

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUSAN DRAPER,

Claimant,

v.

MINIDOKA COUNTY SCHOOL DISTRICT #331,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2015-032256

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

Issued 4/6/18

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 Twin Falls, Idaho, on July 18, 2017. Claimant was represented by Dennis Petersen, of Idaho Falls. Dean Dalling, of Rexburg, represented Minidoka County School District #331 (“Employer”), and Idaho State Insurance Fund (“Surety”), Defendants. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties briefed the issues. The matter came under advisement on January 31, 2018.

ISSUES

The issues to be decided are:

1. Whether Claimant’s low back condition for which she seeks additional treatment, including surgery, is causally related to her industrial accident of December 2, 2015;

2. Whether and to what extent Claimant is entitled to future medical care for her low back, including surgery, together with temporary total disability and/or temporary partial disability benefits during her period of recovery; and

3. Whether Claimant is entitled to a change of physician to Dr. Benjamin Blair.

All remaining issues not litigated at this time are reserved.

CONTENTIONS OF THE PARTIES

Claimant argues she injured her left shoulder and low back while pushing in bleachers as part of her duties for Employer. While the shoulder injury was accepted and is not a part of this hearing, Defendants wrongfully denied Claimant a lumbar fusion surgery as recommended by Dr. Benjamin Blair. Claimant seeks the surgery and temporary disability benefits while in a period of recovery, and would like to have Dr. Blair designated as her treating physician henceforth.

Defendants dispute the assertion that Claimant needs low back surgery at this time, but if and when such surgery is indicated, the precipitating factor for such surgery will be Claimant's pre-existing degenerative disc disease. The accident in question temporarily aggravated her low back condition, but did not permanently aggravate it. As such, Defendants have no obligation to pay for Claimant's medical care, including low back surgery. She is not entitled to temporary disability benefits associated with her low back and is not entitled to a change of physicians to Dr. Blair.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;
2. Joint Exhibits (JE) A through AA, admitted at hearing;
3. The post-hearing deposition transcript of Benjamin Blair, M.D.,

taken on September 11, 2017, and the post-hearing deposition transcript of Keith Holley, M.D., taken on November 1, 2017.

FINDINGS OF FACT

Relevant Pre-Accident Medical History

1. In 1990, when Claimant was thirty years old, she somehow injured her low back – etiology unknown. Claimant eventually saw Peter Reedy, M.D., a neurosurgeon, for surgical consultation. Claimant was experiencing radiating pain through her right buttock to her right foot. The sole medical record from this time frame indicates that Claimant had a herniated disc at L5-S1 and a “partial disc” at L4-5. JE E, p. 9. Claimant testified that between 1990 and 1995, she underwent three low-back surgeries; the last being what she recalled was a fusion at L4-5¹.

2. Medical records from Cody Liljenquist, DC, show Claimant treated periodically from January 1997 until October 2015 for a host of complaints, including all areas of her spine. Fifty-four separate date entries show Claimant sought treatment from her ankle to her wrist, and her cervical spine to her sacroiliac. However, low back, SI, and/or hip pain complaints figure dominantly in Dr. Liljenquist’s notes from mid-2005 onward.

3. Claimant testified she saw Dr. Liljenquist whenever her back got out of alignment from random activities.

4. In 2013, Claimant was diagnosed with rheumatoid arthritis, which appears from medical records to be associated at that time with Claimant’s upper extremities.

¹ Although Claimant testified the fusion was at L4-5, a subsequent x-ray in June 2015 listed a pedicle screw fixation at L5-S1, which corresponds with the prior medical record noting a herniated disc at L5-S1, and only a partially herniated disc at L4-5.

5. On June 17, 2015 Claimant was seen by rheumatologist Akavaram Reddy, M.D., in Twin Falls. Claimant was complaining of pain in her lower back, shoulders, and hands. Dr. Reddy's notes indicate that Claimant "has been having low back pain for quite a while." JE N, p. 148. Lumbosacral imaging was interpreted by the radiologist as showing moderately severe degenerative changes of Claimant's lower lumbar spine, and a "first-degree spondylolisthesis of L3 on L4." JE N, p. 156.

