BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANE POOL

Claimant,

v.

BASIC AMERICAN FOODS,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Surety,
Defendants.

IC 2017-053186

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

FILED
DEC 04 2023
INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Idaho Falls, Idaho, on November 21, 2022. James Arnold represented Claimant at the hearing. Eric Bailey represented Defendants and participated telephonically at the hearing. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. No post-hearing depositions were taken. Instead, the parties and the undersigned agreed to allow the parties to submit updated medical opinions from their respective independent medical experts post hearing and in lieu of depositions. The matter came under advisement on October 11, 2023.

ISSUES

The issues for resolution are;

1. Whether and to what extent Claimant is entitled to medical care benefits, and
2. Whether Claimant is entitled to attorney fees under Idaho Code § 72-804.[1]

CONTENTIONS OF THE PARTIES

Claimant asserts she injured her low back (L4-5) as the result of an industrial accident on December 8, 2017. Various treatment modalities failed to sufficiently address her complaints, and Claimant now seeks a disc replacement surgery at that level. Claimant is entitled to attorney fees under Idaho Code § 72-804 because Defendants were unreasonable in relying on the opinions of Drs. Stromberg and Walker.

Defendants argue Claimant's L4-5 conditions were preexisting and thus not eligible for surgical treatment under her industrial injury claim. This claim does not warrant attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. Joint exhibits (JE) 1 through 17 admitted at hearing; and
3. Post hearing supplemental medical report from Benjamin Blair, M.D., dated March 29, 2023, and filed by Claimant on June 21, 2023 (which Claimant labelled as Exhibit 18, with Bates' Stamp numbers 264 and 265);
4. Post hearing supplemental medical report from Lynn Stromberg, M.D., dated June 15, 2023, and filed by Defendants on June 21, 2023 (which Defendants

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[1] Entitlement to other benefits is not at issue because Claimant previously settled her claim for such benefits on a lump sum basis.

labelled as Exhibit 20, with no page numbering).[2]

FINDINGS OF FACT

1. Claimant moved to Idaho in 2017 and not long thereafter went to work for Employer. On December 8 of that year, while lifting a bag of potatoes, she fell backwards onto a cement floor. She notified Employer of the accident and her resulting pain. She left work early.

2. The next morning Claimant went to the emergency room and x-rays were taken. They showed a 4 mm retrolisthesis of L4 on L5, with otherwise normal alignment, moderate degenerative disc and joint disease at L4-5, with disc loss greater on right, and diffuse "greater than expected" osteopenia for her age. Claimant was given a ten-pound lifting restriction and taken off work for a week.

3. After evaluation at First Choice Urgent care clinic, Claimant was prescribed physical therapy in mid-December. When Claimant next returned to First Choice on April 6, 2018, she indicated her low back had improved with therapy, but had not fully resolved. She was no longer working for Employer. Claimant's lifting, pulling, or pushing restriction was set at 40 pounds.

4. Throughout her eleven months of physical therapy, Claimant's low back complaints varied, decreasing at times, increasing at other times, and involving her right hip with radiating pain at times as well.

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[2] While Claimant's March 29, 2023 report from Dr. Blair was stamped with "264" and "265," in actuality, when the report is added as Exhibit 18, the page numbers should be "628" and "629," and were so numbered by the undersigned. Further, it should be noted that JE 16 and 17, which are transcripts of Claimant's two pre-hearing depositions, were not numbered. The undersigned numbered each page of those exhibits (pages 592 through 627) in the exhibit folder, and recommends counsel do the same, if necessary. Finally, JE 20, which is Dr. Stromberg's supplemental report dated June 15, 2023, was numbered as pages 630 and 631 of the Joint Exhibits. There is no Exhibit 19 in the record.

5. In September 2018, Claimant presented at Physicians and Surgeons Center of Idaho Falls, where she was seen by J. Kendall Christensen, DO. At that time, she complained of pain starting in her right SI joint which would shoot up her back, across the back, and down her legs.[3]

6. Dr. Christensen felt Claimant's complaints were due to an SI joint injury which he associated with her work accident. He ordered an MRI of her pelvis.

7. The MRI, taken on September 19, 2018, showed arthritic changes bilaterally in Claimant's SI joints, right greater than left. A small area of subchondral edema was suggestive of active arthropathy, perhaps early spondyloarthropathy. The MRI partially captured Claimant's L4-5 region, with degenerative changes noted.

8. The following day x-rays of her lumbar spine were taken. They showed multilevel degenerative disc disease, worst at L4-5, with mild scoliosis.

9. Claimant was sent to physical therapy. She also received steroid injections into the SI joint. Neither modality was curative.

