that the surgeries performed by Dr. Doerr were appropriate but, unfortunately, did not alleviate Claimant's symptomatology. He proposed that further diagnostic workup is necessary in order to understand whether Claimant's current complaints are referable to pseudoarthritis at the L4-5 level, or whether Claimant has some other pain generator. Depending on what further diagnostic testing reveals, Claimant may be a candidate for further surgical treatment to include possible extension of the L4-5 fusion to the levels immediately above and below the current fusion site.

42. Finally, Dr. Frizzell acknowledged that the findings of Drs. Calhoun and McClay would seem to make it clear that Claimant should not be considered a candidate for a third surgical procedure without following the recommendations for psychological treatment made by Claimant's treating and evaluating physicians.

43. On March 22, 2011, Michael McClay, Ph.D., clinical psychologist, evaluated Claimant. Claimant displayed an abnormal psychological profile with probable symptom magnification syndrome and secondary gain issues. Dr. McClay apportioned 40% of Claimant's pain to her physical state and the remaining 60% to her psychological state. Dr. McClay opined that neither industrial accident predominantly caused her present problems or psychological impairment. D. Exh. M, p. 9. Dr. McClay recommended conservative management of Claimant, including anti-depressants, careful monitoring of Claimant's narcotic medication and psychotherapy for her pre-existing issues. D. Exh. M, p. 6.

44. On April 6, 2011, Paul Montalbano, M.D., performed an independent medical exam of Claimant. Dr. Montalbano, neurosurgeon, has practiced in Boise since 2000.

Dr. Montalbano charged the 2004 accident for causing Claimant's need for medical care. Dr. Montalbano criticized Claimant's post-2006 treatment, including the injections and surgeries, as excessive and unwise. For future treatment, Dr. Montalbano opposes a third surgery, but agrees that bone scan, CAT scan, X-rays and MRI results will resolve whether Claimant has a failed fusion. Even if she has a failed fusion, Claimant's functional overlay issues demand psychological treatment, and the psychological treatment must precede any surgery.

Claimant's Presentation

45. Claimant is a pleasant individual with occasional theatrical and unusual behaviors. For example, Claimant requested she be provided with a bed to rest during questioning. Referee Powers declined; Claimant supplied no medical justification for such. During depositions, Claimant emphasized her perceived disability, allowed her husband to answer her questions, and rarely provided substantive responses to Zurich's questioning. After three continuances of her deposition to accommodate Claimant's desires for rest, a Commission Referee attended the fourth deposition to facilitate the taking of Claimant's testimony. At this final deposition, Claimant laid herself on the floor. Claimant was able to sit in a chair at hearing, occasionally shifting her position, and exhibited better recall. Claimant continued to vocally assert that her industrial accident ruined her financially and rendered her incapable of employment or basic household tasks. Though Claimant has previously resisted psychological treatment, she agreed at hearing to cooperate with psychological treatment, if required. While Claimant's sincerity is noted, her unresolved psychological overlay issues make her testimony less reliable.

46. As demonstrated at hearing, Claimant attempted to distance herself from the various references in the medical records generated following the 2004 accident to the extension

of left lower extremity discomfort below the left knee and into the foot. She explained, for example, that she did not prepare a number of the pain diagrams, and is therefore not answerable for why they may depict discomfort going below the left knee. She also testified that she simply disagreed with some of the history contained in the notes of her treating physicians suggesting that her complaints were the same following the 2006 injury as before. She also disagreed with certain notes generated following the 2004 accident suggesting that she had discomfort extending into the left foot. Finally, to the extent that Claimant did agree that some of the pre-2006 notes accurately reflect heel or foot pain, she explained that this discomfort was not radicular in nature, but rather due to the gait alteration she experienced as a consequence of the injury to her low back. On balance, the Commission declines to accept Claimant's various explanations for why her medical records say what they do, and in evaluating Claimant's clinical presentation before and after the 2006 accident, find the contemporaneously recorded medical records to be more accurate than Claimant's current recollection.

DISCUSSION

Causation

47. 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).

48. The 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 medical testimony supporting the claim for compensation to a reasonable degree of medical probability. 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), overruled on other grounds by Jones v. Emmett Manor, 134 Idaho 160, 997 P.2d 621 (2000). *See* also Callantine, supra.

49. The Idaho Supreme Court has held that 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).

50. The permanent aggravation of a preexisting condition is compensable. Bowman v. Twin Falls Construction Company, Inc., 99 Idaho 312, 581 P.2d 770 (1978). "The fact that [claimant's] spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen [or women] who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he [or she] finds him [or her]. Wynn v. J.R. Simplot Company, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

51. In this case, the parties dispute which industrial accident caused Claimant's post-2006 low back injuries. Claimant and Liberty argue that Claimant's 2006 accident caused her post-2006 need for medical care. Zurich argues that Claimant's 2006 accident temporarily exacerbated Claimant's ongoing low back issues from her 2004 accident.

