BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KIMBERLEY BOSWELL, Claimant, v. EDGEWOOD VISTA, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2015-033326** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** **Issued 3/15/19**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted the hearing in this matter in two sessions; the first in Pocatello, Idaho, on July 18, 2018, where Claimant testified, and the second on July 20, 2018 in Boise, where Defendants' witness Joyce Marlar testified. Dennis Petersen of Idaho Falls represented Claimant. W. Scott Wigle of Boise represented Defendants. The parties produced oral and documentary evidence at the hearing and submitted post-hearing briefs. Two post-hearing depositions were taken. The matter came under advisement on January 8, 2019.

ISSUES

The sole issue for adjudication in this decision is Claimant's entitlement to medical care in the form of a proposed lumbar spinal surgery and related treatments. While Claimant lists

the issue of temporary disability benefits, she withdrew her request for past TTD benefits in her brief. Claimant attempts to argue her entitlement to temporary disability benefits during her anticipated period of recovery in the event she proves her entitlement to the proposed surgery. However, Defendants do not currently dispute her right to such temporary disability payments should Claimant obtain surgery benefits; thus there is no currently-justiciable issue for resolution. Issues which are merely hypothetical or advisory are not ripe for adjudication. *Accord, ABC Agra, LLC, v. Critical Access Group, Inc.*, 156 Idaho 781, 331 P.3d 523 (2014).

CONTENTIONS OF THE PARTIES

On December 4, 2015, Claimant suffered injury to her low back and right shoulder from an industrial accident. While Claimant's right shoulder injury recovered with time and treatment, Claimant eventually came under the care of Dr. Benjamin Blair for her continuing low back complaints. In August 2016 Dr. Blair recommended lumbar surgery, and he attributed the need for such surgery entirely to Claimant's industrial accident. Defendants denied the surgery. Claimant is entitled to continuing medical care as proposed by Dr. Blair, including a followup MRI and the surgery.

Defendants argue that Claimant has not proven her current need for lumbar surgery, and if and when she does undergo such surgery it will be due to conditions unrelated to her work accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Joyce Marlar taken at hearing;
2. Claimant's exhibits (CE) A through Q admitted at hearing;
3. Defendants' exhibits (DE) 1 through 10 admitted at hearing; and

4. The post-hearing deposition transcripts of Benjamin Blair, M.D., and Paul Collins, M.D., taken on September 5 and September 27, 2017, respectively.

FINDINGS OF FACT

1. On December 4, 2015, while in the course and scope of her duties with Employer, Claimant was assisting a resident returning from the restroom when the resident started to fall. Claimant managed to keep the resident from falling but in the process Claimant experienced right shoulder and low back pain which shot down her left leg from her hip to her foot. Claimant was able to work the remainder of her shift and subsequent shifts over the next several days. During this time frame Claimant testified her condition worsened, with bilateral leg pain and difficulty walking.

2. Claimant sought medical treatment five days after the work accident at Power County Hospital, where x-rays were taken. No acute process or abnormalities were identified. Claimant was prescribed anti-inflammatory, muscle relaxant, and pain medications. Physical therapy was ordered. Claimant was allowed to return to work with a "no lifting" temporary restriction.

3. Claimant was taken off work on December 18, 2015 pending physical therapy. Records indicate Claimant obtained some relief from therapy, but still reported ongoing right shoulder and left lower extremity radiculopathy.

4. On January 7, 2016, Claimant was directed to Pocatello Orthopedics (n.k.a. OrthoIdaho), where she came under the care of Benjamin Blair, M.D., a Pocatello orthopedic surgeon, and Justin Pool, P.A.-C. Mr. Pool ordered lumbar x-rays which showed straightening of the normal lumbar lordosis with grade 1 anterior spondylolisthesis of L4 on L5. Degenerative changes and anterior osteophytes were identified at all lumbar levels, with some

loss of disc space height at L4-5 and L5-S-1. Mr. Pool encouraged Claimant to continue with physical therapy, and consider an MRI if symptoms persisted; he also prescribed a Medrol dose pack. Mr. Pool restricted Claimant to no repetitive bending or twisting, no overhead lifting, and no lifting over five pounds. These restrictions were conveyed to Employer.

