

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUDI DAVIS,

Claimant,

v.

EDGEWOOD SPRING CREEK SODA
SPRINGS, LLC, d/b/a EDGEWOOD VISTA,

Employer,

and

TRAVELERS PROPERTY & CASUALTY
COMPANY OF AMERICA,

Surety,

Defendants.

IC 2016-020326

IC 2017-001300

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

Filed May 28, 2020

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 Pocatello, Idaho, on July 8, 2019. Darin Monroe represented Claimant. W. Scott Wigle represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Three post-hearing depositions were taken. The matter came under advisement on April 5, 2020.

ISSUES

The parties agreed to the following issues for this bifurcated adjudication:

1. Whether the condition for which Claimant seeks benefits was caused by

the industrial accidents; and

2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical Care;
 - b. Temporary partial and/or temporary total disability (TPD/TTD); and
 - c. Attorney Fees.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts she injured her low back to the point where surgery was required as the result of two industrial accidents which occurred in July 2016. She is entitled to medical care and temporary disability benefits associated with the surgery and related care. She also is entitled to attorney fees based on Defendants' unreasonable denial of such benefits.

Defendants argue that Claimant may have temporarily aggravated her lumbar spine in the industrial accidents, but her need for surgery was due to the natural progression of her longstanding degenerative low back condition and prior fusion surgery at the level just below her most recent surgery. In fact, Claimant's low back became symptomatic shortly before her industrial accidents. Defendants are not liable for any of the medical expenses or benefits claimed in this matter and attorney fees are unwarranted.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Joint exhibits (JE) A through N admitted at hearing; and
3. The post-hearing deposition transcripts of Nita Weber, D.O., James Bates, M.D., and Lynn Stromberg, M.D., taken on September 12, September 24,

and December 17, 2019, respectively.

FINDINGS OF FACT

1. At the time of hearing Claimant was a 57-year-old woman living in Soda Springs, Idaho. She had worked for Employer for several years in nursing and supervisory capacities.

PRE-EXISTING LOW BACK HISTORY

2. In or around 1999, Claimant underwent lumbar spine surgery which fused the vertebrae at L5-S1. Claimant had no appreciable residual low back issues after this surgery until 2016. Exactly when in 2016 Claimant's lower back became symptomatic is a key dispute in this case and will be discussed in greater detail hereinafter.

INDUSTRIAL ACCIDENTS

3. On July 12, 2016, Claimant was assisting a resident from a toilet to her wheelchair. As Claimant pivoted to set the patient in the chair Claimant felt a sudden onset of excruciating pain in her low back and right thigh. Claimant testified she had not experienced that type of pain at any point prior.

4. Claimant did not seek medical treatment after this event. She left work early and stayed home for the next couple of days. Her initial pain lessened over time with ice and anti-inflammatories. Claimant assumed she has strained her low back.

5. Claimant avoided heavy lifting when she returned to work but was able to do her regular duties as the director of nursing services.

6. On July 25, 2016, Claimant was lifting a piano bench at work. As she did so she felt immediate pain in her right thigh and low back. The pain was so severe she fell to the ground

and could not get up by herself. Two co-workers assisted her into a standing position and helped her to her office. Claimant sought immediate medical care with her regular physician, Nita Weber, D.O.

OVERVIEW OF MEDICAL TREATMENT FROM JULY 2016 FORWARD¹

7. Upon examination Dr. Weber recommended Claimant see a neurosurgeon. In August 2016 Claimant was evaluated at the Utah Spine, Sport & Rehab facilities in Ogden, Utah. In mid-September 2016 Claimant underwent a spinal MRI² which read to include a broad-based disc bulge at L4-5 with moderate to severe foraminal stenosis right greater than left. Claimant's symptoms were increasing during this time frame. Electrodiagnostic studies performed that same month revealed evidence of mild right sided L5 acute lumbosacral radiculopathy with a loss of reflexes at Claimant's right knee and bilateral ankles. Surgical consultation was arranged with Dennis Winters, M.D., a spinal surgeon.

8. Dr. Winters ordered a third MRI in early October 2016, which showed post-operative changes (from 1999 surgery) at L5-S1, and a suspected focal disc protrusion/herniation at L4-L5. Based on Claimant's increasing symptoms and the MRI findings Dr. Winters recommended a micro-discectomy at L4-5.

9. After learning of Dr. Winters' recommendation, Defendants sent Claimant for an independent medical examination with Lynn Stromberg, M.D., a spinal surgeon in Idaho.

¹ The medical treatment overview is a general synopsis of Claimant's treatment from the time of her second industrial accident through the time of surgery in November 2016. A more detailed analysis of those and other records which are pivotal to this decision is discussed separately.

² This MRI is the second such study on Claimant's low back in 2016. She previously had an MRI done in May of 2016. Discussion surrounding the reason for the May MRI is found in the "DISCUSSION AND FURTHER FINDINGS" section, *infra*.

Dr. Stromberg believed Claimant would benefit from spinal surgery but disagreed that a microdiscectomy was the proper procedure. Instead, Dr. Stromberg felt Claimant needed a fusion surgery. However, Dr. Stromberg felt Claimant's need for surgery was unrelated to her industrial accidents of July 2016.

10. Claimant sought out another surgical opinion, this time from Clark Allen, M.D., an Idaho Falls neurosurgeon. After his evaluation Dr. Allen opined that Claimant needed a full decompression and fusion surgery at L4-5. Defendants refused to pay for the proposed surgery.