6. After reviewing the diagnostic films, Dr. Reddy diagnosed degenerative disc disease of the lumbar spine with no evidence of spondyloarthropathy.

7. At hearing, Claimant testified she told Dr. Reddy that she was not sure if her pain was in her low back or in her hip. She demonstrated her area of pain as right and left of center with pain down her upper leg. Her right side hurt worse than her left. She claimed at hearing that she was having no low back pain when she first saw Dr. Reddy. She also testified that Dr. Reddy gave her injections in both her left and right hips on her June 25, 2015 visit, which, together with the Aleve he prescribed that day, relieved the pain in her hips.

8. In his office records of June 25, 2015, Dr. Reddy noted Claimant was complaining of pain and catching in her left hip. He determined she had no sacroiliitis. His records indicate he prescribed Aleve, but are devoid of any mention of bilateral hip injections during that visit. No further records from Dr. Reddy were introduced into the record.

Accident and Post-Accident Medical Care

9. Claimant began working for Employer in the custodial department at Minico High School in February 2012. At the time of her industrial accident, Claimant was a head custodian with eight custodians working under her. While her job was primarily supervisory, she testified she helps out with manual tasks when and where needed. Her job

is basically light duty level.

10. On December 2, 2015, Claimant and a co-worker were pushing in bleachers as part of their employment with Employer when the apparatus used to push them gave way, pulling Claimant toward the bleachers. She hit her left shoulder and left hip before falling and landing on her back. Claimant initially felt pain in her left shoulder.

11. Shortly thereafter Claimant presented at Minidoka Memorial ER, still complaining exclusively of left shoulder pain. Claimant was diagnosed with a left shoulder contusion, given a Toradol shot, and prescribed Ultram. She was then discharged.

12. Five days later Claimant saw Cameron McHan, NP. At that time, Claimant complained of pain in her low back and left shoulder. The record indicates Claimant's throbbing low back pain was most prominent in her lower lumbar spine into her left posterior thigh. Claimant's walking was slow and stooped with a left leg limp. She complained of pain with back flexion, extension, and lateral flexion. X-rays taken that day showed degenerative disc disease in her lower lumbar spine with associated facet degeneration. Grade 1 spondylolisthesis of L3 and L4 noted. No spondylolysis (stress fracture) seen. Endplate sclerosis and osteophytes most pronounced at L4-5 and L5-S1; less pronounced at L3-4.

13. Claimant treated with Bryce Millar, M.D., for her shoulder injury. His notes contain references to Claimant's complaint of ongoing low back pain, but he did not treat her for that condition.

14. Claimant came under the care of David Verst, M.D., an orthopedic surgeon, for her back issues. At her initial visit on February 1, 2016, Claimant complained of

worsening, intermittent left-sided low back and left lower extremity pain which she rated as severe. Claimant was working at the time.

15. An MRI showed L3-4 lateral recess stenosis, herniated nucleus pulposus, and spondylolisthesis, grade 1. Dr. Verst tried epidural injections and physical therapy without success in alleviating Claimant's complaints. He recommended an L3-4 laminectomy and fusion due to Claimant's spondylolisthesis, instability, and severe spinal stenosis. Dr. Verst initially related Claimant's need for surgery to her industrial accident.

16. Surety scheduled Claimant for an IME with Keith Holley, M.D., an orthopedic surgeon from Nampa, on May 20, 2016. He diagnosed a lumbar strain related to Claimant's work accident, together with non-related pre-existing lumbar spondylosis with degenerative disc disease and facet arthropathy, and L5-S1 arthrodesis. Dr. Holley felt Claimant was not at MMI with regard to her back, and could benefit from a course of core strengthening physical therapy, and anti-inflammatories, muscle relaxers, and pain relievers. He also felt Claimant should enter a smoking cessation program. Dr. Holley did not see a spondylolisthesis in the MRI he reviewed. He felt that, if in the future Claimant reached a point where she needed surgery, it would be due to her pre-existing degenerative disc disease and not her industrial accident.

17. In a letter dated June 16, 2016 addressed to Surety, Dr. Verst disagreed with Dr. Holley's opinions on causation. While both doctors believed Claimant had sustained low back injury during her industrial accident, Dr. Verst indicated the MRI showed lateral recess compression upon the L4 nerve roots. He also pointed out x-rays clearly showed

the spondylolisthesis, with 25% translation at the L3-4 level.² Dr. Verst confirmed he had previously recommended Claimant undergo surgery to stabilize the L3-4 instability-spondylolisthesis.