5. Employer made Claimant a light duty job offer which Claimant felt violated her restrictions, so she declined it. Claimant was then terminated on January 15, 2016.

6. With time and therapy treatments Claimant's shoulder/upper extremity complaints resolved. However, her low back/left lower extremity complaints persisted. On February 1, 2016, Mr. Pool ordered a lumbar spine MRI and prescribed Meloxicam.

7. The MRI showed disc bulges at L2-3, L4-5, and L5-S1 with a small annular tear at L5-S1. Additionally, there was multilevel facet arthropathy, most advanced (moderate in severity) at L4-5 and L5-S1. No significant central spinal stenosis or focal lateralizing disc protrusion was noted. CE E, p. 13.

8. After reviewing the films, Mr. Pool noted Claimant was still complaining of left leg and buttock pain and pain over her left greater trochanter region associated with bursitis. On February 9, 2016, Mr. Pool recommended an injection into Claimant's left hip for her bursitis, and sought authority for epidural injections at L4-L5 for Claimant's low back. Mr. Pool felt Claimant could return to work with no restrictions.

9. Anthony Joseph, M.D., of Pocatello Orthopedics obtained authority for three epidural steroid injections. He also took Claimant off work as of March 10, 2016 – the date he administered Claimant's first injection.

10. When Claimant next saw Mr. Pool three weeks post injection, she denied any significant relief from the lumbar injection. Mr. Pool felt it would be appropriate for Claimant

to discuss surgery with Dr. Blair or consider a pain management regimen if the next injection was unsuccessful. He also limited Claimant to sedentary work with option of sitting or standing at her discretion and lifting no more than three to five pounds.

11. Claimant had her second ESI on May 3, 2016. At that time Dr. Joseph noted Claimant was complaining of sharp stabbing pain down her left leg when she walked, although her left foot numbness was better since the first injection.

12. The second injection provided some relief, but Claimant still had left leg complaints with occasional right leg symptoms. It was decided Claimant should see Dr. Blair.

13. Dr. Blair examined Claimant on May 23, 2016, at which time Claimant continued to complain of pain in her lower extremities, left side far worse than right. Her symptoms were relieved by leaning forward in a sitting position and aggravated by walking. His examination was unremarkable in that Claimant had a full range of motion, walked with normal gait, had symmetrical muscle and lower leg sensation, and negative leg raise testing. X-rays again showed Claimant's grade 1 spondylolisthesis at L4-5; an MRI showed multilevel degenerative disc disease and what Dr. Blair called borderline stenosis at L4-5. Hip x-rays were normal. Dr. Blair ruled out hip involvement, and suggested a myelogram and CT scan to "delineate the extent of neurologic impingement." CE G, p. 75.

14. Surety then sent Claimant to Lynn Stromberg, M.D., an Idaho Falls neurosurgeon in mid-June. Dr. Stromberg perceived his involvement as providing a second surgical opinion. He examined Claimant and reviewed her lumbar spine x-rays. He noted Claimant's generalized degenerative changes seemed somewhat advanced for a woman of her age. Dr. Stromberg's impression after examination was that Claimant had "degenerative facet disease resulting in a minor spondylolisthesis of L4-5." He also noted "an incidental annular fissure" at L5-S1.

The doctor felt these findings were longstanding degenerative changes with no evidence of acute fracture or herniation or traumatic instability. CE I, pp. 96, 97. Dr. Stromberg opined that at "some point" Claimant would likely require decompression and fusion surgery. He disagreed with the need for a CT myelogram as requested by Dr. Blair, as "it appears the diagnosis is pretty straightforward." *Id* at 97. Dr. Stromberg specifically chose not to opine on causation.

