

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK,
Claimant,

v.

SHARIS MANAGEMENT
CORPORATION, Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,
Defendants.

IC 2009-011431

ORDER

March 13, 2012

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 13th day of March, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

PAUL T CURTIS
CURTIS & PORTER P.A.
598 NORTH CAPITAL
IDAHO FALLS ID 83402

ROGER L BROWN
LAW OFFICES OF HARMON & DAY
P O BOX 6358
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sjw

/s/

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

March 13, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls, Idaho on June 1, 2011. Claimant, Dallas L. Clark, was present in person and represented by Paul T. Curtis, of Idaho Falls. Defendant Employer, Sharis Management Corporation, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kimberly A. Doyle, of Boise at the hearing. Thereafter, Roger Brown, also of Boise, substituted for Ms. Doyle on Defendants' briefing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 6, 2012.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of her employment;
2. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury or condition;
3. Whether and to what extent Claimant is entitled to medical care; and
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

Eight days prior to the hearing, Defendants moved to add notice issues. Claimant objected, and that motion was denied. Defendants did not argue the point further in their post-hearing briefing.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered a herniated disc at L5-S1 due to a workplace accident on November 24, 2008, in which she felt a sudden sharp pain in her low back when she lifted a heavy silverware tray up to a head-height shelf. As a result, she is entitled to workers' compensation benefits for medical care, including reimbursement for past treatment which includes spinal decompression surgery, as well as future treatment, including a second surgery, to repair her recurrent herniation. Claimant also argues that she is entitled to an award of attorney fees for unreasonable denial of her claim. She relies upon her own testimony and that of Aaron Swenson, as well as the independent medical evaluation (IME) report and deposition testimony of Benjamin Blair, M.D., an orthopedic surgeon.

Defendants counter that Claimant did not assert her low back pathology was the result of a workplace accident until she learned she required surgery, about five months after she first obtained medical treatment. They contrast Claimant's early statements, reflected in her First Report of Injury (FROI) and her initial medical records, with her later statements to Surety and

in these proceedings, to assert that Claimant is not a credible witness. They also rely upon the independent medical evaluation report of Michael Hajjar, M.D., a neurosurgeon.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Dallas L. Clark taken April 13, 2011;
2. Claimant's Exhibits 1 through 12 and 15 through 19 admitted at the hearing;
3. Defendants' Exhibits A through R admitted at the hearing;
4. The testimony of Claimant and Aaron Swenson, a coworker, taken at the hearing;
and
5. The post-hearing deposition testimony of Benjamin Blair, M.D., taken October 19, 2011.

OBJECTIONS

At the hearing, Defendants objected to Claimant's Exhibits numbered 13 and 14 because they were affidavits from witnesses who Defendants had no opportunity to cross-examine. The affiant of Exhibit 13 is Michelle Morgan, Claimant's supervisor during the relevant period, who has resided in Germany since sometime before Claimant was deposed, on April 13, 2011. The affiant of Exhibit 14 is Billie Rowan, who Claimant had not disclosed as a potential witness in discovery, and who Defendants had not heard of in the context of these proceedings before receiving Claimant's Rule 10 exhibits, about a week prior to the hearing. The Referee took these objections and motions to exclude under advisement and now, having reviewed the record and the parties' briefs, finds good cause to grant Defendants' motions. Allowing these affidavits into the record, to the extent that the contents thereof are relevant, would be more prejudicial than probative given that Defendants were unable to cross-examine these witnesses. Therefore, this

evidence is not sufficiently reliable to assist the Referee in resolving the issues in dispute. Further, Claimant does not refer to the contents of either affidavit in her briefing.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was an original hire when Employer opened in September 2008. An expert server, Claimant came to Employer with a great deal of experience. She very much liked serving, particularly the customer service aspect of her job. Claimant was soon placed on the graveyard shift, from 10:00 p.m. until 6:00 a.m., because she could manage the front of the house on her own, which many servers were incapable of doing. In addition to her regular duties, Claimant also trained other servers.

2. Educationally, Claimant quit school sometime during her ninth grade year. She told Surety she has a GED, but in her deposition she testified that she is working on it. Medically, she has no significant history of low back pain.

3. Claimant was 38 years of age when she began receiving medical treatment for low back symptoms, which she attributes to a workplace accident on or about November 24, 2008.