10. By the time Claimant presented to Dr. Christensen on January 24, 2019, she had been examined by Lynn Stromberg, M.D., at Defendants' request. She brought with her to that appointment a copy of his IME report. She also informed Dr. Christensen the insurance company would no longer cover her low back treatment. Dr. Christensen reviewed Dr. Stromberg's report and prepared a written response in which he made his disagreement with Dr. Stromberg's statements and opinions abundantly clear. All physician IME reports, and Dr. Christensen's response mentioned above, will be discussed in greater detail hereinafter.

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[3] By the time Claimant presented to Dr. Christensen, she had undergone a left knee arthroscopy for injury to that knee from the work accident in question. It appears from the record that some of Claimant's complaints present in September manifested after the knee surgery. As noted previously, Claimant's knee injury is not at issue in this hearing.

11. An MRI taken on February 5, 2019, showed severe disc degeneration at L4-5 with type 1 Modic endplate changes and osteophyte formation, severe spinal canal stenosis and severe left lateral recess stenosis with mild right lateral recess stenosis. The MRI also disclosed severe neural foraminal stenosis on the right, moderate on left. All other segments of Claimant's lumbar spine, except L1, also showed degenerative changes, less severe than L4-5.

12. In March 2019, at the request of her attorney, Claimant saw Benjamin Blair, M.D., for an independent medical examination. His opinions will be discussed below. However, he did recommend further injections, which were performed in the autumn and winter months of 2019, and in the spring of 2020.

13. On July 15, 2020, Claimant was seen by Gary Walker, M.D., a physical medicine physician in Idaho Falls, at Defendants' request for yet another IME. While his report will be further discussed below, Dr. Walker felt that, based on Claimant's presentation that day and the relief she got from recent sacroiliac joint injections, her current problems stemmed from her right SI joint, and treatment with radiofrequency ablation would likely provide "long-term or perhaps even permanent relief." JE 13, p. 328.

14. In line with Dr. Walker's recommendation, Dr. Daniel Smith, DO, of Idaho Pain Group in Blackfoot, who had been administering Claimant's SI joint injections, sought and obtained authority from Surety for a nerve ablation procedure for Claimant's right SI joint (specifically for L5 S1-S2-S3).

15. The nerve ablation procedure was performed on September 25, 2020, by Robert Johnson, DO. However, for reasons not clear in the record, the procedure was performed on Claimant's low back at level L4-5, and not her SI joints.

16. Claimant felt immediate relief from the ablation procedure. She noted to Dr. Johnson that her pain was "100% better" and she was no longer taking any pain medication. JE 14, p. 330. Two weeks out from the ablation reported a 90% reduction in her overall back pain.

17. Claimant's L4-5 level pain relief continued into 2021, although she did experience bouts of SI joint pain, for which she received steroid injections.

18. On Claimant's July 29, 2021 visit with Dr. Johnson, she reported her low back (L4-5) pain had returned and she was seeking long term options to control it. Dr. Johnson noted Claimant suffered from lumbar degenerative disc disease, with Modic changes and spondylolisthesis with intermittent radiculopathy at L4-5. Dr. Johnson discussed with Claimant surgical options, including disc replacement surgery or fusion. He felt Claimant was a "very good" disc replacement candidate if her bone quality checked out. JE 14 p. 352. Claimant desired the disc replacement surgery.

19. Surety did not authorize the disc replacement surgery.

20. Dr. Blair reviewed the medical records generated since his previous IME, as well as the hearing transcript, and on March 29, 2023, authored a letter in which he opined that either the disc replacement surgery or the fusion surgery would be reasonable options and related to Claimant's industrial accident. In response, Dr. Stromberg opined in writing that Claimant's proposed surgical treatment was not proven to be caused by her industrial accident. Both opinions will be discussed further below.

DISCUSSION AND FURTHER FINDINGS

21. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's

physician or needed immediately after an injury, and for a reasonable time thereafter. Of course, an employer is only obligated to provide medical treatment necessitated by the industrial accident and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

22. Claimant carries the burden of proving that the condition for which compensation is sought is causally related to an industrial accident." *Duncan v. Navajo Trucking,* 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000). In fact, "causation is an issue whenever entitlement to benefits is at question." *Gomez v. Dura Mark, Inc.,* 152 Idaho 597, 601, 272 P.3d 569, 573 (2012). The proof required is "a reasonable degree of medical probability" that Claimant's "injury was caused by an industrial accident." *Anderson v. Harper's Inc.,* 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). In determining causation, it is the role of the Commission to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony.