52. Claimant and Employer dispute the physical area of Claimant's 2004 injury, whether Claimant had radicular symptoms following the 2004 injury, and whether such were ongoing. Claimant argues that the 2004 injury was only to her left buttock, and that Employer mislabeled it as a low back injury because Employer's computer-generated form did not allow for the word "buttocks". Claimant also vigorously denied radicular complaints, and blamed her pain medication for discrepancies between her testimony and the medical record. C. Exh. I. pp. 74-75.

53. The Commission is not persuaded by Claimant's pain medication arguments and will rely on the contemporaneously produced medical records. After her 2004 accident, Employer sent Claimant to Michael Kennedy, D.O., at Primary Health West Boise. Claimant complained of pain after hitting her back on the corner of a table. Claimant reported some pain radiation down her left leg, but the contemporaneously pain chart focuses exclusively on the left buttock area. C. Exh. 3, pp.1-3. On March 25, 2004, Claimant returned to Primary Health with complaints of back pain. Claimant denied numbness or tingling down into her lower extremity, but reported pain radiating down the posterior aspect of her leg from her buttocks. There were no obvious abnormalities, no bruising, swelling or deformities. Claimant was diagnosed with low back spasms. On exam, Claimant's sitting straight leg raise test (SLR) was negative for radicular symptoms, and she was discharged home in stable condition. C. Exh. 3, p. 6-8.

54. While Claimant waited to meet with Dr. Shoemaker, she returned to Primary Health West Boise. Dr. Kennedy reported that Claimant described some radiation in her left leg. On exam, Claimant had muscle spasms and tenderness, with exquisite tenderness by palpation of the left buttocks area around the piriformis muscle. There was a negative SLR bilaterally, and good patellar reflexes and musculoskeletal strength bilaterally in the lower extremities. C. Exh.

3, p. 16. On March 18, 2004, Claimant presented at the St. Luke's ER with reports of pain from her left buttock to her knee.

55. On April 26, 2004, Claimant first met with Howard Shoemaker, M.D. Claimant reported intermittent pain from her left leg without tingling in her toes. Dr. Shoemaker reported a normal gait, no back tenderness, but tenderness into the left buttock area with pain radiating along the L5-S1 nerve root. Claimant had a negative bilateral SLR test, and full range of motion (ROM) of her lumbar spine. C. Exh. 5, pp. 1-3. Dr. Shoemaker thought Claimant should alternate standing and sitting while at work and referred Claimant to physical therapy. Claimant returned to work around five hours per day while attending physical therapy. Sensing little improvement, Claimant became frustrated. Dr. Shoemaker recorded pain in the left lumbosacral region down into her left buttock area, no fasciculations or atrophy, no weakness, and normal sensations. Claimant received an MRI evaluation with Dr. Newton.

56. On June 10, 2004, Dr. Shoemaker reviewed the 2004 MRI with Claimant. Claimant's pain seemed more centralized, and did not extend below her knee. C. Exh. 5, p. 25. Dr. Shoemaker observed that Claimant's condition was improving. On June 24, 2004, Dr. Shoemaker encouraged Claimant to use her body as much as possible, and gradually return to full-duty work. Again, Claimant occasionally had pain "that radiate[d] from her left low back down into her left thigh but it [was] no longer going all the way down to her foot." C. Exh. 5, p. 24.

57. Claimant's Primary Health Physical Therapy report from June 24, 2004 shows good progress in symptom reduction, including Claimant's left low back pain. C. Exh. 5, p. 41. Claimant's SLR testing was negative on the left. Id.

58. Dr. Shoemaker saw Claimant again on July 08, 2004. Given her objective findings, Claimant's ongoing difficulties with pain control were difficult to explain. The MRI did not reveal any significant abnormalities and she was suffering "somewhat out of proportion to the physical findings." C. Exh. 5, p. 37. Claimant's accompanying pain chart showed new pain in her left heel (but not connected to her left buttock or back), and Claimant denied numbness or tingling. C. Exh. 5, p. 37.

59. On July 22, 2004, Dr. Shoemaker sought a second opinion with Dr. Nancy Greenwald, because Claimant's complaints were "quite baffling" and suggestive of psychological factors affecting her physical condition. Dr. Shoemaker suggested an SI joint injection and EMG nerve conduction studies. In all, Dr. Shoemaker did "not really see any true radicular findings. The patient's mechanism of injury certainly is inconsistent with any significant tissue damage." C. Exh. 5, p. 42.

60. With few exceptions, Claimant consistently reported pain from her left buttock extending down to the back of her knee to her providers. C. Exh. 8, pp. 4, 13, 19, 24, 34; C. Exh. 5, p. 45. The outliers include Claimant's September 1, 2004 visit with calf pain in Claimant's right and left legs and the January 27, 2004 visit referencing "top of foot" pain on Claimant's left side. C. Exh. 8, pp. 25-27. Dr. Greenwald suspected a left S1 joint dysfunction, and generally advised Claimant to stop focusing on pain. By November 10, 2004, Dr. Greenwald had treated Claimant several times, and she anticipated that Claimant would reach MMI within the next six weeks. Dr. Greenwald increased Claimant's weight limits to 35 pounds occasionally with limited bending, twisting, and stooping. Dr. Greenwald's notes from August 2004 through March 3, 2005 indicate that Claimant continued working, although her hours may have been reduced to six hours per day.