11. On November 14, 2016, Dr. Allen performed a bilateral discectomy and fusion surgery at L4-5. At surgery, Dr. Allen noted Claimant's exiting L4-5 nerve roots were severely compressed, right greater than left. He also noted scarring from the adjacent previously fused level which contributed to Claimant's L4-5 segment narrowing.

12. Claimant had a good result from the surgery, and after a period of recovery was released from care by Dr. Allen on January 26, 2017. Thereafter Claimant returned to work for a new employer.

DISCUSSION AND FURTHER FINDINGS

13. 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). The proof required is "a reasonable degree of medical probability." *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). In other words, Claimant must show there is more evidence for causation than against.

Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974). 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.

14. The fact that Claimant suffered a covered injury to a particular part of her body does not make Defendants liable for all future medical care to that part of her body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). In the present case, it is undisputed that Claimant injured her low back in July 2016 in one or more industrial accidents. The debate is over whether one or more of these work accidents necessitated or contributed to the need for Claimant's November 14, 2016, back surgery.

Medical Record Dispute

15. Defendants' position centers in large part on a medical records trail which began shortly before Claimant's industrial accidents. Defendants argue the records establish the fact that Claimant's low back became symptomatic weeks before her industrial accidents due to an ongoing degenerative process related to her 1999 L5-S1 fusion surgery and progressing until her November 2016 surgery.

16. Defendants' alleged "smoking gun" medical record is dated May 16, 2016. On that day Claimant presented at Dr. Weber's office. Dr. Weber's chart notes from that visit states;

This is a 54-year-old female who is having leg pain at night. She says it is a deep ache and sometimes burns and tingles down her legs. She is thinking she is going to have to face another surgery. She has not had any problem for several years since her initial back surgery and discectomy. Now symptoms have returned with a vengeance the last few weeks. We scheduled her for an MRI on 5/18. I gave her a prescription for gabapentin to use 1 or 2 at night to see if this would help with the nerve pain.

JE A, p. 14. Dr. Weber assessed Claimant's condition as "[l]ow back pain with radiculopathy bilateral legs." *Id.* Dr. Weber ordered an MRI which was taken two days later, on May 18.

17. From this beginning point, Defendants weave their argument that Claimant was clearly suffering from a degenerative and progressive low back condition prior to either work accident as follows:

- Claimant's 1999 fusion surgery at L5-S1 put additional stress on her adjacent vertebrae which brought about increased degeneration of her spine at L4-5 through a process commonly referred to as next level degeneration.
- By May 2016 Claimant's low back degenerative condition became symptomatic without a specific incident, leading her to seek treatment from Dr. Weber, who diagnosed Claimant with bilateral lumbar radiculopathy.
- Claimant, a trained medical professional, and Dr. Weber, both understood that Claimant was suffering radiculopathy, and that Claimant was concerned that she would need another surgery for her condition.
- Claimant was prescribed gabapentin, a medication used for nerve pain.
- The MRI ordered by Dr. Weber in May 2016 showed a number of abnormalities including at the L4-5 level. Dr. Weber handwrote on the MRI report, "Sudi; you need to consult a neurosurgeon and see what they think needs to be done."³

³ Defendants are vague on how the MRI findings support their theory, instead they assert the "most significant aspect" of the report is the handwritten note. The MRI report will be discussed more fully hereinafter.

- Contrary to Dr. Weber’s recommendation, Claimant did not seek treatment with a neurosurgeon immediately following her May 2016 MRI, but instead waited to seek such treatment until after her July work accidents.
- Claimant next sought medical treatment for her low back on July 25, 2016, the date of her second work accident. Dr. Weber’s office notes do not correlate with Claimant’s narrative of events. Instead, Dr. Weber’s notes indicated Claimant injured her low back “a few weeks ago” and then again on July 12, 2016. Furthermore, Dr. Weber indicated that Claimant’s back problems had been getting progressively worse despite taking muscle relaxants and occasional pain medications.

18. Defendants argue these facts demonstrate the reality that Claimant was suffering from a symptomatic degenerative low back condition leading to bilateral radiculopathy weeks prior to any work accident she may have suffered, and those symptoms progressively worsened despite medication. Claimant then “disingenuously” attempted to obtain medical and time loss benefits for her necessary back surgery (under *Neel* rates, no less) from Defendants through misrepresentation, with the help of hometown friend Dr. Weber, who let her bias color her narrative under oath on Claimant’s behalf.

19. While the above argument is not Defendants’ only defense, it is a lynchpin argument holding together the remainder of their theory. As a practical matter, if Claimant was symptomatic with degenerative, progressive, bilateral radiculopathy just weeks prior to her work accidents, and felt obligated to create a fictional narrative to create the potential for a claim, it would be difficult for her to convincingly argue that her surgery was in whole or in part due to the incidents at work. Conversely, if Claimant was not having low back pain until two closely-

timed discrete events at work, immediately after which she suffered unrelenting and progressing pain and disability, it cuts against Defendants' argument that Claimant's work accidents with resulting pain and disability to her low back, even when coupled with documented L4-L5 disc abnormalities, were completely unrelated to those accidents and the relationship between the two was simply coincidental.

20. Claimant testified consistently on the events leading up to Dr. Weber's medical records of May 16, 2016 in her deposition and at hearing. According to Claimant, her calves began hurting her by April 2016 to the point that by the end of the day she could not rest or touch them on any surface. She suspected deep vein thrombosis and went to see Dr. Weber.