23. A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

CAUSATION

Expert Opinions

24. In the present case, Claimant seeks benefits for a contemplated disc replacement at L4-5. Dr. Blair opined that Claimant's L4-5 condition was causally related to her industrial accident. Dr. Stromberg opined to the contrary. Dr. Walker provided another IME for Defendants and will be discussed below. Dr. Christensen also had opinions critical of Defendants' IME report from Dr. Stromberg.

Dr. Christensen

25. Dr. Christensen, who treated Claimant for her low back and SI joint pain for a considerable period of time, did not ever specifically state Claimant's low back (L4-5) pain was caused by her work accident, but he was quite critical of Dr. Stromberg's analysis. He felt Dr. Stromberg's diagnosis of a right hip contusion – which Dr. Christensen called "laughable" – neglected the most likely cause of Claimant's pain complaints. JE 8 p. 263-3. (Dr. Christensen diagnosed Claimant with low back pain, SI joint dysfunction and tendinosis of her gluteal tendons.) Dr. Christensen argued a hip contusion would have "improved in a week" but Claimant's pain complaints were ongoing more than a year post accident. He carried on his criticism of Dr. Stromberg for an additional three paragraphs in his progress notes of January 24, 2019, picking at various findings which he called "ignorant" and "asinine" but are not material to the decision herein.

Dr. Walker

26. At the time of her IME with Dr. Walker, Claimant's complaints, according to the IME report, centered on her low back, right greater than left, right leg pain, and tenderness over her SI joint, again right greater than left. However, on that date (July 15, 2020), Claimant was in minimal observable discomfort, with no leg or back pain with straight leg raises to 90 degrees. Other tests designed to identify low back, hip and SI joint issues were mixed.

27 . After reviewing the records and examining Claimant, Dr. Walker felt Claimant suffered from an SI joint sprain related to her work accident. Dr. Walker pointed out Claimant suffered from preexisting lumbar spinal stenosis and severe degenerative joint disease at L4-5. While Dr. Walker felt additional treatment was reasonable for Claimant's SI joint due to her work accident, he also opined that treatment for Claimant's L4-5 disc disease would be entirely non-

industrial. Dr. Walker died before the hearing took place. At no time prior to his death was he asked to elaborate on his IME report.

Dr. Stromberg

28. As noted previously, Defendants hired Lynn Stromberg, M.D., to conduct an independent medical examination on Claimant. The exam took place on January 10, 2019.

29. After a physical examination and a medical record review, Dr. Stromberg opined that Claimant exhibited "very strong signs of symptom magnification," and exaggerated pain reports, "out of proportion to her manifestation during the exam." JE 9, p. 267. Likewise, Claimant described non-anatomic pain distribution (pain extending from her right hip radiating into her left lower extremity.)

30. Dr. Stromberg diagnosed Claimant with right hip contusion (and a left knee meniscus tear, not the subject of this hearing). He noted Claimant's contusion should have resolved in a few weeks at most without any treatment. He assigned Claimant a class zero impairment for her hip/pelvis.

31. Dr. Stromberg wrote that Claimant had "unreasonable claims and an unreasonable presentation" without "documentable anatomic anomaly" associated with her work accident. *Id* at 268. Dr. Stromberg gave Claimant no work restrictions and felt no further medical treatment was necessary at the time of his examination. While he noted Claimant had "fairly advanced degenerative change in [her] lumbar spine, particularly at L4-5," with early signs of instability, any future treatment on her lumbar spine would be due to chronic degenerative disease, not to the work accident in question. *Id* at 269.

32. Dr. Stromberg authored a supplemental report dated February 14, 2019, after reviewing a recently-taken lumbar MRI scan and comparing it to previous x-rays of Claimant's

lumbar spine. The MRI confirmed Dr. Stromberg's diagnosis of advanced degenerative change in Claimant's lumbar spine. He noted central canal stenosis and instability at L4-5. Dr. Stromberg opined the changes were related to chronic advancing degenerative changes which accompany the aging process. None of the findings could be "reasonably related to a single isolated incident or minor trauma" in the doctor's opinion. JE 9, p. 286.

33. Dr. Stromberg provided a post-hearing "medical expert letter," identified as JE 20. Therein, he indicated he had reviewed Dr. Blair's IME reports and re-examined his previous reports. In this June 15, 2023 expert letter, Dr. Stromberg first critiqued Dr. Blair's findings. He wrote that Dr. Blair found a temporal association between Claimant's work accident and the onset of pain in her lumbar spine. However, he opined "there is yet to be provided any objective evidence which would associate subjective complaints with physical examination, radiographic evidence of acute injury, or evidence of neurologic compromise." Donning his lawyer's hat, he then pointed out that "temporal association only denotes the time of onset of subjective complaints. It seems the burden of causation is not met to associate reported symptoms with physical evidence." JE 20, p. 630.