ACCIDENT

4. **First Report of Injury.** Claimant completed a First Report of Injury on April 24, 2009, in which she reported an ache in her lower back, with onset on November 24, 2008, while “standing” and “making a salad.” DE A, p. 2. More specifically, Claimant wrote that she was “standing there and back began hurting.” *Id.* As a result, Surety denied Claimant’s claim on

May 18, 2009, because her injury was not due to a workplace accident. “Ms. Clark did not associate any injuries or trauma to the onset of her pain.” DE K, p. 68.

5. Claimant testified at the hearing that Surety later paid for some random medical expenses associated with her injury. There is no evidence in the record to support Claimant’s assertion, which is contrary to Surety’s position that it denied her claim. Claimant has failed to establish that Surety paid any medical benefits associated with the instant claim.

MEDICAL RECORDS

6. Chiropractic Care. Claimant first obtained treatment following her alleged accident at Orchard’s Naturopathic Center, L.L.C., on December 11, 2008. The corresponding chart note consists of handwriting on a check-box form only a third-of-a-page long. It mentions nothing about symptom onset, but it does state a diagnosis of sciatica.

7. Claimant returned for two more treatments – one in November 2009 and one in February 2010. The notes pertaining to these visits do not provide evidence of any causal facts.

8. Then, on May 10, 2011, Justin T. Crook, D.C., opined that Claimant’s sciatica was work-related. He based his opinion on Claimant’s description of a lifting and twisting event at work that triggered her symptoms.

9. Community Care and EIRMC. On December 16, 2008, when the chiropractic treatment failed to relieve her symptoms, Claimant sought medical treatment at Community Care. She followed up on December 19 and 24, when she was referred to Dr. Walker. Sciatica was diagnosed and medications were prescribed. The December 16 note indicates Claimant had been suffering left leg pain for about three weeks. On December 19, Claimant also sought pain relief from the emergency room at Eastern Idaho Regional Medical Center (EIRMC). The record of that visit indicates pain onset “several days ago.” DE D, p. 10.

10. None of the documentation related to Claimant's above-described visits to Community Care or EIRMC indicates any cause or triggering event for her low back symptoms. No attempts to bill a workers' compensation provider for any of these visits are evident.

11. Gary C. Walker, M.D. On December 29, 2008, Claimant was examined by Dr. Walker. He recorded onset of Claimant's symptoms as of early November, associated with work, that sharpened over time, with no inciting injury. "Ms. Clark's history dates back to early November. She did not recall any particular injury but noted the onset of left lower extremity pain associated with work. It became sharper over time and has continued to worsen." DE E, p. 19.

12. Claimant ultimately underwent an MRI on December 29, 2008, and Dr. Walker diagnosed a left-sided herniated disc at L5-S1 with root compression. Claimant underwent a course of cortisone injections, which provided only temporary relief from her symptoms.

13. On July 28, 2010, Dr. Walker prepared a permanent partial impairment (PPI) rating at the request of Surety. Dr. Walker assumes without explanation in his introductory sentence that Claimant's low back-related impairment is work-related.

14. Physical Therapy. On March 19, 2009, Claimant began a course of physical therapy. The intake note, like Dr. Walker's, indicates Claimant could not recall an injury related to onset of her low back symptoms. Inconsistent with Dr. Walker's note, however, Claimant now reported that her pain came on suddenly. "She states the pain came on suddenly, but she is unaware of any specific injury to cause her pain. She denies any background or previous history of low back pain and contributes this episode to being a server/bartender for many, many years catching up to her and her not taking care of her body." DE G, p. 41.

15. Stephen Marano, M.D./James L. Cook, PA-C. On April 22, 2009, Claimant was examined by Mr. Cook, who is a physician assistant to Stephen Marano, M.D., a neurosurgeon. Dr. Marano was present during the intake interview and examination, but Mr. Cook authored the chart note. Again, Claimant identified onset as of early November 2008 and could not identify any inciting injury. She posited that her symptoms occurred spontaneously, perhaps from standing at an odd angle. “This lady states that she began having some left sided low back and left hip pain at work in early November. She cannot associate any injuries or trauma to the onset of her pain. She said that it just kind of started out of the blue. She thought maybe it was due to standing funny. Over the next couple of days the pain got worse.” DE I, p. 53.

16. On June 8, 2009, Claimant underwent microsurgical disc excision, root decompressive foraminotomy and annular repair at L5-S1. She suffered complications from that surgery, including drop foot on the left. Subsequently, she suffered a recurrent disc herniation at L5-S1.