18. Dr. Verst agreed with Dr. Holley that Claimant would benefit from smoking cessation and “revisiting physical therapy focusing on lumbar core stabilization, strengthening, and stretching in hopes of resolving [her] low back pain” prior to considering surgery. JE P, p. 234.

19. Claimant returned to physical therapy on June 24, 2016 with Surety authorization. She continued with physical therapy until early August. She was working light duty during this time. By her last p/t visit she was complaining of bilateral gluteal and lower back pain at a level of 8/10.

20. Claimant sought out an IME with Benjamin Blair, M.D., a Pocatello orthopedic surgeon, on July 5, 2016. On that day Claimant was experiencing pain in her right and left lower extremities, left far greater than right.³

21. Dr. Blair’s notes acknowledge Claimant’s three past lumbar surgeries, but indicate Claimant had “minimal, if any, symptomatology since the time of [Claimant’s past] surger[ies].” Dr. Blair characterized Claimant’s chiropractic treatment as being for “mid-thoracic pain; however, again, she has had no lumbar spine pain until this particular injury.” JE T p. 301. Dr. Blair felt it was noteworthy that Claimant was able to perform her full work duties without restrictions after her previous spine surgeries and before

² It appears Dr. Holley had only the MRI from February 10, 2016 to review at the time of his examination, although he did have the x-ray report from December 7, 2015.

³ Claimant testified at hearing that her pain would sometimes be on the right, sometimes on the left, sometimes both sides. By the time of hearing she felt that during 2016 her right side pain was most severe, although the records seem to indicate she complained of left side pain more frequently. In any event, there is no dispute that Claimant’s pain would shift from right to left gluteal areas with pain extending down the corresponding leg to at least knee level.

the accident in question.⁴ Apparently by the time of this appointment Claimant had quit smoking, as Dr. Blair's notes indicate Claimant did not smoke.

22. Dr. Blair diagnosed pre-existing spondylolisthesis with secondary L3-4 stenosis, aggravated by the industrial accident in question.

23. Dr. Blair felt that Claimant had by the time of his examination exhausted all non-operative treatment options, and surgery in the form of a lumbar laminectomy and fusion at L3-4 was reasonable and necessary. He felt the need for surgery was 100% related to Claimant's industrial accident, due to his position that Claimant's low back was asymptomatic prior to her work accident. While he acknowledged Claimant had pre-existing degenerative changes, Dr. Blair opined the accident caused Claimant's previously asymptomatic conditions to become symptomatic. Since Claimant's degeneration and stenosis was at her L3-4 level, two levels above her past fusion surgery at L5-S1, Dr. Blair felt Claimant's previous surgeries would not have caused or contributed to Claimant's current condition.

24. Dr. Blair imposed temporary restrictions of no lifting greater than 20 pounds occasionally, 10 pounds frequently, with no repetitive bending or twisting. Interestingly, he also found Claimant was at MMI, in spite of recommending surgery.

25. On December 7, 2016, Dr. Verst responded by letter to an inquiry from Surety. Therein, Dr. Verst indicated he had reviewed previously unseen medical records (provided to him by Surety) apparently from Dr. Reddy. In the letter, Dr. Verst stated that he was previously unaware that Dr. Reddy had treated Claimant for rheumatoid arthritis, with associated polyarticular arthrosis. Dr. Verst now believed

⁴ Claimant continued to do her regular job duties even after the industrial accident in question, as she was primarily in a supervisory position, as discussed above.

that Claimant's low back pain stemming from her spondylolisthesis at L3-4, "is related to underlying spondyloarthropathy as it relates to [Claimant's] rheumatoid arthritis." Dr. Verst further suspected pushing the bleachers aggravated Claimant's arthritic low back condition, but did not cause instability. He felt Claimant's "presenting symptoms along with imaging findings suggest a progression of [her] underlying rheumatoid disease." JE P p. 239.