34. Dr. Stromberg acknowledged Claimant had extensive degenerative change in her lumbar spine which "could be amenable to surgical intervention." He stressed that her lumbar spine condition was solely due to degenerative disease.

35. Turning to Claimant's subjective complaints, Dr. Stromberg concluded that being subjective only, and given her "nonanatomic pain distribution and obvious attempts at symptom magnification on her examination, the determination of causation based on subjective complaints alone would be quite unreasonable." *Id.*

Dr. Blair

36. Dr. Blair performed an IME on March 13, 2019, at the request of Claimant. He reviewed medical records and conducted a physical examination on Claimant. He noted her chief complaint at the time was low back pain radiating into her bilateral lower extremities. In the "history of present illness" section, Dr. Blair noted Claimant was lifting a 50-pound bag of potatoes when she fell backward onto her left [sic; all other descriptions, including Claimant's testimony indicate she fell on her right hip] hip." JE 10, p. 289. She noticed sudden bilateral paresthesias in her lower extremities. Initially, she had right-sided pain, but with time the pain progressed to radiate bilaterally into her lower extremities. Her complaints with time became far more severe on her left side. She was at 10/10 pain level in her low back, bilateral SI joints, and lower extremities. *Id.*

37. Dr. Blair noted his understanding that Claimant had been in good health, active, without history of pain or treatment for her low back until she injured herself at work on December 8, 2017. He was aware she had previous degenerative arthritis in her lumbar spine and bilateral SI joint.

38. Dr. Blair opined that the accident in question permanently aggravated her preexisting but asymptomatic arthritic conditions at L4-5 and bilateral SI joints.

39. Dr. Blair was also given an opportunity to provide a post-hearing "medical expert letter," which he authored on March 29, 2023. In his March 29 letter, Dr. Blair explained why the nerve ablation, which provided such marked relief for several months, ultimately failed due to nerve regrowth. He reiterated that surgical treatment, including a disc replacement at L4-5 would be reasonable, and causally related to Claimant's work injury. Given Claimant's lack of history of any issues related to her low back prior to her work accident, coupled with immediate and

unrelenting back pain thereafter, and the fact that her mechanism of injury is consistent with an injury to Claimant's lumbar spine, Dr. Blair concluded that "but for" her work accident she would not, on a more probable than not basis, be symptomatic and in need of surgery at the time of his post-hearing letter. *See* JE 18.

Analysis of Expert Opinions

40. In reviewing all the expert opinions and findings, several points are undisputed. They include the following:

- Claimant suffers from varying degrees of multilevel degenerative disc and spondylitic disease, including an osteophyte complex and stenosis most pronounced at L4-5.
- Claimant's state of degeneration at L4-5 is sufficient to warrant surgery.
- The record is devoid of any medical treatment for, or complaints by Claimant of, any preexisting low back, SI joint, or hip issues, in spite of her preexisting conditions.
- Claimant suffered an industrial accident on December 8, 2017, which caused some injury to her person.
- The record establishes that Claimant complained of pain in her low back/sacroiliac region on a consistent basis other than when she had temporary relief from injections and/or ablation therapy.
- There is no obvious, readily identifiable acute injury reasonably linked to her industrial accident and observable on diagnostic imaging which would account for Claimant's claim of a traumatic injury to her low back.

41. The thrust of the dispute lies in whether Claimant's need for back surgery is entirely due to her preexisting severe degenerative changes at L4-5, or whether the accident contributed in whole or in part to Claimant's current need for surgery. The argument for causation centers on Claimant's asymptomatic past, immediate pain from the point of the accident moving forward, and a mechanism of injury which is consistent with Claimant's complaints. The argument against causation highlights Claimant's extensive degenerative disc disease in her low back, most notably at L4-5, which is clearly preexisting, coupled with the fact that diagnostic imaging fails to show any acute injury. Additionally, Claimant's subjective complaints are unreliable due to her

symptom magnification. Temporal association of pain onset, standing alone, does not equate to causation when there is a complete lack of objective evidence of acute injury to Claimant's spine.

42. Complicating this already challenging case is the fact that much of Claimant's treatment has centered on her SI joints, often with positive, albeit temporary relief. Claimant's low back has always been in the discussion by treating physicians, and even defense IME doctors, but at least for Drs. Walker and Stromberg, the L4-5 findings, and Claimant's corresponding pain complaints, are unrelated to her work injury, which only affected her hip and/or SI joint. Claimant's treating physicians likewise noted Claimant's complaints centered on her SI region. For example, office notes from Dr. Christensen recorded that Claimant's pain "starts around her right SI joint and radiates across the back, up the back, and down both legs." JE 8, p. 237. From the outset he felt Claimant's presentation was "most consistent with SI joint injury…." *Id* at 239. After reviewing Claimant's MRI, Dr. Christensen noted Claimant's work injury was "bilateral SI joint dysfunction." *Id* at 241.