17. **Claimant's statements.** Claimant's description of how she first came to require medical treatment for low back pain is recorded in her early medical records, above, as well as in her later statements made to Surety on May 21, 2009, during her deposition on April 13, 2011, and during her hearing testimony on June 1, 2011.

18. Claimant's later statements are inconsistent with those recorded in her early medical records with respect to the details surrounding onset of her symptoms. Her later statements are also inconsistent *with each other* on key points, including the onset of her pain and the circumstances under which she says her supervisor told her to go to the doctor.

a. Onset of Pain.

- i. According to her statement to Surety, Claimant's earliest recollection is that her low back pain began around the beginning of her shift on November 24, 2008, when she was talking with Michelle Morgan, her supervisor. Claimant thought she was just standing wrong, and she joked with Michelle that her weight might have something to do with it. Later, Claimant felt a sharp pain in the same area in her low back when she was lifting a heavy silverware tray up to a head-height shelf. Due to the pain, she set the tray down and did not try to lift it, full, again. Claimant set her tables, then placed the empty tray on the shelf.

...[A]nd when I went to put that up there it just like a sharp pain in the same area and I drop...dropped and so I just laid it there [sic] set it down on the counter where I was (*several words unintelligible*) and, um, just set my tables, from there I didn't try to put the container up there I set all my tables from there and then went to the tray that was just about empty I just set it up on the top...

DE P, p. 207-208.

- ii. According to her deposition testimony, however, Claimant's low back pain began when she was cleaning the salad bar reach-ins. Then, when only Claimant and Aaron Swenson, a cook, were working, Claimant felt a pain like an ice pick being shoved into her low back while lifting a heavy silverware tray up to a head-height shelf. The pain caused Claimant to lose her balance and the weight of the tray caused her to fall to the ground, spilling the silverware. Upon hearing the loud clatter, Aaron came out of the kitchen, helped Claimant to a booth and

picked up the silverware. He also tried to call a manager. Claimant remained on shift, but due to the pain, she rested. Until the end of her shift, Claimant only punched orders into the computer, while Aaron served her food for her.

iii. According to Claimant's hearing testimony, her back pain started when she stood up while cleaning the salad bar reach-ins. Later, when only Claimant and Aaron were working, Claimant felt a sharp pain in her low back that went down her leg while lifting a heavy silverware tray up to a head-height shelf. The rest of her hearing testimony is materially consistent with her deposition testimony.

b. Why Claimant Sought Medical Treatment.

i. According to her statement to Surety, at some unspecified later shift, Claimant was reaching for the scheduling book, but could not bend over to grab it, so Michelle told her to go to the doctor.

ii. According to her deposition testimony, Claimant went in the next day and spoke to Michelle, who told her to take the night off. When Claimant did not feel better the next day, Michelle told her to go to Community Care. Claimant “showed them her prescription” and obtained treatment, then took the next two days off. Tr., p. 47.

iii. According to her hearing testimony, Claimant worked “at least the next five days” because she had no other income. Tr., p. 54. She guessed that she probably went seven or eight days before she determined that the constant pain was not improving and decided to go

to the chiropractor. He taped her ankles, but did not want to touch her spine because he did not think he could improve the pain she described. Claimant worked for a couple of days with taped ankles. The taping took some pressure off Claimant's back, but she was still in pain. At this point, Claimant called in sick and told Michelle that she had gone to the chiropractor and was not improving. Michelle told her to go to the doctor, so Claimant went to Community Care the next day.

19. There is also evidence in the record that Claimant intentionally embellished her testimony at the hearing. In her statement to Surety, Claimant related how a Community Care physician told her, after the accident, how to properly carry heavy items. Then, at her deposition, Claimant recalled that she was carrying the silverware tray at stomach-height, just before the accident, *because* she was following the advice of the Community Care physician:

Q. And when you were carrying it, about how high was it? According to your body, in other words, how high was it?

A. I was trying to carry it because they told me – the doctor I went to at the Community Care, he said to try to always keep my shoulders center with my knees, you know, not to try to bend outside of that area. And so I tried - - I always would carry - - I would carry it towards my body.