21. After Claimant relayed her history, Dr. Weber felt Claimant's condition was likely related to her low back and ordered an MRI. When Dr. Weber suggested Claimant's lower back was the origin for Claimant's calf complaints, Claimant got upset over the possibility of having to undergo another back surgery.

22. Dr. Weber prescribed gabapentin which helped reduce Claimant's calf pain. Claimant did not follow up on Dr. Weber's suggestion to see a neurosurgeon because the gabapentin was relieving Claimant's calf complaints and she was not having other symptoms.

23. Claimant steadfastly denied any low back pain in the months prior to her industrial accidents. She disagreed with the notion that she had complained of low back pain to Dr. Weber in May 2016.

24. The person who could best explain why she wrote her office notes as she did was Dr. Weber herself. During her post-hearing deposition, she testified on this issue.

Dr. Weber Deposition Testimony

25. When asked her recollection of Claimant's May 16, 2016 visit, Dr. Weber recalled that Claimant had unusual complaints about not being able to feel her legs correctly, and that they felt heavy. Dr. Weber further noted that she felt these symptoms sounded like something was going on in Claimant's back, but Claimant told the doctor that she did not have any back pain as such. In spite of that history, Dr. Weber thought "it's got to be coming from somewhere to affect those nerves going down her legs." Weber Depo p. 8.

26. When asked specifically why she stated in her assessment on that visit "low back pain with radiculopathy" even though Claimant testified she did not have low back pain, Dr. Weber testified; "I can't. Because I even reviewed my old handwritten sheet ... she didn't have any back pain; so I don't know why I put it. I really should have just had radiculopathy." Reflecting further, Dr. Weber testified "I think it was a matter of I was thinking 'she has got to have some low back pain,' but she didn't. She was not having it. She was very concerned about her legs at that time." Weber Depo p. 10.

27. Asked about Claimant's concern over surgery as noted in her office notes, Dr. Weber testified;

she mentioned that she had had this surgery, ... like, 15 years before. And I said, "You have made it 15 years on a back surgery?" Because that's kind of unusual. And she said, "I'm just wondering if something is going wrong with that and that's why I'm getting this pain in my legs." *** So anyway, [Claimant] said "I would just hate to have another back surgery." ... "I don't want that."

Id. at 11.

28. Dr. Weber confirmed in her sworn testimony that Claimant's symptoms were "brand new" in spite of the doctor describing Claimant's symptoms as having "returned with

a vengeance.” Dr. Weber stated that she should not have said the symptoms were “returning,” since Claimant had no prior symptoms. Dr. Weber further admitted she had not done a good job with her notes from that visit.

29. As noted previously, Dr. Weber ordered an MRI during the May visit with Claimant. The reading radiologist’s impression contained two enumerated areas of significance. The first was an area of nerve root abutment on the right within the neural foramen and abutting the transitioning right S1 greater than left S1 nerve roots. The second was mild to moderate spinal canal stenosis, particularly at L3-L4 where moderate stenosis was identified, and at T11-T12, where there was significant stenosis due to a disc bulge which effaced the anterior thecal sac and distorted the cord without evidence of signal change. JE A, p. 16.

30. At L4-L5, the radiologist noted a broad-based disc bulge at the lateral aspect of the disk space left greater than right, together with degenerative changes within the posterior facets to include ligamentum flavum hypertrophy and mild to moderate neural foraminal narrowing bilaterally, but this was not significant enough to make the radiologist’s enumerated impressions list. *Id.*

31. Dr. Weber testified she made her note based in part on the disc bulge at L3-4, but even more because of the nerve root abutment at S1, the latter of which could produce pain in Claimant’s calves. Dr. Weber was not concerned about Claimant’s L4-5 level.

32. Dr. Weber was also questioned about her notes from Claimant’s July 25, 2016 visit. Except for the dates of the accidents, the history Claimant described to Dr. Weber correlated with her hearing and deposition testimony. Claimant had initially injured her back

moving a patient, but the pain from that incident was subsiding when she more significantly hurt her back moving a piece of furniture. Claimant presented to Dr. Weber with severe low back pain, which was a new symptom compared to Claimant's last treatment with Dr. Weber. The doctor recalled Claimant was tearful and could hardly walk. Dr. Weber also acknowledged another a mistake in these office notes (besides the accident dates) in that she mentioned a disc herniation at L4-L5 with previous surgical cage when she meant L5-S1.

33. Dr. Weber opined at deposition that Claimant's low back pain and right-sided lower extremity radiculopathy in the fall of 2016 was due to her work accidents, particularly moving the patient. Dr. Weber felt Claimant's previous bilateral lower leg pain was due to abnormalities at S1 and was due to overuse.

34. During cross examination Dr. Weber admitted she knew Claimant outside of the role of physician/patient, and considers her a friend, but the two do not socialize together. Dr. Weber thinks Claimant might have indicated her leg pain in May 2016 was similar to what she experienced before her first back surgery some 15 years prior, although she could not specifically recall if such was the case. Dr. Weber felt Claimant was fortunate to have 15 years without issues since many times fusion patients have recurring symptoms within five years after surgery due to "next level degeneration."

35. When discussing the term "radiculopathy," Dr. Weber stated that she always assumes "that if people have pain in their legs, it's coming from the low back no matter what." She then clarified that it could also be from diabetes. Weber Depo p. 52.