43. Claimant's treatment with Dr. Christensen focused on her SI joint, although in September of 2018, he speculated that Claimant's L4-5 condition "could be" a cause of Claimant's pain. He did not immediately follow up on that speculation because injections at the SI joint level provided Claimant relief.[4]

44. In his notes of January 24, 2019, while criticizing Dr. Stromberg's analysis, Dr. Christensen defended his diagnosis of SI joint dysfunction. Therein he stated "[t]he SI joint is a common cause of pain at the low back and hip and an SI joint injury fits with the patient's

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[4] Eventually, in February 2019, an MRI was done on Claimant's lumbar spine, but by then Dr. Christensen had stopped treating her due to Surety's refusal to pay for more medical treatment, so the record does not contain any notes from Dr. Christensen regarding the MRI findings and whether they would have altered his previous diagnosis.

mechanism of injury. She states that she fell … landing on her right hip and felt sharp pain in her low back at her SI joint." *Id* at 263-3.

45. From soon after the accident through early 2019, physician focus, including IME physician Dr. Walker, was on Claimant's SI joint. Injections at that level produced positive pain reduction, at least temporarily.

46. The focus shifted from Claimant's SI joint to her L4-5 joint when she was examined in an IME setting by Dr. Blair in March 2019, not long after her lumbar MRI. It was he who introduced the diagnosis of injury to Claimant's lumbar spine as the result of her work accident. He concluded that Claimant permanently aggravated her previously asymptomatic L4-5 disc.[5] He noted the temporal relationship between Claimant's "low back" complaints and the accident.[6]

47. While a qualified physician's opinion that a particular work accident caused a particular injury to the worker is sufficient to establish a *prima facie* case for causation, without elaboration on *how* or *why* the accident caused or contributed to the resultant injury, such a conclusory opinion carries little weight when analyzing the conclusion in light of a contrary opinion from another qualified physician. As noted in *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 737, 40 P.3d 91, 95 (2002), "[w]hen deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts."

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[5] He also opined the accident permanently aggravated her arthritic SI joint, but that is not presently an issue for resolution.

[6] Throughout her briefing, Claimant takes note of how many times physicians used the phrase "low back" when discussing Claimant's complaints. The use of the term, without further explanation from the physician using the phrase, does not establish that when the term "low back" was used by a physician, that doctor was distinguishing between Claimant's lumbar spine and her sacroiliac joint, which lies below the lumbar joints. For example, Dr. Christensen used "low back" several times when he was focusing on Claimant's SI joint. The concept of a distinct injury to Claimant's lumbar spine stemming from the accident was introduced by Dr. Blair in 2019.

48. In order to prevail on her claim, Claimant is required to establish more than just a temporal relationship between the onset of pain and a work accident. *See, e.g., Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012), (While a temporal relationship is always required to support a finding of causation between an accident and the injury, the existence of a temporal relationship alone, in the absence of substantive medical evidence establishing causation, is insufficient to satisfy Claimant's burden of proof.).

49. Claimant cites to *Boswell v. Vista,* IC 2015-033326 (2019), and *McCrea v. Idaho Youth Ranch, Inc.,* IC 2012-026908 (2013), to support her argument that she need not point to a specific acute finding to prove causation, so long as reasonable inferences can be drawn from the evidence. While reasonable inferences may be drawn from circumstantial evidence, *Boswell* and *McCrea,* and other cases such as *Kobrock v. The Franklin Group,* IC 2015-009878 (2019), all require the medical evidence, including causation evidence based on a physician's opinion, to be weighed and considered. *See Tenny v. Loomis Armored US, LLC,* 168 Idaho 870, 489 P.3d 457 (2021). There has always been a requirement that Claimant prove causation by a preponderance of the evidence, which requires something more than simply a temporal relationship. While Claimant is correct in noting a physician need not point to a specific acute finding in order to render an opinion on causation, for Claimant to prevail on her claim she needs to show medical evidence beyond simply a temporal association between Claimant's complaints and the accident in question.

50. There is a relative paucity of evidence of causation in the present case due to the fact that expert physicians were not deposed and their post-hearing letters lack the depth that comes from direct and cross examination. This fact is particularly damaging to Claimant, as Dr. Blair's post-hearing letter did little to explain his opinions; rather it mainly restated his original IME

report, which itself left the reader with as many questions as answers. While Dr. Blair figured in each of the three cases cited above, in those cases, he was deposed and was able to present an explanation for his opinions which ultimately carried the day.