61. Dr. Greenwald continued to encourage Claimant's focus on recovery rather than pain. By the end of 2004, Claimant was standing for longer periods of time, but her complaints continued. C. Exh. 5. When Claimant's complaints persisted beyond her expected MMI date, Dr. Greenwald recommended EMG testing. Claimant's pain complaints forced Dr. Greenwald to abandon the EMG. However, Dr. Greenwald's concentric needle examination revealed no abnormalities, and Claimant lacked electrodiagnostic evidence of a left lower extremity radiculopathy or plexopathy. C. Exh. 8, p. 33. Dr. Greenwald, per her March 3, 2005 discharge of Claimant, maintained that Claimant's radicular pain complaints were unsupported by the objective findings. C. Exh. 8, p. 31. On March 3, 2005, Dr. Greenwald released Claimant to work with a 5% whole person PPI impairment rating, and permanent lifting restrictions of 50 pounds occasionally, 25 pounds frequently, and 10 pounds continuously.

62. The majority of Claimant's 2004 medical records focuses on Claimant's upper left buttock region with emphasis on the piriformis muscle, but also fairly include the left low back area and left upper extremity, above the knee. *See* C. Exh. 3, pp. 2-3, 6-8, 14-16; C. Exh. 4, pp. 4-5; C. Exh. 5, pp. 1-3, 13, 15-17, 25-27, 36, 38, 42-43, 45; C. Exh. 6, pp. 1-2; C. Exh. 8, pp. 4, 11, 13, 16, 19, 24-27, 34; C. Exh. 25, p. 62. The Commission finds Claimant sustained a left buttock/low back injury from the 2004 accident.

63. Claimant's 2006 accident, a ladder fall causing a direct injury to her lumbar spine, is, according to physicians questioned about the matter, more likely to cause injury to the L4-L5 disc space, than the 2004 accident. Dr. Shoemaker even questioned whether the mechanism of Claimant's 2004 injury necessitated the extensive conservative care Claimant received, and sought a second opinion from Dr. Greenwald. Dr. Jorgensen acknowledged that between the mechanism of the accidents of 2004 and 2006, the 2006 accident is more likely to have

aggravated or exacerbated Claimant's pre-existing condition and sacralization at L5-S1, but either accident could plausibly have caused or exacerbated Claimant's low back complaints. Jorgensen Depo. pp. 47, L. 20 - 48. L. 19. Thus, the mechanism of the respective industrial accidents is not dispositive on causation.

64. Zurich argues that the similarities of symptoms and injury area supports that Claimant's post-2006 accident only temporarily exacerbated her 2004 condition. Similarities exist between Claimant's post-2004 and post-2006 complaints. As to Claimant's denial of radicular symptoms from the 2004 accident, the records show pain radiating from Claimant's left buttock to her left foot (i.e. April 26 and 29, 2004 and May 24, 2004) or her left calf muscle (i.e. May 20, 2004 and September 1, 2004). Therefore, while Claimant's radicular complaints following the 2004 injuries were far from extensive, radicular complaints did exist. Claimant's 2004 radicular complaints, though recorded by her treating physicians, were of questionable authenticity. To Dr. Shoemaker, Claimant's 2004 complaints were perhaps suggestive of psychological factors, as he did "not really see any true radicular findings." C. Exh. 5, p. 42. Dr. Greenwald, per the March 3, 2005 discharge of Claimant, maintained that Claimant's radicular pain complaints were unsupported by the objective findings. C. Exh. 8, p. 31. Claimant's concentric needle examination revealed no abnormalities, and there was no electrodiagnostic evidence of a left lower extremity radiculopathy or plexopathy. C. Exh. 8, p. 33.

65. After her 2006 accident, Claimant sought treatment from the St. Luke's Meridian ER. Claimant reported back pain to Richard N. Foreman, M.D., as she had experienced "for the last two years" but "worsening" since her 2006 ladder fall. Claimant was taken off work for the next five days. C. Exh. 13, pp. 1-3. Dr. Foreman attempted, but was unable to reach Dr. Greenwald for her clinical opinion or background on Claimant's condition. C. Exh. 13, p. 3.

Dr. Foreman instructed Claimant to follow-up with Dr. Greenwald for further treatment. Claimant had an appointment scheduled with Dr. Greenwald about five weeks out, but believed she needed more immediate treatment from the ER. On March 22, 2006, Claimant reported to Dr. Gary Brandecker that her ladder fall exacerbated her sciatica, and her left lower back pain extended from her inner thigh down to her ankle with tingling and sharp shooting pains. Claimant also reported that she had returned to work after her 2004 accident, doing "fairly well" until her ladder fall. Dr. Brandecker's diagnosis was back pain with radiation to the left leg. C. Exh. 14, p. 7. Dr. Brandecker extended Claimant's time off work through March 25, 2006. Claimant again returned to the ER where she saw Matthew Hulquist, M.D. Claimant reported an exacerbation of sciatica, and pain radiating down her left leg. None of the ER physicians reviewed Claimant's post-2004 medical history. Dr. Hulquist referred Claimant to Dr. Jorgenson.