36. Dr. Weber acknowledged Claimant had significant degenerative changes in her back in May 2016, but Claimant's condition drastically deteriorated after the July accidents.

As she put it;

Once we reached that July mark, then it just totally deteriorated to the point where she was dysfunctional -- not able to function at her work duties within the July, August, September time period. And so I guess I feel like the July injury really precipitated a cascade of events. She was set up for it, I think, with the first surgery in 1999, but it hadn't happened.

Id. at 61.

37. Pressing further, Dr. Weber was asked whether she could definitively state that but for the accidents in July 2016 Claimant would not have needed surgery by November. Dr. Weber responded that while she could not definitively say that absolutely the accidents were the cause for Claimant's second back surgery, based on her experience with other people, Claimant's accidents certainly seemed to be the precipitating factor in her need for a second surgery. Dr. Weber testified she had seen "lifting injuries precipitate a lot of different stuff, and it usually is on older injuries or older surgeries." Weber Depo p. 62.

38. Dr. Weber felt the patient moving accident was the real precipitating event, as opposed to lifting the piano bench, mainly because she had seen "so many of these injuries with other nurses here in the hospital." *Id.*

Symptom Onset Conclusion

39. Considering the record, including Dr. Weber's deposition testimony and the testimony of Claimant, the weight of the evidence supports Claimant's claim that her low back was asymptomatic until the patient-lifting event at work on July 12, 2016. Dr. Weber's sloppy and arguably inaccurate notes, disavowed by the doctor herself, do not

overcome the testimony of Claimant on this issue, especially when supported by Dr. Weber's handwritten notes taken at the May 16, 2016 office visit and her deposition testimony. Having read the deposition it appears to the Referee that Dr. Weber was honest and candid in her responses. Her testimony was logical and reasonable. When the entire record is examined, there is no legitimate basis for Defendants' assertion that Dr. Weber let her "hometown" bias color her testimony for a fellow member of the small Soda Springs medical community. Sloppy medical record entries are not unprecedented, and some physicians are more precise than others. Those records, when contradicted by the credible testimony of a claimant and physicians, *and* supported by other evidence of record, may be discounted.⁴

40. Claimant likewise presented at hearing as truthful, candid, and honest. The Referee finds her to be a credible witness. Claimant's testimony was believable in light of the actual work accidents which were witnessed by others and resulted in immediate debilitating pain.

41. Defendants' argument that Claimant was symptomatic with low back pain stemming from degeneration weeks before her first work accident is not supported by the weight of the evidence and is rejected.

⁴ For a sample comparison of cases involving this Referee's treatment of medical records which are at odds with a claimant's testimony, see, e.g. *McCrea v. Idaho Youth Ranch*, IIC 2012-026908 (Dec. 3, 2013), (records from out-of-state doctor discounted where at odds with other evidence); *Wegner v. Coeur d'Alene Power Tools*, IIC 2012-031071 (May 19, 2015), (claimant's testimony at odds with his own medical entries in spite of sloppy medical records); *Leni Hawks v. Kootenai Hospital District*, 2015-016693 (May 25, 2018), (claimant's testimony contradicted by her medical history *and* mechanism of injury).

Causation and TTD Analysis

42. While Claimant was asymptomatic prior to July 12, 2016, and symptomatic thereafter, she still has the obligation to establish by the weight of the evidence that the work accidents in question, or either of them, contributed to her need for surgery in November 2016. Typically, 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. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012).

43. The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000).

44. Both parties hired veteran workers' compensation medical experts to support their respective positions on causation. In addition to the causation opinion of Dr. Weber, set out above, Claimant relies on the opinions of Dr. James Bates, M.D., a physical medicine and rehabilitation physician in Meridian, Idaho. Defendants utilize Lynn Stromberg, M.D., an orthopedic spinal surgeon in Idaho Falls, to provide a causation analysis. Each physician prepared a written report and each was deposed.

Dr. Stromberg

45. As noted previously, Defendants hired Dr. Stromberg to conduct an independent medical examination of Claimant after surgery was suggested. Dr. Stromberg saw Claimant on October 12, 2016 and prepared a report. He was deposed post hearing.

46. Under the heading INTRODUCTION in his written report, Dr. Stromberg

wrote:

[Claimant] reports a series of work-related incidents which have caused her back pain and right radicular pain. Her original event was in May. She reports that she had some discomfort in her back and some parenthesis or mild numbness in the backs of her legs distally bilaterally. She was given some gabapentin and felt that it had resolved. In early July, she was lifting a resident and indicates that she then had additional discomforts after helping to lift a resident of the facility. She had improvement, then exacerbated her condition on 7/25 when she was lifting a piano bench. She was seen by a Nurse Practitioner and given Valium and Oxycodone. *** In the course of these events she had two MRI scans. Original scan was in May. *** Recently she has only had back pain but awoke Monday with pain in the thigh extending into the right lower extremity and was unable to bear weight on the right lower extremity. She reports that she has also undergone nerve conduction study and that the examiner indicated that things weren't as bad as they had anticipated.

JE D, p. 93. Whatever forms Claimant filled out were not included in the exhibits, although the report references a pain diagram and pain disability questionnaire. It is unknown if Claimant filled out a written history or other intake forms.

47. Dr. Stromberg reviewed the medical records, including Dr. Weber's May 16, 2016 entry. He also reviewed the MRI scans and ordered a lumbar x-ray on the day of his exam.