26. Claimant returned to Dr. Blair on February 6, 2017. Claimant was not interested in surgery at that time, and wanted the doctor to lift her work restrictions so she could return to unrestricted work duties. Dr. Blair felt Claimant was functioning at a high level, so he agreed to release Claimant without restrictions on a trial basis.

27. On June 1, 2017, Dr. Holley authored a letter to Surety after reviewing additional medical records including, but not limited to, Dr. Verst's June 16, 2016 opinion letter and December 7, 2016 "change of opinion" letter, and Dr. Blair's records. Based on the review performed Dr. Holley set out certain clarifications and observations. First, he felt the records confirmed and reinforced his diagnosis of chronic degenerative low back condition and pain, and the fact that Dr. Reddy treated Claimant for inflammatory arthropathy and rheumatoid arthritis prior to the industrial accident provided "additional etiology for the development of the degenerative condition." He reiterated his opinion that Claimant's low back condition pre-existed and was not related to her industrial accident. JE S p. 295.⁵

⁵ While not directly relevant to the issues in play currently, Dr. Holley also reaffirmed his opinion that Claimant's left shoulder, and the need for further medical treatment including surgery on it, was causally related to Claimant's industrial accident, as a permanent aggravation of a pre-existing but asymptomatic degenerative condition.

28. Claimant testified she sought the full-duty release because they were short-handed at work and she felt bad because she could not help out more. She further testified that she was not interested in surgery in February because she had been taking Aleve which she was told was a blood thinner. She wanted to hold off surgery until she had cut back on the Aleve. She was at the time of hearing (July) having pain exclusively in her right buttock and down her right leg to her lower calf. She testified that she desired surgery with Dr. Blair, as she had reduced her Aleve dosage.

DISCUSSION AND FURTHER FINDINGS

29. Claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery on her claims. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934, (1993). Claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). To prove that a causal relationship is medically probable requires Claimant to demonstrate that there is more medical evidence for the proposition than against it. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). The Industrial Commission, as the factfinder, determines the weight to be given to the testimony of a medical expert. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

30. The pivotal issue for resolution is whether Claimant's low back condition for which she seeks additional treatment, including surgery, is causally related to her industrial accident of December 2, 2015. The parties rely on competing medical expert analysis and opinions to support their respective positions.

Expert Witness Testimony

Dr. Blair

31. As previously noted, Claimant hired Dr. Blair to conduct an IME on her specifically regarding her low back complaints. As part of his assignment, Dr. Blair reviewed records, examined Claimant, and formulated opinions on issues related to her low back condition. Post-hearing Dr. Blair was deposed.

32. When Claimant first saw Dr. Blair, she complained of left-sided buttock and leg pain. As part of his examination, Dr. Blair reviewed the February 2016 MRI. At deposition, he stated that he saw a spondylolisthesis and spinal stenosis at L3-4. He attributed these changes to degenerative changes, not any specific event.

33. Dr. Blair diagnosed a permanent aggravation of the “pre-existing asymptomatic spinal stenosis and spondylolisthesis at L3-4.” His diagnosis was based on Claimant’s history to him, as he could not tell by looking at the MRI what had caused her condition to become more symptomatic. His recommendations were either laminectomy and fusion surgery at L3-4, or “living with it.” Blair Depo. pp. 10, 11.

34. At deposition, Dr. Blair confirmed his belief that the proposed surgery should be apportioned 100% to Claimant’s industrial injury, since he felt that but for the accident Claimant would not ever need to undergo surgery for her pre-existing conditions. His rationale for that belief is that “the vast majority of patients with spondylolisthesis and stenosis do not end up with surgical treatment.” Blair Depo. p. 12. Dr. Blair clarified that the reason for surgery would be Claimant’s stenosis which places pressure on the nerves.

35. Dr. Blair argued the diagnosis of rheumatic disease had nothing to do with Claimant's low back. Dr. Blair noted Claimant was being treated by Dr. Reddy (who diagnosed the rheumatic disease) for

arthralgias ... aches and pains throughout her joints... she states that she had some back pain there, but she had told me she had seen a chiropractor a number of times, so that was consistent with ongoing symptoms and having had a fusion previously.

Blair Depo. p. 14. Additionally, Dr. Blair testified that rheumatoid arthritis rarely affects the low back.