66. Dr. Jorgenson first saw Claimant on April 3, 2006. Claimant reported pain down her left leg starting from her left buttock, and that her pain medication was not alleviating her symptoms. C. Exh. 16, pp. 3-6. Claimant reported that her pain was in the "same distribution" as from her 2004 injury, but "more severe" and increased low back pain. Claimant reported her symptoms were "aggravated by almost all activities" and alleviated only by lying down. Claimant remained off work from the 2006 injury. C. Exh. 16, p. 9. Dr. Jorgenson recommended a lumbar spine MRI, which he reviewed with Claimant on May 31, 2006. Dr. Jorgenson considered Claimant's symptoms of severe pain consistent with the MRI findings of S1 sacralization, L4-5 severe disc degeneration, L4-5 spinal stenosis, and left lumbar radiculopathy. C. Exh. 16, pp. 15-16. Dr. Jorgenson continued Claimant's period of total disablement from work for another two weeks. C. Exh. 16, p. 16. Approximately five months

from her industrial accident, Claimant remained completely off work with lumbar radiculopathy and a positive SLR test on the left side C. Exh. 16, pp. 19-21, 24, 26, 31. Thereafter, Dr. Jorgenson recommended a lumbar laminectomy and fusion at L4-5. While Claimant's 2004 radicular complaints were doubted by Dr. Shoemaker and unsubstantiated by Dr. Greenwald's objective testing, Claimant's post-2006 radicular condition was well-supported and prevented her from returning to work.

67. Claimant completed fewer pain charts following her 2006 accident than she did following her 2004 accident. On March 8, 2006, Claimant's pain chart with Stephen Martinez, M.D. showed pain concentrated in the left buttock and lower back, with other symptoms suggesting lumbar contusion and sciatica. C. Exh. 12, p. 3. Claimant's April 3, 2006 pain chart at the Spine Institute of Idaho shows pain radiating from the left buttock/low back area to the Claimant's ankle. C. Exh. 16, p. 4.

68. To treat Claimant's 2004 and 2006 pain complaints as non-changed because Claimant reported pain in the "same distribution," ignores Claimant's reports of "more severe" pain, and "increased low back pain" aggravated by almost all activities. In all, Claimant's post-2006 complaints were of greater intensity and consequence.

69. The most striking differences between Claimant's 2004 and 2006 accident consequences remain Claimant's post-2006 inability to return to work and her medical treatment. Claimant received a generous amount of conservative treatment related to her 2004 accident until her release back to work in 2005. Dr. Jorgensen acknowledged that Claimant's ability to return would be significant if Claimant returned to work following the 2004 accident, but could not following the 2006 accident. Jorgensen Depo. p. 37, Ll. 4-10. This is precisely the situation of

the case. Claimant successfully returned to work after her 2004 accident, without seeking or receiving medical care suggestive of an ongoing low back condition.

70. Next, Claimant's post-2006 medical records reflect objective findings of greater severity. As discussed above, Claimant's 2004 injury did not warrant surgery. After Claimant's 2006 injury, Claimant's treating physicians, Drs. Doerr, Frizzell, and even Dr. Jorgenson, thought surgery appropriate after considering the 2006 radiological evidence. An excerpt of the radiological reports below shows the objective differences between Claimant's 2004 and 2006 condition:

2004 Radiological report

> L4-5. There is reduced T2 signal pulposus with mild loss of vertical disk height. Circumferential annulus bulge is present with minor accompanying endplate hypertrophic spurring and bilateral facet arthropathy. There is mild intrusion of disk material into the right L4 neural foramen, but L4 nerve roots exist without evidence of impingement.
>
> . . . .

C. Ex. 5, pp. 20-21; D. Ex. X, pp. 534-535.

2006 Radiological report

> L4-5: There is decreased disc height, disc desiccation, degenerative endplate signal changes, endplate spondylosis, diffuse annular bulging, accentuated toward the left, with resultant mild to moderate lateral recess stenosis and only minimal spinal stenosis. Facet arthropathy contributes to mild bilateral neural foraminal stenosis.
>
> . . . .

C. Ex. 16, p. 12; C. Ex. 25, pp. 97-98; D. Ex. X, pp. 536-537.

71. Claimant's post-2006 MRI showed S1 sacralization, L4-5 severe disc degeneration, L4-5 spinal stenosis, severe disc space collapse, modic changes to the endplates above and below, posterior disc bulge and resultant spinal stenosis. C. Ex. 16, p. 15.

Dr. Jorgensen acknowledged that, as compared to the 2004 MRI, the 2006 MRI depicts a significant worsening of Claimant's objective findings. Jorgensen Depo. p. 44, Ll. 19 – 24.