48. Dr. Stromberg noted in his report the images of the October 5, 2016 MRI were read as showing a large L4-L5 lateral disc herniation on the right and a smaller one on the left, which were not present on prior imaging studies. Dr. Stromberg's interpretation of the x-rays taken on the day of his exam included a grade 1 listhesis seen on extension at L3-4 with loss of disk height at L3-4 and L4-5. He also noted an anterior osteophyte formation at L4-5. Dr. Stromberg felt the most notable finding was curvature of Claimant's lumbar spine extending from T11 to L5 with a lateral subluxation to the right of L3 on L4.

49. Dr. Stromberg's impression after his physical examination of Claimant included his opinion the Claimant's complaints of lower leg symptoms in May 2016 did not have an industrial component. Dr. Stromberg felt Claimant's symptoms were ongoing and progressive over a period of weeks prior to her industrial accidents. He noted what he felt were inconsistencies in the record; Claimant at times had bilateral lower extremity complaints, at other times unilateral complaints, and still at other times only components of numbness. He felt Claimant may have been magnifying her symptoms, including at the time of his examination of her.

50. Dr. Stromberg knew Claimant was scheduled for an L5 discectomy but felt such surgery would not provide her with lasting relief of all her symptoms, especially those secondary to stenosis and her spinal instability of L3 on L4. Dr. Stromberg also felt the EMG report and nerve conduction study suggesting a possible L5 radiculopathy were "soft" and did not correlate with Claimant's presentation of symptoms or imaging.

51. Ultimately, and apparently despite Claimant's symptom magnification and inconsistent and shifting complaints, Dr. Stromberg opined Claimant would need a more extensive lumbar surgical procedure than the proposed micro discectomy to decompress and stabilize her lumbar spine. However, as discussed below, he felt Claimant's need for surgery was unrelated to her industrial accidents of July 2016.

52. On the issue of causation, Dr. Stromberg opined that it was "clear that there is no temporal association of the L4-5 herniation with the work injury. The other symptoms are likewise now [sic not?] well associated by temporality, nor is there objective evidence of injury on the radiologic studies at or around the time of the reported incident."

Dr. Stromberg further opined that on a more probable than not basis Claimant's lumbar complaints were directly related to progressive lumbar degeneration degenerative disease. In his opinion, her work incidents "may have subjectively brought the worsening lumbar condition to mind but are not the proximate cause for the need for medical treatment." Dr. Stromberg apportioned 100% of Claimant's need for further medical treatment to her chronic and ongoing degenerative lumbar disease. JE D, p. 97.

53. When asked for his specific diagnosis, Dr. Stromberg indicated Claimant was suffering from "chronic degenerative disease of the lumbar facets yielding instability and stenosis." He further opined that Claimant's onset of symptoms "preceded the cited clinical work incidents." He also believed the "acute herniation of L4-5 is not chronologically related to the cited work incident. On a more probable than not basis, the condition is related to chronic ongoing degenerative condition and not particularly to any industrial event." *Id.*

54. When asked to comment on whether Claimant had documented disability or restrictions prior to the industrial accident, and if so, whether the industrial accident temporarily or permanently aggravated or accelerated those pre-existing conditions, Dr. Stromberg responded by noting Claimant had chronic and ongoing discomfort in her lumbar spine for which she sought medical treatment in May, after her symptoms had advanced over a period of weeks. He did not indicate whether either industrial accident temporarily or permanently aggravated or accelerated this pre-existing condition; instead he simply noted that any work restrictions Claimant may have at the time he saw her would be due to her ongoing degenerative condition.

55. In his deposition, Dr. Stromberg clarified that he was unsure if the sentence in the INTRODUCTION (history) which stated; *She reports that she had some discomfort in her back and some parenthesis or mild numbness in the backs of her legs distally bilaterally*” referred back to May 2016 or if it related to her condition at the time she saw Dr. Stromberg in October. In either event, Dr. Stromberg was under the impression Claimant had a series of work accidents beginning in May 2016 and continuing into July.

56. When discussing the MRIs done in May, September, and October 2016, Dr. Stromberg made it clear the best quality scan was done in May. The two subsequent scans were of inferior quality, making precise diagnoses difficult. Dr. Stromberg clearly found no evidence of an L4-5 disc herniation in the May MRI. Beyond that, he personally could not definitely tell whether there was or was not a herniation at L4-5 shown in either subsequent film. But he did see lateral instability at L3-4 on x-ray, which could not be corrected by the proposed micro discectomy at L4-L5. Dr. Stromberg felt the instability at L3-4 was not caused by trauma, but rather by progressive degeneration.

57. Dr. Stromberg would not sign on to attempts by Defendants to make the case that Claimant developed a disc herniation at L4-5 between the September and October MRIs; he felt the scans were of such poor quality that he could not reach such a conclusion.

58. Dr. Stromberg testified that he could not conclude that the symptoms reported by Claimant “were objectively relatable to the incident in July.” Stromberg Depo p. 21. Instead, he felt that Claimant’s progressive degenerative condition was more probably not caused by any work accident, but such accident(s) “may have simply been an incident in a progression of deterioration that may have made her more mindful of her condition.”