36. In spite of Dr. Blair's acknowledgment cited above, records indicating that Claimant periodically saw a chiropractor for low back issues, and her complaints of chronic low back pain to Dr. Reddy, Dr. Blair put in his July 5, 2016 report that Claimant had been asymptomatic since her third low back surgery in 1995. Therein, he wrote that Claimant "has had minimal, if any, symptomatology since the time of surgery. She has undergone occasional chiropractic treatment for mid-thoracic pain; however, again, she has had no lumbar spine pain until this particular injury." JE T, p. 301. In direct examination at his deposition, he again stated Claimant was asymptomatic until the work accident in question and that the need for surgery was to address previously asymptomatic lumbar spinal stenosis.⁶

37. Dr. Blair acknowledged that when he next saw Claimant in February 2017, she did not want surgery. His notes do not list a reason why, but Claimant testified it was because she was taking Aleve which thinned her blood. Dr. Blair indicated that people on Aleve have to stop taking the medication for just 5 to 9 days prior to surgery.

⁶ During cross examination, Dr. Blair admitted he was unaware that Claimant had experienced recurrent buttocks pain prior to the accident.

38. In cross examination, Dr. Blair appeared to modify his findings and conclusions. Therein he testified for the first time that before the accident, Claimant had “typical low back symptoms” which after the accident became “severe, continuous, radiating into her buttocks and her legs.” He then argued that it was the more constant and prolonged nature of her complaints post accident which led to his opinion that Claimant suffered a permanent aggravation of pre-existing low back stenosis in the accident. Blair Depo. p. 36.

39. Under cross examination, Dr. Blair opined that one can have chronic episodic issues and still be asymptomatic. He argued that when he used the term asymptomatic he meant “directly around the time” of his examination. Blair Depo. pp. 27, 28. He further testified that if Claimant had no medical treatment for her low back in the month or two prior to his examination, he would consider her to be asymptomatic.

40. Dr. Blair admitted that the last time he saw Claimant in February 2017,

surgery wasn't a reasonable option because she was doing well enough that she didn't want to, so it would be up to her if after sitting down and talking to her how much at this time affects her life. It's a quality of life the issue of surgery, so it's a patient's choice. If it affects her health, then yes.

Blair Depo. p. 35. He stated he would want to see her and get an MRI, and perhaps try injections prior to deciding on surgery should he become her treater.

Dr. Holley

41. As previously noted, Defendants retained Dr. Holley to review records, examine Claimant, and (in part) render opinions on issues related to her low back condition. Post-hearing Dr. Holley was also deposed.

42. In his deposition, Dr. Holley was asked about Claimant's more recent testimony that her pain was almost exclusively in her right buttock and leg, but previously had been more prominent in her left buttock and left leg. Dr. Holley explained that in his view her shifting pain locus would be unlikely if the cause of her pain was an injury, but is "more consistent with a chronic degenerative condition that waxes and wanes and can cause intermittent inflammation and flare up of pain due to irritation of the nerve roots on either side." Holley Depo. pp. 11, 12. He further noted that herniated discs tend to occur on one side or the other and affect only one side or the other, and "they don't move around." Holley Depo. p. 11.

43. Dr. Holley confirmed his diagnosis that Claimant had strained her low back, aggravating the muscles during her industrial accident. Her low back strain was a temporary condition which did not injure the vertebrae, cause any spine damage, or spinal instability. Claimant's obvious degenerative changes to her discs and vertebrae as noted on MRI were pre-existing and related to the normal aging process coupled with Claimant's prior L5-S1 fusion. Dr. Holley saw no evidence of acute or traumatic damage in the MRI.

44. Dr. Holley had diagnosed multi-level spondylosis, which he defined as "degenerative changes." He did not see evidence of a spondylolisthesis on the MRI he reviewed. He defined spondylolisthesis as "slippage of one vertebrae [sic] relative to another." *Id.* at 14. Dr. Holley was aware other doctors had diagnosed Claimant as having a spondylolisthesis.