72. The 2004 MRI study, as compared to the 2006 MRI, demonstrates a significant interval worsening of Claimant's findings at L4-5. However, among the various physicians who have treated/evaluated Claimant, are a number who have testified that surgeons do not operate on MRI findings alone. Drs. Jorgensen, Doerr and Frizzell have all acknowledged that it is important to correlate Claimant's radiologic studies with her clinical history and findings on exam. Only then can an informed judgment be made on the central issue in this case, *i.e.* whether the 2006 accident is responsible for causing additional injury to Claimant's L4-5 level such that she required the two surgeries performed by Dr. Doerr, and such further treatment as may be recommended by her treating/evaluating physicians. In evaluating this question, we first note that it is important to recognize that the MRI study of 2006 did show an interval worsening in Claimant's condition, as compared to the 2004 study. To this, is added the fact that a number of physicians in this case have testified that the 2006 injury is of the type which could be expected to cause the interval change seen in the 2006 study. It is also worth noting that Claimant was never thought to be a surgical candidate prior to the 2006 accident, but was thought to be a surgical candidate after that accident. Claimant was able to return to work following the 2004 accident, but was never able to return to work following the 2006 accident. Finally, in this case, a great deal of effort has been devoted to either proving or disproving the proposition that Claimant's clinical findings on exam were no different prior to the 2006 accident than they were after that accident. Although there are assuredly pre-2006 records which establish that Claimant had episodic radiation of discomfort below the left knee and even into the foot, it is equally clear that those complaints became more frequent and more severe following

the 2006 accident, and expanded to include radiation into the toes. Although Claimant has attempted to downplay the significance of her pre-2006 symptoms when it suits her purposes, we believe that the medical record nevertheless establishes that the 2006 accident is implicated in permanently worsening Claimant's underlying condition. In this regard, we find the opinions of Drs. Frizzell and Doerr most persuasive.

Reasonable Treatment

73. Despite Claimant's two unsuccessful back surgeries, Claimant seeks a third surgery to restore her ability to work. As of the date of hearing, Claimant's medical treatment was sporadic and her pain medication intake was high. Claimant takes daily doses of 5-6 Hydrocodone and Nucynta pills each to manage her pain, as prescribed by Dr. Frizzell. Zurich argues that Claimant's injections, back surgeries, and requested surgery, constitute unreasonable treatment, due to Claimant's psychological condition and because Claimant's complaints persisted after her surgeries. Per Wykle v. J.R. Simplot, 1990 IIC 0488, Zurich contends that Dr. Doerr's surgery, which Liberty authorized, is the source of Claimant's current complaints, and that Liberty should not be able to pass responsibility for its poor decisions to Zurich. Liberty defended Claimant's past injections and surgeries as reasonable treatment, and insists that Zurich is responsible for such, and for any future medical care Claimant requires.

74. In order to recover medical benefits, the injured worker must prove that the medical care is "reasonable." See Henderson v. McCain Foods, Inc., 142 Idaho 559, 130 P.3d 1097 (2006). Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by her physician immediately following an injury and for a reasonable time thereafter. 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 is reasonable. See, Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

75. Under the peculiar facts at issue in Sprague, the Idaho Supreme Court held that medical treatment is reasonable when three circumstances exist: 1) the claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 3) the treatment received was within the physician's standard of practice, and the charges were fair, reasonable and similar to charges in the same profession. *Id*. This analysis cannot be used in all cases. See, Richan v. Arlo G. Lott Trucking, Inc., IC 2007-027185 (Feb. 2011); and Ferguson v. CDA Computune, Inc., et. al., consolidated case numbers IC 2001-005778, IC 2001-021764, IC 2004-504577 and IC 2004-000161 (filed Feb. 2011).

76. Because some of Claimant's requested care is prospective, the Commission will also consider reasonableness in terms of "whether the proposed care is likely to be efficacious, and is of a type that finds support and acceptance in the medical community." Richan v. Arlo G. Lott Trucking, Inc., 2011 IIC 8, 8.7 (February 7, 2011).

77. The Commission will first address Claimant's previous medical treatment. After her 2006 accident, Claimant received a trial of conservative care, including injections. When Claimant's symptoms failed to subside, Claimant's treating physician recommended back surgery. Though Claimant initially did well, a second surgery was required to address a recurrent disc herniation and fuse the L4-5 level. Claimant argues that expert testimony from Drs. Doerr and Frizzell supports that her past medical treatment, including the surgeries, was necessary treatment. Claimant notes that even Dr. Jorgenson concurred in the surgery recommendation. Zurich argues that Dr. Montalbano's opinion is more persuasive.

Dr. Montalbano, who saw Claimant on April 6, 2011—years after the disputed care occurred—opined that Claimant should not have undergone either surgery. Dr. Montalbano also criticized Dr. Doerr's surgery as being the cause of Claimant's current complaints. Dr. Montalbano's criticisms in this regard were speculative and unsubstantiated. While Dr. Montalbano is confident that his criticisms would be substantiated pending further radiologic testing, no such testing has occurred. Montalbano Depo. pp. 51, L. 23 - 52, L. 7. Dr. Doerr, Claimant's treating physician, supported and recommended Claimant's medical treatment as her symptoms correlated with the imaging studies. The decision to operate after a failed trial of conservative care was reasonable medical treatment. If Claimant is to be believed, neither of the surgeries performed by Dr. Doerr provided any relief from her symptoms. Because Claimant enjoyed no improvement as a result of the treatment, Zurich invokes the Sprague test to argue that Claimant's past care is not reasonable, and therefore not compensable. We are disinclined to apply Sprague in this fashion.