Stromberg Depo p. 22. Dr. Stromberg responded to defense counsel's statement that Claimant had symptomology in May, before her accidents, by noting "[t]he record indicates that she had sought treatment for back and leg pain prior to the cited work incident." *Id.*

59. In cross examination the following colloquy took place;

Q. (Mr. Thompson) **And so do you think it's probable that the work incidents made it (Claimant's progressive degenerative low back condition) progress even faster?**

A. Whether someone has a disc herniation from sneezing or from picking up the newspaper or for [sic; from] jumping off of a scaffold, the disc herniation itself is not generally caused by whatever temporal event that it's associated with, but rather the temporal event is usually a straw that broke the camel's back.

So the disc is degenerative and it tends to develop fissures within the substance of the disc. Those fissures coalesce and a fragment of the disk becomes disassociated from the main body. It then puts an eccentric load on the containing structures on the outside, and then that outer containment can be breached, and that's how a disc herniation develops.

It's not uncommon for people to come and tell me that they've been going to the chiropractor for several months and then one day they sneezed and they have a disc herniation and a couple days later they got this horrible pain going down their leg.

And I've had people come tell me that they went to visit with the chiropractor, he moved them just so and they felt something give, and two days later they're just miserable. So it wasn't necessarily the chiropractor caused a disc herniation. It was just stresses that eventually the disc wall couldn't handle, and the herniation developed.

Q. **So do you think that her July incidents were the straw that broke the camel's back?**

A. Yeah, possibly.

Stromberg Depo pp. 38, 39.

Dr. Bates

60. In anticipation of hearing, Claimant hired Dr. Bates to conduct an independent medical examination and prepare a report for Claimant. Dr. Bates saw Claimant on July 9, 2018 and prepared a report. He was deposed post hearing.

61. By the time of his examination, Dr. Bates had the luxury of having all medical records, including Dr. Stromberg's report and Claimant's November 2016 surgical records, available to him for review. He was able to track Claimant's recovery from the surgery to the date of his examination. Dr. Bates took a detailed history from Claimant and conducted a physical examination.

62. Dr. Bates opined in his report that Claimant's need for surgery in November 2016 was due to the lifting injury on July 25, 2016. Dr. Bates' rationale for his opinion included the fact that while Claimant had undergone a laminectomy and fusion surgery at L5-S1 in 1999, she did well following that surgery until May of 2016 when she reported having some issues in her legs. She did not report any specific back pain at that time. An MRI was ordered which showed, among other things, an area of nerve root abutment within the neural foramen and abutting the transitioning S1 nerve root, greater on right than left. Claimant's symptoms in May 2016 were consistent with the S1 nerve root compromise or irritation. Dr. Bates opined that this condition was different than what Claimant experienced after her July 25, 2016 work accident, which ultimately led to Claimant's low back surgery in November.

63. Dr. Bates felt the work accident of July 12, 2016, was simply a lumbar strain which resolved. However, the accident of July 25, 2016, was a new occurrence - a right L4

radiculopathy. From the time of this accident Claimant consistently reported back pain and right leg pain and weakness. Her symptoms and findings on physical examination were all in the right L4 distribution. The MRIs obtained after the July 25 injury showed compromise of the right L4-5 foramen with right foraminal stenosis greater than left following the injury as compared to the MRI taken prior to the July 25, 2016 accident, which had no such findings.

64. Dr. Bates further noted that Claimant was doing well post surgery for those symptoms associated with the right L4 distribution. Dr. Bates pointed out that Claimant had recently begun treatment, including epidural injections, to address chronic back and extremity problems associated with her residual S1 radiculopathy. As a result, Dr. Bates felt there was “plenty of evidence” that Claimant had two separate conditions in her back rather than simply a progression of her old condition.

65. In his deposition, Dr. Bates pointed out that the MRI taken in May 2016 showed a possible compromise at the S1 nerve root, which was consistent with Claimant’s bilateral calf complaints at that time. That same MRI did not show significant L4-L5 issues other than some fairly mild degenerative changes, left side greater than right side. However, after July 2016 Claimant’s pain became right sided and involved the front of Claimant’s leg. These complaints were consistent with a different level of Claimant’s spine than her previous complaints. An MRI taken after the July 25 incident showed changes at L4-5 affecting Claimant’s right side more than left side. These MRI findings were consistent with Claimant’s new complaints. A subsequent MRI showed progressive bulging of the L4-5 disc, which Dr. Bates found was not surprising.

66. During cross-examination Dr. Bates acknowledged the fact that Claimant had degenerative changes at several levels in her lumbar spine as noted in the May 2016 MRI. Dr. Bates felt this was typical for many people over age 50.

67. Dr. Bates also acknowledged that Claimant experienced a marked increase in pain complaints between September and October 2016, and the MRI taken in October shows the L4-L5 disc had progressed from a bulge to a herniation compressing the L4 nerve root on the right. Despite this finding, Dr. Bates felt that on a more likely than not basis the July 25, 2016 injury caused Claimant's L4-5 disc injury. Dr. Bates reiterated that his opinion was supported by the fact the MRI taken after the accident showed changes at L4-5 which were not present at the time of her May 2016 MRI. He acknowledged Claimant's disc protrusion progressed thereafter but testified that disc injuries can progress in severity. Dr. Bates felt Claimant's condition was a reasonable progression of an injury occasioned by her July 25 work accident.

68. Dr. Bates rejected the idea that Claimant's condition at the time of surgery was simply a progression from her May 2016 condition as seen on the MRI at that time. He testified the MRI in May was very nonspecific and it showed changes on Claimant's left side greater than right at L4-L5.