Tr., p. 43. Claimant's testimony and her medical records establish that she had not received medical care for her back from Community Care (or anywhere) before the accident she alleges, so there is no prior time when Claimant would have received this advice. Even if this were not the case, the context of Claimant's comments indicates she was testifying about her post-accident visit to Community Care. Yet, Claimant asserts that she had this admonition in mind while carrying the tray *before* the alleged accident. This temporal inconsistency does not prove that Claimant was not carrying the tray or that she was not injured at work. However, it is sufficient

to establish that, on at least one occasion during these proceedings, Claimant testified inaccurately so as to place herself in a more favorable light.

20. **Aaron Swenson.** As mentioned above, Aaron Swenson was a cook on graveyard shift, the only other employee on duty when Claimant alleges her accident occurred. Claimant called him as a witness at the hearing.

21. Aaron worked with Claimant at Employer's before and after the time of her alleged accident, but he voluntarily left in mid-June 2010 because he was unhappy with management. He believed management did not treat employees with the care they deserved.

22. Claimant's son was an acquaintance of Aaron's, but Aaron denied a close relationship with Claimant.

23. Aaron testified that he recalled working with Claimant the night she hurt her back. He said he was in the kitchen, around 1:00 or 2:00 a.m., when he heard a "big bang out in the lobby" so he came out to see what happened. Tr. p. 25-26. He found Claimant among a bunch of "plates, silverware, and stuff" and helped her to a seat. Tr., p. 24. Aaron testified that Claimant had slipped or tripped and fallen with a full dish bucket, so he helped her to a seat. He said he assisted her with her duties through her shift that night, as well as many future graveyard shifts, until she was eventually moved to days.

24. Aaron did not report the event to management because, he explained, the managers all already knew about it. He testified that all of the managers had asked him about it. Claimant also testified that she reported her injury to management. However, this assertion is otherwise unsupported in the record.

25. About a month after that night, Aaron referred Claimant to her current attorney. Aaron had previously hurt his shoulder at work and was happy with the legal services he received. Claimant had never before made a workers' compensation claim.

26. **Daily Manager's Log Book.** The daily manager's log book was kept by supervisors to communicate noteworthy events that occurred on each shift. A broad array of topics are evident from a review of the log book, like individual employee performance (mostly concerns, but kudos on a couple of occasions), building and machine maintenance (i.e., plumbing leak, gas malfunction, extra telephone line, signage lights, cleanliness, ice tea machine malfunction), general employee issues (i.e., terminations, till shortages, uniform issues, sick calls and shift coverage), food issues (i.e., preparation, waste, apportionment, orders), and extraordinary customer issues. Some workplace injuries and, in one instance, details of a non-work-related illness were also recorded. All of the workplace injuries recorded involved a need for medical care (i.e., head bleeding after hitting it on kitchen door, finger cut and skin was coming off, slipped on butter and sprained back, burned fingers and skin was peeling). While the breadth of issues to be recorded and the newness of the staff at the time Claimant says she was hurt at work certainly could explain a failure to record a minor on-the-job injury that did not require treatment, it is unlikely that a significant workplace injury that affected staffing needs over several weeks or months would not be noted.

27. No log book entry states that Claimant was hurt at work. The first entry referencing any difficulties Claimant was having appears on December 18, 2012. "Dallas called in again. Jesse will cover. Terry will work Fri & Sat for Dallas if need be." DE R, p. 359. Subsequent entries indicated Claimant was sometimes unable to come to work, but none of them indicate that she thought she had incurred a workplace accident or that Employer had

recommended medical treatment through the date of the last log entry in evidence (April 30, 2009). In fact, the last entry states that Claimant was being placed back on the work schedule because she was unable to schedule her surgery because she was still waiting on “insurance info”, with no mention of any topics related to workers’ compensation. DE R, p. 606.

28. The failure of the log book to reflect that Claimant’s low back pain resulted from a workplace injury is far from dispositive of the causation issue, but it does imply that Claimant did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009.

INDEPENDENT MEDICAL EVALUATIONS

29. **Michael V. Hajjar, M.D.** On January 5, 2011, Dr. Hajjar, a neurosurgeon, performed an IME at Surety’s request. In preparing his report, Dr. Hajjar reviewed Claimant’s relevant medical records, conducted an interview and performed an examination.