78. In the discharge of their responsibilities to patients, physicians make informed guesses concerning the propriety of this or that treatment. We believe that is what happened in this case when the judgment was made to offer Claimant surgical treatment for her L4-5 lesion after conservative modalities proved ineffective. However, in making the decision to offer Claimant surgical treatment, no one made Claimant, or Liberty, any promise that Claimant would, of a certainty, enjoy a good outcome. Dr. Doerr doubtless felt that the chances were better than not that the treatment he proposed would be efficacious, but in this, as in all surgeries, there remained a sizable risk that things would go other than as hoped. We will not, at this remove, make a judgment that the care rendered by Dr. Doerr was not reasonable, merely because it did not produce the hoped-for outcome. Were we to do so under these facts, it would

be just a small step to conclude that no surety should be held responsible for treatment that, in retrospect, proved unsuccessful in curing an injured worker. The Commission finds that Claimant's post-2006 medical care, including her injections and back surgeries, was reasonable medical treatment. See Page v. McCain Foods, Inc., 2009 IIC 0424.7 (Sept. 8, 2009) ("Sprague and its progeny have not created a rule that medical care is compensable only when it is successful.")

79. Zurich also argues that Claimant's post-2006 surgeries were unreasonable per Dr. Montalbano because her functional overlay contradicted a positive outcome. Although there are hints of psychological concerns in the record prior to the 2006 accident, the Commission finds that Claimant's psychological issues became more pronounced as the case progressed and were certainly readily apparent by the time of Dr. Montalbano's 2011 IME. After the 2006 accident, Claimant's complaints generally aligned with the physical findings. Claimant had no record of psychological or psychiatric treatment prior to her accidents, and enjoyed full employment for years before her 2006 industrial accident. When, after Claimant second surgery on January 3, 2008, Claimant's complaints departed from the objective findings, Dr. Doerr recommended work-hardening and Dr. Kadyan emphasized the importance of Claimant's February 14, 2008 appointment with Dr. Calhoun. Dr. Calhoun strongly encouraged psychological treatment. On March 11, 2008, Work STAR rehabilitation rejected Claimant due to her nonorganic pain complaints. Psychological care is now prerequisite to Claimant's reapplication for the rehabilitation program. To dismiss Claimant's pre-surgical complaints as psychological only and deny those previous surgeries, causes Claimant an injustice and ignores the legitimate injuries the 2006 accident caused. The Commission is not persuaded by Zurich's

arguments that Claimant's psychological condition makes her previous surgeries unreasonable treatment.

80. However, Claimant has not shown that her current condition supports her requested third surgery for several reasons. First, it is unclear whether Claimant has a failed fusion. Dr. Frizzell recommended a series of radiologic testing (bone scan, CAT scan, X-rays, and MRI testing) to explore a possible failed fusion. Absent such updated radiologic testing, it is premature to approve Claimant's requested orthopedic surgery. Second, even if Claimant has a failed fusion, the current medical consensus is that a third surgery should not be entertained before addressing Claimant's psychological problems. Claimant has not shown that a third surgery would be reasonable treatment at this time.

81. Due to the sureties' denials of care and Claimant's financial inability to pay, Claimant's sporadic medical treatment has not illuminated Claimant's current physical status. Except as qualified below, Zurich shall provide such reasonable diagnostic and other care as Claimant may require for treatment of her low back per Idaho Code §72-432. As of the date of hearing, Claimant has failed to prove that she is currently entitled to a third surgery. It is possible that her L4-5 fusion has not failed, and even if she is otherwise a candidate for a third surgery, Claimant requires further psychological treatment/evaluation before deciding whether surgery is an appropriate treatment modality.

Reimbursement

82. Liberty provided Claimant a significant amount of medical care, including two back surgeries, that the Commission finds related to the 2006 accident. Liberty seeks reimbursement for such medical care from Zurich. Although Zurich was Employer's surety for the 2006 accident, Zurich argues that Liberty's claim for reimbursement is void because

Claimant suffered a poor result from her medical treatment. Zurich also contends that Liberty waived their right to reimbursement under the last injury rule, per Wykle v. J.R. Simplot, 1990 IIC 0488. The parties' dispute is limited to the medical care Liberty paid after Claimant's 2006 accident. The parties agree that Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), controls any additional medical bills incurred outside the workers' compensation system that Claimant or her private health insurance carrier paid.

83. The Commission has jurisdiction over all disputes and questions arising under the worker's compensation laws. Idaho Code § 72-707. Therefore, the Commission has jurisdiction over a claim for reimbursement or contribution brought by one surety against another. *See*, Brooks v. Standard Fire Insurance Company, 117 Idaho 1066, 793 P.2d 1238 (1990). Brooks is instructive. In that case, Fireman's Fund provided workers' compensation coverage to Associated Foods prior to June 1, 1984. Subsequent thereto, workers' compensation coverage was provided to Associated Foods by Aetna. Claimant suffered a compensable accident in 1983 during Fireman's period on the risk. Fireman's Fund paid medical and related benefits to Claimant for his compensable wrist injury. After Aetna went on the risk, Claimant developed additional wrist problems which he related to the use of the affected hand in his daily loading and unloading activities as a truck driver. Medical evaluation subsequently determined that Claimant had suffered a failure of his wrist fusion. Fireman's Fund took the position that Aetna was responsible for the payment of workers' compensation benefits related to Claimant's need for additional treatment. Aetna denied responsibility arguing, *inter alia,* that Claimant had not suffered a compensable accident during Aetna's period on the risk. Fireman's Fund agreed to provisionally accept responsibility for the payment of workers' compensation benefits associated

with Claimant's need for additional medical care, and put Aetna on notice that it would seek reimbursement of these benefits from Aetna.