45. Spondylolisthesis can be degenerative, developmental, or traumatic, as per Dr. Holley. However, he noted that typically a traumatic spondylolisthesis requires a fracture of some bony vertebral elements, and is less common. Dr. Holley pointed out

that even the doctors who found a spondylolisthesis felt it was low grade, thus suggesting it was degenerative in nature. Dr. Holley found no evidence of a fracture in Claimant's lumbar spine. He opined that whether Claimant's condition was spondylosis at L3-4 or a grade one spondylolisthesis would be subtle, but "[e]ither way it's a degenerative condition...not caused by her occupational injury." *Id.* at 45, 46.

46. Dr. Holley restated his position that surgery was not currently indicated for Claimant's lumbar condition. He testified that surgery is indicated when a patient has a radicular condition with compressed nerve roots that either do not respond to conservative treatment, or do result in neurologic compromise and have a corresponding lesion which could be surgically decompressed. Claimant had no such lesion. Dr. Holley also felt if Claimant still smoked she would "not [be] a great surgical candidate." Holley Depo. pp. 18, 19. Since Dr. Holley did not see a spondylolisthesis at L3-4, he obviously felt surgery to correct that condition was not appropriate.⁷ Finally, Claimant's rheumatoid arthritis was a concern, as it could, in Dr. Holley's opinion, make surgery even less likely to alleviate her symptoms.

47. Dr. Holley agreed with Dr. Verst's revised opinion that while Claimant's industrial accident aggravated her arthritic low back condition it did not cause instability. He disagreed with Dr. Blair's opinion that Claimant's industrial accident permanently aggravated her pre-existing degenerative disc disease. Dr. Holley felt that Claimant needed no further medical treatment to her low back as a result of her December 2, 2015 work accident.

⁷ Dr. Blair also testified that Claimant's surgery would not be to "fix" the spondylolisthesis, but rather the stenosis associated with the slippage.

48. In cross examination, Dr. Holley conceded that Dr. Reddy's notes of "polyarticular inflammatory osteoarthritis versus rheumatoid arthritis" did not refer to any specific body part. He also acknowledged that Dr. Reddy was treating Claimant for multiple complaints, including her hands and shoulder, in addition to Claimant's chronic low back complaints. From the record, there was no way to know if the rheumatoid arthritis was affecting Claimant's low back.

49. Dr. Holley testified that there is often overlap between hip pain and low back pain, such that often patients complain of hip pain when the source of the pain is really their low backs, and vice versa. Claimant's pre-existing complaints of hip pain and her relief of pain after injections into her hips do not necessarily rule out her low back as the source of her pain. Dr. Holley declined to comment further without more knowledge on the nature and location of the injections, which was not available in the record.

Causation and Medical Care Benefits Analysis

50. Claimant's industrial accident of December 2, 2015 caused either a temporary or a permanent aggravation of her pre-existing lumbar stenosis. If the aggravation was but temporary and has resolved, as Defendants argue, then Claimant's ongoing complaints are simply a manifestation of her ongoing pre-existing degenerative condition. Her requested future medical care, including perhaps a surgery, would not be causally related. If the aggravation was permanent, Claimant asserts she would be entitled to additional medical care including surgery, since the industrial accident caused the need for such ongoing medical care, including possible surgical intervention. Each of these positions is supported with the testimony of medical experts.

51. Both experts agree that Claimant has significant pre-existing spinal stenosis, and that any spondylolisthesis is degenerative in nature, not caused by the industrial accident. Both acknowledge that Claimant had multiple low back surgeries in the past and intermittent pain since that time.

52. Claimant's symptom of waxing and waning pain complaints, with shifting pain centers (from left to right buttocks) was convincingly explained by Dr. Holley's deposition testimony and fits well with his opinion that Claimant is simply suffering from a pre-existing, progressive, degenerative disc disease. The fact that she has good days and bad days is consistent with worsening and lessening inflammation and flare up of pain due to irritation of the nerve roots on either side due to her progressive degenerative disc disease. Dr. Holley's opinion that Claimant strained her low back muscles in the accident is also consistent with her presentation thereafter. Her immediate pain to her shoulder is consistent with a traumatic injury, as found by Dr. Holley. Claimant's low back symptoms arose more slowly, and produced no radiographic evidence of injury or instability to her spine.