15. Surety authorized Dr. Blair's myelogram and CT, which was performed on August 24, 2016. The myelogram demonstrated the grade 1 anterior spondylolisthesis at L4-5 and "small anterior extradural defects at L3-4, L4-5 and L5-S1 without frank central spinal canal stenosis identified at any level of lumbar spine." CE E, p. 17. The report noted "some neural foraminal narrowing at L5-S1, right greater than left. Correlation with pain in the right L5 nerve root distribution is recommended." *Id.* at 15. The final conclusion was that the CT scan did not show any "significant change when compared to the previous MRI of [Claimant's] lumbar spine." *Id.*

16. Upon review of the myelogram and CT reports, Dr. Blair suggested fusion and instrumentation surgery at L4-5 for the spondylolisthesis, and laminectomy at L5-S1 for the foraminal stenosis. He sought authority from Surety to proceed surgically.[1]

17. Surety sent Claimant for an IME with Paul Collins, M.D., an orthopedist and former surgeon, who currently is a consultant for the Idaho State Insurance Fund, an independent

[1] Claimant returned to Dr. Blair in mid September with complaints diagnosed as dysesthesias (Dr. Blair described her symptoms as numbness in both arms and legs) not associated with her back. While Defendants use Dr. Blair's office notes of that visit (unsure of exact etiology of the [Claimant's] symptoms) as "evidence" that Dr. Blair was unsure what was causing Claimant's back problems, it is clear by looking at the record, and confirmed by Dr. Blair in his deposition, that his notes were discussing Claimant's new dysesthesias symptoms, not her back. Because this visit is not related to Claimant's complaints at issue it is not discussed in the body of this decision. Also, four days after this visit to Dr. Blair in September 2016, Claimant began treatment, including hospitalization, for a serious vascular condition in her lower extremities. Her hospital treatment ran into early October. There is no medical evidence this condition was due to her industrial accident.

medical examiner on matters not involving the Fund, and an airman medical examiner.

18. Dr. Collins saw Claimant on October 18, 2016. Dr. Collins reviewed records, took Claimant's history, and performed an examination. Dr. Collins prepared a report wherein he concluded Claimant suffered a back strain in her industrial accident. He felt there was no "evident operable factor which might improve [Claimant's] back function" and therefore disagreed with Dr. Blair that Claimant was a suitable candidate for lumbar spine surgery.[2] Dr. Collins also cited Claimant's then-current poor overall health and vascular complications, and her smoking habit as contraindications for surgery at that specific time.

19. Claimant's attorney sent Claimant back to Dr. Blair in late November 2017 for an examination and report. Dr. Blair conducted a physical exam which was unremarkable. He was asked for a diagnosis and opinion on causation, to which he responded that Claimant suffered a "permanent aggravation of her pre-existing, asymptomatic spondylolisthesis and secondary foraminal stenosis at L4-5" which he attributed entirely to the accident in question. CE I, p. 89. His rationale was based on the notion that Claimant, by her history, was "relatively asymptomatic" prior to her industrial accident such that had Claimant not experienced the work accident she would have "remained asymptomatic for the foreseeable future." *Id.*

20. Dr. Blair again advocated for surgery, arguing that Claimant was not at MMI without surgical intervention. Dr. Blair noted Claimant had not smoked for more than one year

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[2] Dr. Collins' report was complicated by the fact that Claimant was having vascular issues during the timeframe relevant to this report; thus the doctor discussed her vascular health when answering questions regarding aspects of Claimant's condition. Also, Dr. Collins noted in his report an almost certain mistype in the earlier CT scan, where it mentioned Claimant's spondylolisthesis at L2-L3 instead of L4-5. All other films and all other opinions reference the spondylolisthesis at L4-5, including the MRI reports reviewed by Dr. Collins. It appears obvious the CT scan report was in error. Dr. Collins did not specifically rely on the error when he stated there were no evident operable factors so it is not clear what he relied on when making that statement. However, Dr. Collins was deposed post hearing, and did not mention the erroneous CT report statement. He agreed at the time of his deposition that surgery "may be needed" as will be discussed hereinafter.

prior to this examination so any concerns over her smoking as negatively affecting her surgery were moot (assuming she does not restart prior to surgery). Dr. Blair was deposed post hearing.