30. With respect to work-relatedness, Claimant reported that her symptoms began following a workplace accident. Dr. Hajjar, however, opined in his report and in two follow-up letters to Surety, both dated February 4, 2011, that Claimant’s medical records and clinical presentation were inadequate to establish a causal connection with a workplace activity on November 24, 2008. In his report, Dr. Hajjar opined, “Based on Dallas’s medical record, it is somewhat difficult to tie the original herniation and report of injury dated December 16, 2008, to the work-related injury which was noted three weeks earlier without any treatment in that three week period.” DE K, p. 72. In his follow-up letters, Dr. Hajjar unambiguously opined that Claimant’s low back condition was not caused by an accident on November 24, 2008, because her symptoms did not commence until three weeks later.

31. Dr. Hajjar was apparently unaware of Claimant's visit to the chiropractor on December 11, 2008, or her pain complaints preceding her visit to Community Care on December 16, 2008. Dr. Hajjar's opinion is not particularly persuasive on the issue of causation due to its weak foundation. It cannot be construed, however, to support Claimant's position.

32. **Benjamin Blair, M.D.** On May 4, 2011, Dr. Blair, an orthopedic spine surgeon, conducted an IME at Claimant's request. Prior to rendering his opinion, Dr. Blair and his nurse each took an intake history from Claimant. In addition, Dr. Blair reviewed Claimant's related medical records, including her imaging films, and conducted an examination of her low back complaints. Claimant's chiropractic records were provided later. On May 18, 2011, Dr. Blair indicated to Claimant's attorney in a check-box letter that he had reviewed those records and that they did not change his opinion, which is discussed below.

33. Prior to his examination, Claimant's attorney, via a May 3, 2011 letter, encouraged Dr. Blair to base his causation finding on Claimant's "incident with the 'silverware tray', where she dropped to the floor, which one of the cook's [*sic*] witnessed." DE L, p. 77B. Claimant's attorney also represented that Surety had accepted the claim and had paid benefits until Claimant requested approval for surgery, at which time it denied her claim on causation grounds, which it had never before questioned. In actuality, Claimant did not file a FROI until after the surgical recommendation was made, and it is undisputed that Surety never paid Claimant any benefits through December 11, 2009. Although Claimant has asserted that Surety paid some random medical benefits after that date, as discussed above, she has failed to prove this point.

34. Dr. Blair opined that Claimant's report of her accident was both credible and consistent with her "recorded medical statement":¹

Ms. Clark gives a very convincing history of a work related injury including lifting of a heavy object and as reaching to do so, felt an immediate sharp pain. This is very consistent with herniated nucleus pulposus. In addition, I have reviewed her recorded medical statement which is also consistent with such.

DE L, p. 83.

35. Dr. Blair opined that Claimant sustained a herniated nucleus pulposus of the lumbar spine at L5-S1, from the below-described silverware-lifting injury:

She was pulling out a tub of silverware. As she was lifting it up, she felt a sharp pain in her back, "like stabbed in the back with a knife." She dropped the silverware tray. The cook at the restaurant helped her to sit. She finished the remainder of that shift; however, she remained markedly symptomatic and had marked difficulty throughout her shift, particularly with left lower extremity radicular pain.

Id.

36. Dr. Blair based his opinion on the assumption that Claimant "was in a normal state of good health until 11/24/08 while at work at night as a server." DE L, p. 82. He also assumed that, "For a few days prior to this injury, she did have a dull ache in her back; however, she had no radicular pain and was able to function at a fairly high level." *Id.* This conclusion is somewhat inconsistent with Dr. Blair's aforementioned statement that Claimant was in good health prior to her accident. Further, it is directly inconsistent with Dr. Walker's December 29, 2008, chart note recording left lower extremity pain since early November 2008. Dr. Blair does not offer any explanation for these inconsistencies. He also does not attempt to reconcile Claimant's early reports regarding back pain onset recorded in her medical records with the causation scenario he relied upon, proposed by Claimant's attorney.

¹ Dr. Blair is probably referring to Claimant's statement to Surety on April 13, 2009.

DISCUSSION AND FURTHER FINDINGS

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).

CAUSATION

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

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. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

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).

37. There is little doubt, based upon the medical evidence, that Claimant had no history of lumbar spine pathology until she sustained a herniated disc in her low back in late 2008. The pivotal question is whether or not that herniated disc was the result of a workplace accident.