51. In the present case, the extent of Dr. Blair's opinions boils down to timing and mechanism of injury. His "mechanism of injury" explanation proves nothing on its own; it only establishes that the type of injury Claimant complains of (low back pain) *can* occur as the result of a fall onto her hip. Disproving impossibility is not a substitute for proving causation. This leaves Dr. Blair with a temporal connection, which, standing alone, will not prove causation. Claimant needs "timing plus" to prevail. In other words, she must establish something else in addition to timing of pain onset to have a chance of overcoming Dr. Stromberg's contrary medical opinion; she must adduce evidence of a causative physical injury, even an unspecified physical injury.

52. A fair reading of *Tenny* allows the fact finder to review medical records, medical testimony, and medical opinions (when offered to a reasonable medical probability or its equivalent, to wit, a doctor's testimony plainly and unequivocally conveying conviction that the events are causally related) when determining "medical testimony" needed for Claimant to carry her burden of proof. *See Tenny* at Idaho 465. (Medical evidence includes both oral testimony from physicians and evidence from medical records or reports.)

53. In reviewing the record, two items potentially offer support for the "plus" Claimant needs to couple with Dr. Blair's proximity-in-time argument.

54. First, there is the fact that when Claimant underwent a nerve ablation at L4-5, it eliminated the low back pain she had been complaining of *since the date of her accident*. Claimant was asymptomatic prior to her fall in December 2017. Thereafter she had ongoing

complaints of low back and/or SI joint pain. She was treated unsuccessfully for SI joint pain. Then she had the nerve ablation and her low back pain complaints, which originated with her work accident, went away until the nerve endings regrew, at which time her pain returned. She did, however, continue to have some residual SI joint pain during this time. The fact that the ablation resolved Claimant's low back pain which began at the time of her work accident lends support to Dr. Blair's opinion that in addition to injuring her SI joint in the work accident, Claimant also permanently aggravated her L4-5 in the same accident.[7]

55. Interestingly, both parties cite to medical records from Robert Johnson, DO, the physician who suggested Claimant undergo a disc replacement surgery at L4-5. Since Defendants' argument from those records does not involve causation, it will be addressed subsequently.

56. As a second way of attempting to establish the "plus" in a "timing plus" argument, Claimant argues Dr. Johnson's records support causation. His notes from June 15, 2022 include the following observation from him:

> [Claimant] has unfortunately had multiple accidents … first one was back in 2017. I believe when she sustained some injuries that affected her SI joints and lower back, specifically was noted at the L4-5 level as well and then in more recent years had a subsequent injury back in the beginning of this year, which based off MRI's and imaging, affected the L2-3 level. Unfortunately, she has multiple levels of disc collapse and disc herniations throughout the lumbar spine and the SI joint pathology. She did previously undergo … an L4 and L5 … nerve ablation which helped dramatically with her back pain at that point. She had significant back pain relief. Unfortunately, she has continued to have a mechanical collapse of the discs from the initial injury and subsequent injuries as previously mentioned to the L2-3 level.

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[7] While one could argue Claimant's preexisting condition at L4-5 coincidentally became symptomatic at or near the time of her work accident and then was successfully treated with nerve ablation treatment, no physician has opined such an argument and it is not a theory which is self-evident.

JE 14, p. 373.[8]

57. Claimant argues Dr. Johnson's notes form a medical opinion on causation when he stated "[u]nfortunately, she has continued to have a mechanical collapse of the discs **from the initial injury** and subsequent injuries as previously mentioned to the L2-3 level." (Emphasis added.) It is not clear that Dr. Johnson is stating his causation opinion to a reasonable medical probability, or merely stating what Claimant has told him in her history. After reviewing the document at length, as well as Dr. Johnson's other medical records, this Referee does not find Dr. Johnson's statement on causation to be sufficient to qualify as a plain, unequivocal statement of conviction on causation.

58. After all the medical records are examined, Claimant's evidence in favor of causation can be summarized as having the following components;

- Claimant's L4-5 back pain originated at the time of her industrial accident in question,
- Claimant's mechanism of injury could result in injury at L4-5,
- Claimant had no history of any back complaints prior to such accident,
- Claimant's pain was relieved when she underwent an ablation procedure at L4-5,
- Claimant's IME physician, Dr. Blair provided a medical opinion relating Claimant's L4-5 pain to an accident-caused permanent aggravation of a preexisting condition for the reasons set out in 1 through 3 above.

59. Claimant has met her burden of making a *prima facie* case on causation. However, to prevail, her evidence in favor of causation must be weighed against the evidence against causation.

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[8] The reference to a subsequent injury to Claimant's L2-3 stem from a subsequent industrial accident with a different employer and is not material to the findings herein.