Defendants' Expert Opinion Position

69. Defendants begin their argument on the medical opinions by discussing the fact that there is a potential for bias among all experts - in general, and in this case specifically. While their arguments are certainly true in a general sense, in the present case there did not appear to this Referee to be overt signs of bias by any of the experts such that their opinions should

be excluded, or even discounted. In fact, in this case each of the experts supported their opinions with reasonable, sound rationale. There was no obvious overreaching, or experts appearing to “go out on a limb” to support the party who hired them (or in the case of Dr. Weber, to support her patient and acquaintance).

70. Defendants also argue that Dr. Weber is the least qualified to express an opinion in this matter, as she is neither a physical medical specialist nor a surgeon. They argue she lacks the credentials of Drs. Bates and Stromberg when it comes to spinal issues. Additionally, her opinion conflicts with Dr. Bates to the extent that Dr. Weber thinks Claimant’s first accident, moving the patient, was the cause of Claimant’s need for surgery, where Dr. Bates feels the first accident was a nonevent. Instead he opined it was lifting the piano bench which permanently aggravated Claimant’s lower back, leading to surgery.

71. Left with the conflicting opinions of Drs. Bates and Stromberg, Defendants naturally argue that Dr. Stromberg’s opinions carry the most weight. They are critical of Dr. Bates’ examination timing, coming two years after Claimant’s surgery. It was not “contemporaneous” with Claimant’s complaints and treatment. Furthermore, Claimant had to travel all the way from Soda Springs to Meridian for the appointment, evidence of his “hired gun” status. Dr. Bates did not look at the MRI films, but instead relied on radiologists’ reports. He is not a surgeon.

72. Defendants argue that Dr. Bates’ opinion relies upon Claimant’s history which was inconsistent with contemporaneous medical records. They point to the fact that Dr. Bates listed as the basis for his causation opinion the “fact” that Claimant had an abrupt onset of pain on July 25, 2016, which was different than her previous complaints and did not resolve, even though Dr. Weber’s July 25, 2016 office notes do not mention an abrupt onset of right leg

pain or even mention an accident occurring on that date.

73. Additionally, Dr. Bates acknowledged Claimant had a dramatic increase in her symptoms between September and October 2016 and the October MRI was the first to show a disc herniation compressing the L4 nerve root. Defendants argue this scenario makes it difficult to attribute Claimant's need for surgery on an accident which occurred more than two months prior to the herniation. Dr. Bates' only explanation for this inconsistency was to note that sometimes disc injuries progress from bulging to herniated, a position not shared by Dr. Stromberg.

74. Defendants argue Dr. Stromberg, a spinal surgeon, had the most persuasive opinions in this case. Dr. Stromberg saw Claimant during the course of her treatment. He actually read the MRI films. It was he who determined Claimant needed a more invasive surgery than that which was proposed initially. Dr. Stromberg ordered x-rays. It was Dr. Stromberg who determined the MRI quality of the September and October films was insufficient to make a definitive diagnosis. It was Dr. Stromberg who counseled Claimant regarding her treatment options.

75. Dr. Stromberg determined Claimant had structural instability in her spine and had disc herniation at L4-5, but he found no causal connection between the industrial accidents and Claimant's degenerative spinal instability. Claimant's work accidents in July of 2016 did not cause her condition but simply made her "more mindful" of her degenerating spine. Whatever discomfort Claimant may have felt as a result of these work accidents was temporary and there was no permanent aggravation to her spine resulting therefrom.

Claimant's Expert Opinion Position

76. Claimant argues that Dr. Stromberg was not provided with all the medical records

related to the course of Claimant's low back treatment. Dr. Stromberg was not even convinced Claimant had a herniated disc at L4-L5 on the date he examined her, but rather cited his opinion on Claimant's need for surgery as being L3-4 instability. The surgical records establish the fact that Claimant had a substantial right sided disc herniation at L4-5 at the time of surgery.

Expert Opinion Analysis

77. Defendants' argument that Dr. Weber's opinion should be given the least weight is correct, but for reasons other than those provided. In reviewing her medical records and deposition testimony the record is not clear that Dr. Weber had a good grasp of Claimant's history. Her medical records are repeatedly inaccurate and sloppy and her deposition testimony on the sequence and significance of Claimant's work accidents is likewise suspect. However, her opinion on causation is not without merit in that the doctor has seen in her practice several instances where healthcare professionals have injured their backs while moving patients. As such, her opinion that Claimant's injury while moving a patient set in motion the events leading to Claimant's surgery is not unreasonable.

78. Importantly, for the sake of this analysis the Referee does not have to make a determinative finding on which of the two accidents in July 2016 caused Claimant's condition; it is sufficient to find that one or more of those accidents permanently aggravated Claimant's low back condition to the point where one or both accidents accelerated Claimant's need for surgery.

79. Dr. Stromberg was candid in his deposition testimony. He repeatedly indicated that the September and October MRI films were of such poor quality that he could not definitively diagnose a disc herniation at L4-5. However, he did testify that the May 2016 MRI was of good quality and did not show a disc herniation at that time. Dr. Stromberg did not testify that Claimant

suffered a disc herniation between the September and October 2016 MRIs. In fact, even in October Dr. Stromberg could not tell, based on the poor quality of the MRI films, whether Claimant had a disc herniation at that time.