53. By the time of hearing, only Dr. Blair continued to opine that Claimant's low back complaints and potential need for surgery were caused by her industrial accident. His opinions are suspect for several reasons. First, he did not review prior medical records until after he rendered his opinions. While he did not change his opinion even after reviewing records which could cast some doubt on the basis for his opinion, he did attempt to modify his stance. In his report of July 5, 2016, Dr. Blair specifically stated that Claimant had minimal, if any, symptomatology since the time of her third low back surgery in 1995, and relied on that "fact" to bolster his opinion that Claimant's ongoing low back

pain originated from her 2015 work accident. Dr. Blair relied on the notion that Claimant's pre-existing lumbar spine condition was "asymptomatic" until after the accident, thus creating a "she-had-no-pain-before-and-now-she-hurts" type of causation argument to establish an alleged permanent aggravation requiring surgery. When confronted with chiropractic records and Dr. Reddy's office notes, Dr. Blair attempted to explain that "asymptomatic" could mean "periodically symptomatic." His attempt to square his position at deposition with his earlier report is not convincing.

54. While Claimant testified she is ready for lumbar surgery, she still performs her regular work duties. She told Dr. Blair she did not want surgery in February 2017. While she testified at hearing that her rationale was because she was on Aleve, Dr. Blair indicated her Aleve usage would have delayed her surgery less than two weeks. In light of Dr. Blair's testimony, there is some question whether Claimant would currently be a surgical candidate. She was, as Dr. Blair testified, functioning at a high level. He suggested additional studies and perhaps conservative treatment prior to suggesting surgery. Certainly Dr. Holley felt Claimant was not a surgical candidate in her current condition.

55. Dr. Blair's testimony that the vast majority of individuals who have spinal stenosis never require surgery fails to address the fact that Claimant already has had three prior surgeries. It is questionable whether it can be said that most individuals who have had multiple surgeries at one level on their spine will never require surgery for any other (even non-adjacent) level of their spine. It may not be valid to lump Claimant into the general population, the vast majority of which never have any spinal surgeries.

56. When the totality of the facts are examined and considered, Dr. Holley's opinions that Claimant is not currently a surgical candidate, and if and when she becomes one it will not be due to her industrial accident of December 2, 2015, carries the most weight. His opinions are the most consistent with the evidence adduced in this matter.

57. When considering the record as a whole, Claimant has failed to prove her low back condition for which she seeks additional treatment, including surgery, is causally related to her industrial accident of December 2, 2015.

58. When considering the record as a whole, Claimant has failed to prove she is entitled to future medical care for her low back, including surgery and/or temporary partial disability benefits during her period of recovery.

Change of Physician

59. While in briefing, Claimant appeared, at least by implication, to tie her change of physician request to her request for surgical benefits, such that a denial of those benefits would render the change of physician request moot, the record does not support the request even if not so entwined.

60. Claimant presented no grounds for changing her treating physician to Dr. Blair. She presented no arguments for the change, and it is unclear if she would even want the change in light of the ruling herein. Claimant presented no arguments why her current treater is not adequate; she simply asserted her right to have Dr. Blair treat her. Claimant did not meet her burden for allowing a change of physician on the scant record presented.

61. When the record as a whole is considered, Claimant has not shown good cause for allowing a change of physician to Dr. Benjamin Blair.

CONCLUSIONS OF LAW

1. Claimant has failed to prove her low back condition for which she seeks additional treatment, including surgery, is causally related to her industrial accident of December 2, 2015.

2. Claimant has failed to prove she is entitled to future medical care for her low back, including surgery and/or temporary partial disability benefits during her period of recovery.

3. Claimant has failed to show good cause for allowing a change of physician to Dr. Benjamin Blair.

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 2nd day of April, 2018.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DENNIS PETERSON
PO BOX 1645
IDAHO FALLS ID 83403

DEAN DALLING
859 S YELLOWSTONE HWY #306
REXBURG ID 83440

jsk

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SUSAN DRAPER,

Claimant,

v.

MINIDOKA COUNTY SCHOOL DISTRICT #331,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2015-032256

ORDER

Issued 4/6/18

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 recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove her low back condition for which she seeks additional treatment, including surgery, is causally related to her industrial accident of December 2, 2015.

ORDER - 1

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS PETERSON
PO BOX 1645
IDAHO FALLS ID 83403

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