60. Dr. Stromberg is the main witness for Defendants. While Dr. Walker also opined that Claimant's L4-5 degeneration preexisted and was not impacted by her work accident, his untimely death prevented the parties from testing the conviction of his opinion and more importantly prevented the fact finder from considering his methodology in formulating his opinion.

61. In his January 10, 2019 IME report, Dr. Stromberg noted "strong signs of symptom magnification" during the examination, with reports of pain out of proportion to her "manifestation" during examination. Additionally, her report of radiating pain (from right hip to left lower extremity) was not "anatomic." JE 9, pp. 267, 268. Those factors, coupled with radiologic studies which did not show evidence of pelvis or hip abnormalities beyond normal-for-her-age degenerative changes, Dr. Stromberg diagnosed Claimant with a contusion, which was overtreated and should have resolved in days or weeks.

62. In his post-hearing letter, Dr. Stromberg, basically reiterated his position that without radiographic evidence of trauma, temporal association is insufficient to find causation. He noted Claimant's severe degenerative lumbar changes would warrant surgery, but those changes are "clearly degenerative." He goes on to state "given [Claimant's]non-anatomic pain distribution and obvious attempts at symptom magnification…, the determination of causation based on subjective complaints alone would be quite unreasonable." JE 20, p. 630. He summed up his thoughts by again noting surgery for Claimant's advanced degenerative lumbar disc disease would be reasonable, but "the causation question remains in the realm of degenerative origin on a more probable than not basis." *Id* at 631.

63. Without his deposition, there is no way to find out how Dr. Stromberg would defend his position against the proposition that Claimant's back was asymptomatic prior to the accident, she was not a surgical candidate prior to the accident, she had degenerative changes before

the accident, but was fully able to function in a job which, at least on occasion, required heavy lifting, her pain began immediately after she fell at work, she continued to experience pain to varying degrees post accident in spite of therapy and other conservative modalities until she had an ablation at L4-5, which eliminated her pain for a period of months, and even if she may be prone to exaggeration or histrionics, she acknowledged her left knee surgery greatly reduced her knee pain to the point of no longer seeking treatment for it, and likewise immediately stopped all pain medication after her ablation, and told her doctor she was 90% pain free.

64. Like Dr. Blair's assessment, Dr. Stromberg's final conclusions lack the type of detail worthy of substantial weight when determining the issue at hand. Neither party did much to illuminate a clear path to resolution in this case. While the medical opinions submitted in support of the parties' positions will be considered, both leave the Referee sorting through the remainder of the medical record in an attempt to determine the proper outcome.

65. Looking at all the evidence, this case has much in common with cases such as *Boswell, McCrea,* and *Tenny.* In each of those cases there was no "smoking gun" radiological evidence and (especially in *Tenny*) the issue of medical causation was vigorously debated among competing physicians. Just as in those cases, all the evidence must be carefully considered in the present case in order to reach a conclusion on medical causation.

66. Looking at the record, the evidence supports the conclusion that although Claimant had degenerative changes at multiple levels, some mild, some more advanced, she was not experiencing issues or seeking medical treatment prior to her industrial accident. The weight of the medical evidence supports the conclusion, as offered by Dr. Blair, that the accident in question permanently aggravated or "lit up" Claimant's previously asymptomatic condition at multiple levels in her low back/sacroiliac joints. *See Thom v. GTE Northwest*, IIC 92-810818

(April 20, 1999) (citing to *Bowman v Twin Falls Construction Company, Inc.*, 99 Idaho 312, 316, 581 P.2d 770, 774 (1978)), "[i]t has long been the law in the state of Idaho that a pre-existing disease or infirmity of an employee is compensable under the arising out of employment requirement of an industrial accident and injury if the employment aggravated, accelerated, or lit up a pre-existing condition." Claimant treated conservatively without resolution of her pain complaints and physical limitations for over a year. All physicians agree that if Claimant's injury was simply a contusion, her symptoms would have resolved in a matter of weeks.

67. While Claimant can be overly dramatic, (she once accused Dr. Christensen of "throwing her around like a wet noodle with no regard to how I was feeling," when in fact the doctor had performed only mild procedures he often used on children and elderly patients), exaggerated behavior does not necessarily equate to a lack of injury. Claimant expresses herself and conveys her discomfort in a dramatic fashion. At hearing she was quite demonstrative but appeared to be honest and sincere in her testimony. Importantly, when a treatment was helpful, she acknowledged as much; it does not appear that she is a type who will always complain no matter what treatment modalities are tried. It appears to this Referee she sincerely wants to get better.