38. Claimant alleges she sustained a workplace accident on November 24, 2008. However, the contemporaneously compiled documentation, through April 22, 2009, which includes Claimant's FROI, the daily manager's log and Claimant's medical records, together establish that Claimant did not attribute her low back pain to any particular event during this period. She told Dr. Walker and her physical therapist, in December 2008 and March 2009, respectively, that no injury coincided with the onset of her symptoms. She explained to her physical therapist that she thought her work as a server and bartender for many years, combined with not taking care of her body, was finally catching up with her. As late as April 22, 2009, Claimant reported to Dr. Marano/Mr. Cook that her pain just kind of started out of the blue. At the most, this evidence proves that Claimant felt a pain in her low back while standing and chatting, which worsened with work.

39. Then, after Dr. Marano recommended surgery and sought Surety's approval, Claimant told Surety, in her recorded statement in May 2009, that her symptoms began either when she was cleaning the salad bar reach-ins or when she attempted to lift a heavy silverware tray to a head-height shelf. By the time of her deposition in April 2011, Claimant's silverware-lifting description grew to include an elaborate recitation of how she dropped the silverware tray as she fell to the ground, creating a clamor that brought Aaron from the kitchen. She had not

previously divulged this dramatic fact, not to her many treating medical providers, and not in response to direct questioning by Defendants about how she incurred her back pain. Instead, she told Surety in May 2009 that she set the tray down. Claimant's hearing testimony was even more detailed than her deposition testimony regarding the silverware-dropping/falling-to-the-ground event. Yet, she fails to provide a persuasive explanation why she did not report this event until after surgery was recommended.

40. Further, Claimant's explanation at her deposition, that she was carrying the silverware tray before her accident at stomach-height, according to the Community Care physician's instructions, is clearly an inaccurate embellishment because her prior statement to Surety establishes that she did not see that physician until after she alleges her accident occurred.

41. There is no explanation in the record why Claimant would have reported to Surety that she did not drop the silverware tray if, as she later claimed, she did. The record also fails to provide a reasonable basis for why Claimant had such disparate recollections of how Michelle first told her to go to a doctor.

42. On its face, Aaron's testimony corroborates Claimant's later assertions. However, he recalled that Claimant dropped a *dish tub* and that he saw *plates*, as well as silverware, on the ground. In addition, he did not mention making a telephone call to Michelle, which, according to both Claimant's deposition and hearing testimony, he did. Conversely, Aaron did claim to have driven Claimant home that night, which Claimant never mentioned. Further, Aaron thought very highly of Claimant and so poorly of Employer's poor employee relations that he quit. In addition, Aaron had knowledge and experience related to his own prior workers' compensation claim which prompted him to recommend his attorney to Claimant.

43. Claimant takes exception to the fact that Defendants did not interview any witnesses prior to denying her claim. However, by the time Claimant filed her FROI, on April 24, 2009, Michelle was no longer an employee and Claimant did not reveal any other potential witnesses during her recorded statement to Surety. She said she set the tray down and she did not mention anything about Aaron coming out of the kitchen or helping her. It was not until her deposition, in April 2011, that she related dropping the tray, causing a loud clatter that brought Aaron out of the kitchen. Based upon the information it had as of May 2009, Surety did not unreasonably deny Claimant's claim.

44. Under the circumstances presented by the record, Aaron's testimony is consistent with an intentional plan to assist Claimant in misleading this tribunal. There is inadequate evidence to establish this as a fact; however, Aaron's testimony alone is not credible to corroborate Claimant's testimony about what happened on the night of her alleged accident.

45. At the hearing, Claimant was cooperative and non-defensive, and she appeared credible. However, there are serious factual discrepancies among her various reports of onset of her low back pain and other facts that cannot be reconciled based upon the evidence in the record. Claimant's statements reflected in documents prepared after April 22, 2009 are not credible. Even combined with the bulk of evidence in the record, they fail to rebut her earlier statements recorded in her FROI, her medical records, and the negative inference created by the absence of any notation in the daily manager's log linking Claimant's low back injury to her work. Although the accident now described by Claimant could have caused the injury of which she complains, the evidence, considered as a whole, fails to establish the occurrence of the claimed accident.

46. No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment. There is credible evidence that work worsened Claimant's back pain over time. However, this evidence is inadequate to establish Claimant's herniated disc is the result of a workplace accident.

47. Claimant has failed to adduce sufficient evidence to prove that her low back injury was caused by an accident arising out of and in the course of her employment.

48. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment.

2. All other issues are moot.

RECOMMENDATION

Based on the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 7th day of March, 2012.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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/s/_____