80. Defendants are left with the fact that in May 2016 Claimant did not have a herniation at L4-5, or even any significant right sided bulge. Changes at that level were primarily on Claimant's left side and were not particularly significant. In May 2016 the MRI findings at L5-S1 and L3-L4 (and T11-12) were more significant. Beyond that time the record is not clear when Claimant's L4-5 disc herniated. Defendants suggest it was in September 2016, but they receive little support for this proposition from Dr. Stromberg. At most he testified acutely herniated discs tend to exert their maximum pain within a few days of the event and do not continue to progress thereafter. Dr. Bates opined that sometimes ruptured discs do progress and sometimes they do not.

81. Dr. Stromberg admitted in his deposition the July 25, 2016 accident may have been "the straw that broke the camel's back" with regard to Claimant's need for surgery.

82. When the entirety of the record is considered, the opinions of Dr. Bates are afforded the greater weight. His opinions are more consistent with the evidence of symptom onset and the evidence in the record that Claimant experienced a new injury in July 2016, as opposed to a progression of ongoing symptomatology which pre-dated her work accidents.

83. While the record as a whole supports the notion that Claimant had degenerative processes ongoing in her spine and that given her previous fusion surgery in 1999 she was at some point more likely than not destined for additional lumbar surgery, the record also supports a finding that Claimant's work injuries in July 2016 permanently aggravated her degenerative low back condition to the point surgery became necessary by November 2016. There is little evidence

to support the idea that but for the work accidents Claimant would have needed low back surgery in November 2016 due to the natural progression of her degenerative low back condition.

Causation Findings

84. Based upon a totality of the evidence, Claimant has proven her low back condition culminating in the need for surgery by November 14, 2016 was causally related to one or more of her work accidents occurring in July 2016, which permanently aggravated her pre-existing degenerative spinal condition.

Total Temporary Disability Findings

85. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on Claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability.

86. Claimant testified she ceased working due to her back on either October 12 or October 13, 2016. After her surgery she was released to return to work on January 26, 2017. By February 23, 2017 she had returned to work for a new employer, Bear Lake Memorial Hospital.

87. In their briefing, Defendants acknowledge if they are responsible for the surgery then they are likewise responsible for Claimant’s temporary disability benefits during her period of recovery. Defendants have no quarrel with the timeline for benefits set forth herein.

88. Claimant has established her right to total temporary disability benefits from October 12, 2016 through January 26, 2017.

Attorney Fee Analysis

89. The final issue is Claimant’s entitlement to attorney fees pursuant to

Idaho Code § 72-804. Claimant has proven her entitlement to medical and temporary disability benefits relating to her July 2016 industrial accidents. However, attorney fees are not granted 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:

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 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).

90. Claimant asserts Defendants acted unreasonably in failing to explore the legal theory of an aggravation or acceleration of a pre-existing condition with Dr. Stromberg at the time of his independent medical examination in October 2016.

91. It is clear from the record that Defendants, in denying Claimant additional medical benefits, relied on medical records from treating physician Weber, which reasonably could be read to suggest Claimant was experiencing low back pain weeks prior to her industrial accident, coupled with the opinions of Dr. Stromberg that Claimant's condition was wholly preexisting. The Referee finds that Defendants' reliance on medical records from a treating physician coupled with a reasonable opinion from their medical doctor is sufficient to shield

Defendants from a demand for attorney fees. Claimant cites to no cases which stand for the proposition that Defendants' failure to ask their independent medical doctor to explore every potential legal theory of recovery constitutes unreasonable behavior.

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

CONCLUSIONS OF LAW

1. Claimant has proven by a preponderance of the evidence her low back condition culminating in the need for surgery by November 14, 2016 was causally related to one or more of her work accidents occurring in July 2016, which permanently aggravated her pre-existing degenerative spinal condition.

2. Claimant has proven by a preponderance of the evidence her entitlement to total temporary disability benefits from October 12, 2016 through January 26, 2017.

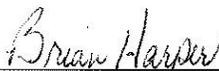
3. Claimant has failed to prove by a preponderance of the evidence her entitlement to attorney fees under Idaho Code § 72-804.

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 28th day of April, 2020.

INDUSTRIAL COMMISSION



Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission upon each of the following:

DARIN MONROE
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W SCOTT WIGLE
swigle@bowen-bailey.com

Jennifer S. Komperud

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUDI DAVIS,

Claimant,

v.

EDGEWOOD SPRING CREEK SODA
SPRINGS, LLC, d/b/a EDGEWOOD VISTA,

Employer,

and

TRAVELERS PROPERTY & CASUALTY
COMPANY OF AMERICA,

Surety,

Defendants.

IC 2016-020326
IC 2017-001300

ORDER

Filed May 28, 2020

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 conclusion 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 conclusion 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 low back condition culminating in the need for surgery by November 14, 2016 was causally related to one or more

of her work accidents occurring in July 2016, which permanently aggravated her pre-existing degenerative spinal condition.

2. Claimant has proven by a preponderance of the evidence her entitlement to total temporary disability benefits from October 12, 2016 through January 26, 2017.

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

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

DATED this the 28th day of May, 2020.

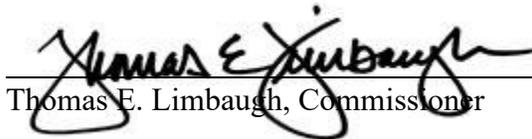
INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman



Aaron White, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2020, a true and correct copy of the foregoing **ORDER** was served by email transmission upon each of the following:

DARIN MONROE
dmonroe@monroelawoffice.com

W SCOTT WIGLE
swigle@bowen-bailey.com

Emma O. Landers

jsk