68. Dr. Stromberg's opinion that Claimant suffered a hip contusion may well be correct; in fact, post-accident bruising was noted. However, his failure to explain how it is medically improbable that Claimant's accident could "light up" or render a previously asymptomatic condition at L4-5 to become symptomatic causes his opinions to carry less weight than those of Dr. Blair. His diagnosis of permanent aggravation of a preexisting condition at L4-5 is more in line with the remainder of the evidence, both medical, and testimonial, and is given the greater weight.

69. As noted previously, Defendants argue Dr. Johnson's records from June 15, 2022, highlight the various levels of disc herniation ongoing in Claimant's spine (L2 through L5), and spondylolisthesis with radiculopathy (L2 through S1). While Defendants argue that *none* of Claimant's back conditions are due to the work accident, they note that *even if* Dr. Blair is to be believed, only L4-5 is Defendants' responsibility. They argue the vast majority of her current spinal ailments "are simply the result of having a bad spine at multiple levels" and have nothing to do with her industrial accident. Claimant's condition continues to deteriorate and will necessitate further surgeries that have nothing to do with these Defendants. Def's Brief, pp. 8, 9. Defendants also point out that Dr. Johnson counselled Claimant that surgery would not necessarily help with Claimant's overall back pain. They argue the suggested surgery (disc replacement at L4-5) "is no panacea for all of the problems that afflict Claimant." *Id.*

70. Defendants further argue surgery at L4-5 will be unsuccessful. However, no physician has said as much. Defendants' argument appears to suggest that Defendants should not be responsible for Claimant's L4-5 surgery because it will not help all of her other, non-industrial back issues. However, that is not the standard for providing reasonable medical care under Idaho Code § 72-432. Dr. Johnson explained that one surgery will not cure all of Claimant's spinal ailments, but he believes Claimant is a good candidate for disc replacement surgery at L4-5. Claimant's issues at other levels will have to be addressed outside of the context of this worker's compensation litigation.

71. Finally, it may be that Defendants are suggesting the surgery is not reasonable, but there is no medical testimony supporting that proposition. If Claimant is entitled to the suggested surgery, the fact that it will not cure Claimant's non-industrial conditions is irrelevant.

72. When all of the evidence is considered, Claimant has proven by a preponderance of the evidence her entitlement to disc replacement surgery at L4-5, and all reasonable medical costs associated with such surgical treatment.

ATTORNEY FEES

73. Claimant seeks attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law but may be recovered only under three circumstances – when a surety contests a claim without reasonable grounds, neglects or refuses to pay benefits due and owing an employee within a reasonable time frame, or discontinues payment of benefits due the employee without reasonable grounds. The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

74. Claimant asserts Defendants were unreasonable in relying on the opinions of Drs. Stromberg and Walker. Claimant's argument carries no weight. Dr. Walker's opinion that Claimant's accident-related injury was to her SI joint, which was an opinion shared by several other physicians treating Claimant. Dr. Walker acknowledged Claimant had degenerative disc disease in her lumbar spine (as did every other doctor in this case) but felt her lumbar spine was not impacted by the accident. In the absence of any radiographic evidence to the contrary, such an opinion was not unreasonable.

75. Dr. Stromberg's opinion, while discounting SI joint involvement, relied on the absence of objective evidence of trauma to Claimant's lumbar spine. The issue was not whether Claimant needed lumbar surgery, but rather what precipitated that need. Her x-rays and MRI results did not point to any trauma-related findings to support Claimant's assertion.

76. Claimant's argument suggests that sureties should ignore the medical opinions of their expert physicians even when they are supported by objective evidence (or lack thereof) and instead rely on a spatial relationship between the accident and complaints of pain, which standing alone is an insufficient basis for an award of benefits. Claimant's argument is untenable.

77. Defendants' reliance on the opinions of Drs. Walker and Stromberg was not unreasonable.

78. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence her entitlement to disc replacement surgery at L4-5, and all reasonable medical costs associated with such surgical treatment.

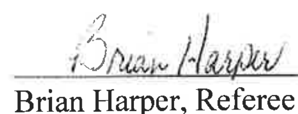
2. Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 9th day of November, 2023.

INDUSTRIAL COMMISSION



Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANE POOL, Claimant, v. BASIC AMERICAN FOODS, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2017-053186** **ORDER** FILED DEC 04 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his 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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

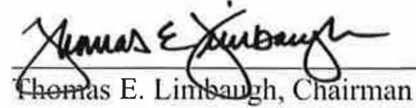
1. Claimant has proven by a preponderance of the evidence her entitlement to disc replacement surgery at L4-5, and all reasonable medical costs associated with such surgical treatment.

2. Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under Idaho Code § 72-804.

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

DATED this the 1st day of December, 2023.

INDUSTRIAL COMMISSION



Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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