84. The Supreme Court determined that the Commission did not err in concluding that Claimant had suffered a compensable event during Aetna's period on the risk, and that Aetna was appropriately responsible for the payment of workers' compensation benefits to which Claimant was entitled by reason of his new wrist injury. As to Fireman's claim for reimbursement, the Court affirmed the Commission's conclusion that the Commission did have jurisdiction to determine the dispute between the two sureties. Aetna then argued that instead of voluntarily paying benefits to Claimant, Fireman's could have moved the Commission, under Idaho Code § 72-313, to make an interim order concerning the payment of workers' compensation benefits pending a subsequent determination as to who, as between Fireman's and Aetna, should be held responsible. Having failed to avail itself of the remedy afforded by Idaho Code § 72-313, Aetna argued that Fireman's could not invoke the equity jurisdiction of the Commission; Fireman's had an adequate remedy at law available to it, which it failed to utilize.

85. The Court rejected this argument, noting that Idaho Code § 72-313 is inapposite where Claimant actually had received ongoing workers' compensation benefits from Fireman's Fund. Therefore, Fireman's Fund did not have an adequate remedy at law in Idaho Code § 72-313, and it was entirely within the jurisdiction of the Industrial Commission to entertain Fireman's claim for reimbursement.

86. Here, as in Brooks, it is entirely within the jurisdiction of the Industrial Commission to entertain the request by Liberty for reimbursement of benefits it paid, but which it believes are more properly the responsibility of Zurich. Brooks demonstrates that the Commission is empowered to make such an order where equity requires.

87. The Commission takes great care to award reasonable medical care, as guided by expert testimony, to promote recovery from industrial accidents. The evaluation of an injured worker's entitlement to medical treatment should not be made on the basis of retrospective analysis of whether that treatment proved efficacious. Claimant was a surgical candidate following her 2006 accident, and elected to proceed with that treatment. After the first, more conservative surgery failed to alleviate her symptoms, Claimant's treating physician performed a more extensive second surgery. Unfortunately, Claimant had a poor surgical result and her symptoms did not subside. Although Claimant's surgeries did not produce the desire outcome, the decision to operate on Claimant was reasonable.

88. Zurich argues that Wykle v. J.R. Simplot, 1990 IIC 0488, makes Liberty accountable for ongoing medical care because it cannot abandon Claimant after paying for the first surgery. In that case, the claimant suffered a blow to the head which produced significant right upper extremity symptoms. The differential diagnosis included thoracic outlet syndrome, and surety authorized a first surgery for treatment of this condition. Claimant's complaints persisted, and a recommendation was made for a revision of the initial thoracic outlet syndrome surgery, which surety declined to authorize. The surgery was performed at claimant's own expense. Claimant contended that surety was responsible for payment of the bills associated with the second surgery. The defendants defended this claim arguing, *inter alia*, that there was some doubt as to whether there was in fact a causal relationship between claimant's accident and the need for the first surgery. Therefore, defendants should not bear responsibility for the second surgery even though it was conceded that the need for the second surgery was directly related to the failure of the first surgery. In rejecting this argument, the Commission stated:

> However, since the Employer accepted responsibility for the first surgery and paid for the Claimant's medical care related to that surgery and for her disability for

> work following the surgery, we find it to be unreasonable to assert now that there is no causal relationship.

89. Zurich argues that Wykle supports the proposition that having authorized two surgeries which did more harm than good, Liberty cannot now wash its hands of responsibility for ongoing treatment of the bad outcome its decisions produced. In other words, "you break it you buy it."

90. We reject this argument for several reasons. First, we believe that Liberty and the Claimant's physician did the best he could with the information at hand in deciding that surgical treatment offered the best prospect for treatment of Claimant's condition. Other of Claimant's evaluating physicians, notably Dr. Frizzell, have commented that the surgeries performed by Dr. Doerr were entirely appropriate. Liability for future care should not be assigned to Liberty simply because Claimant had a poor surgical outcome. Second, Wykle is dissimilar from the peculiar facts at bar, and does not address how responsibility for care should be assigned where the fight is over which of two sureties should be held responsible for Claimant's treatment. Finally, unlike Wykle, where there was evidently some doubt as to whether or not a causal relationship existed between the need for the first surgery and the subject accident, the facts of this case demonstrate that a causal relationship does exist between the 2006 accident and Claimant's need for surgical treatment.

91. Zurich knew at the time it issued its denial that Claimant was a surgical candidate, per its own expert's recommendation. As the parties changed positions on causation, Liberty paid for Claimant's TTD and medical care, including the low back surgery. Zurich did not produce an opinion recommending against the first low back surgery in 2006 until years after the fact. For reasons discussed above, Claimant's post-2006 medical care causally relates to the

2006 accident (Zurich) and was reasonable. The strong statutory guidance and public policy of providing a claimant with medical care, even if causation is disputed, promotes swift and certain relief for injured workers. It is preferable to encourage employers to err on the side of making voluntary payments to injured workers in situations of questionable liability. To otherwise hold would discourage the voluntary payment of workers' compensation benefits. Liberty's voluntary payment of workers' compensation payments does not absolve Zurich of responsibility for medical care casually connected to the 2006 accident.

92. Liberty has shown it is entitled to reimbursement from Zurich.

TTDs

93. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial temporary disability during a period of recovery. Once a claimant reaches a point of medical stability, he or she is no longer in a period of recovery and the claimant's entitlement to temporary total or temporary partial disability benefits comes to an end. Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 38 P.3d 617 (2001).

94. In Malueg, the Idaho Supreme Court approved a test formulated by the Commission to determine when, and under what circumstances, TTD benefits can be curtailed by an employer. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986). Affirming the Commission's approach, the Court stated:

> We agree with the following test set forth by the Commission:
>
> > In the opinion of the commission, once 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 reasonable opportunity of securing and which employment is consistent with the terms of this light duty work release.

Id.

95. Claimant requests TTDs from January 2007 until she reaches medical stability. Claimant argues that she is not yet stable and completely unable to work. Liberty and Zurich both deny responsibility for TTD benefits.

96. Claimant was off-work after her 2006 accident, and during recovery from her first surgery. On or around December 21, 2007, subsequent to her second back surgery, Claimant was still unable to work in any capacity. D. Exh. X, p. 448. On January 17, 2008, Claimant had light-duty restrictions of no lifting over 10 pounds, no bending or twisting. D. Exh. X, p. 467. Liberty denied Claimant's case on April 25, 2008. Zurich declined to accept Claimant's claim after that time. Due to the Sureties' denials and Claimant's financial limitations, Claimant's ongoing medical status is uncertain. Claimant is taking a concerning amount of prescription pain medication, and medical evidence shows psychological issues in Claimant's presentation.

97. Claimant has satisfied her initial burden under Malueg; she has established that she is in a period of recovery from the original industrial accident. Per Malueg, Claimant is entitled to TTD benefits unless, and until, it is demonstrated that Claimant has been released to modified duty work and (1) Employer has offered Claimant a job or (2) there is employment available for Claimant in the general labor market. Defendants have put on no proof that would allow the Commission to identify a date of medical stability for Claimant, or a date on which the Commission could conclude that the Malueg criteria have been met such that Claimant is no longer entitled to time loss benefits. Accordingly, Claimant is entitled to time loss benefits commencing from the date on which such benefits were curtailed, and running to such date that may later be determined as an appropriate stopping point for Claimant's entitlement

to TTD benefits.

Attorney Fees

98. Claimant argues she is entitled to attorney fees pursuant to Idaho Code § 72-804, because Zurich unreasonably denied additional medical care and TTD benefits. Attorney fees are not granted to a claimant 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:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). Zurich argues that Claimant is not entitled to attorney fees.

99. Here, Claimant argues that Zurich adjusters cajoled her treating physician to reverse his opinion. Adjusters from Zurich and Liberty both asked their respective experts causation questions and supplied medical records that might assist the experts in making their decision. As those medical opinions evolved, so did the sureties' positions on causation and acceptance of the claim. Zurich and Liberty both followed their medical experts' opinions on causation in accepting and then denying Claimant's medical care. The record reflects a

complicated claim involving two separate industrial accidents affecting the same general physical area and causing similar complaints, multiple physician opinions, and psychological concerns. Both Drs. Jorgenson and Doerr are well-known to the Commission, and further explained their opinions at deposition. The Commission is not persuaded that Zurich or Liberty frivolously denied responsibility or that Drs. Jorgenson and Doerr clarified opinions based on undue influence from an adjuster. Claimant has not proven her entitlement to attorney's fees.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has shown that her 2006 accident caused her need for medical treatment;

2. Claimant is not entitled to surgery. Zurich shall arrange for Claimant to undergo a diagnostic examination to determine the current status of her industrial injuries and her need for additional medical care. Zurich shall provide such additional care that Claimant may require for the effects of the subject accident;

3. Liberty is entitled to reimbursement for workers' compensation benefits it paid following the 2006 accident;

4. Claimant is entitled to the payment of time loss benefits by Zurich commencing from the date on which such benefits were curtailed, and running to such date as it is demonstrated Claimant is no longer entitled to the payment of time loss benefits;

5. Claimant has not proven her entitlement to attorney's fees from Zurich;

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

IT IS SO ORDERED.

DATED this 22nd day of February 2013.

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 22nd day of February 2013, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

JOHN GREENFIELD
PO BOX 854
BOISE ID 83701

SCOTT HARMON
PO BOX 6358
BOISE ID 83707-6358

ALAN HULL
PO BOX 7426
BOISE ID 83707

/s/_____