DISCUSSION AND FURTHER FINDINGS

SURGERY AND RELATED CARE

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 as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide the care, the injured employee may obtain that care at the expense of the employer. An employer is only obligated to provide necessary and reasonable medical treatment necessitated by the industrial accident, and is not responsible for treatment unrelated to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

22. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident with evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

23. In order for Claimant to have a compensable claim, she must establish there was an accident-caused injury "which result[ed] in violence to the physical structure of the body". I.C. § 72-102(18)(c). Claimant seeks compensation for a claimed permanent aggravation of her pre-existing degenerative low back condition. A pre-existing

disease or infirmity does not disqualify a workers' compensation claim. As noted in *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983), "our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him."

24. Claimant relies upon Dr. Blair to provide the needed medical opinion establishing the causal connection between the December 4, 2015, accident and Claimant's current condition.[3] While his written reports are long on conclusions and short on analysis, he had the opportunity to expound on his opinions at his deposition.

Dr. Blair's Deposition Testimony

25. In his deposition Dr. Blair testified that the CT scan and myelogram showed Claimant had "dynamic stenosis," or a pinched nerve at L4-5 when she bent forward and backward, as well as foraminal stenosis at L5-S1. He later explained that these findings are not always evident on MRI which is done with a patient in a supine position and not flexing or extending. As such, just because the MRI did not show a herniated disc pressing on a nerve, Dr. Blair still felt Claimant's "spine was narrowed to the point that it almost was pinched, and the spondylolisthesis was putting it over the edge, the motion would close it further when she'd move." Blair Depo., p. 30. He felt this pinching with movement was the cause of Claimant's continuing leg pain. Dr. Blair testified an L4-5 fusion surgery was warranted, with a laminectomy at L5-S1.

[3] Claimant attempts to put Dr. Stromberg in her camp, but her reasoning is faulty. Dr. Stromberg did not say Claimant needed the proposed surgery at that time; rather he indicated that "at some point" Claimant may need a decompression surgery. Also, he did not discuss causation and thus is no help to Claimant in establishing the causal link she needs to obtain the medical benefits she seeks.

26. Dr. Blair acknowledged Claimant had pre-existing degenerative changes in her lower back, including the spondylolisthesis, "but the accident caused a permanent aggravation." *Id*, p. 17. He testified that if not for the industrial accident Claimant would not have needed surgery at the time he saw her, based on his understanding that "maybe ten percent of patients, if that, with [Claimant's] diagnoses end up having to have surgery." *Id.* at 18. Dr. Blair opined that the industrial accident alone caused the need for Claimant's proposed surgery.

27. Dr. Blair felt that if Claimant did not have leg pain she would still need the fusion surgery (but not the laminectomy) to stabilize her spondylolisthesis, which was the source of Claimant's back pain. Her leg pain was caused by nerves being pinched by the spondylolisthesis and the arthritis present in Claimant's low back.

28. During cross examination Dr. Blair noted the fact that Claimant complained of left leg pain initially, with bilateral pain beginning several months post accident. He explained the progression of symptoms would be due to the development of swelling and inflammation around the nerve.

29. Dr. Blair admitted his proposed surgery would address conditions – spondylolisthesis at L4-5 and stenosis at L5-S1 – which likely existed prior to Claimant's industrial accident. When asked to state what anatomical injury was caused by the accident in question, Dr. Blair stated "I can't." Blair Depo. p. 23. He did however opine that;

> I think there might be a microanatomic injury that we wouldn't be able to see on an MRI as the cause. It could be a biomechanical injury that we're not going to see on the MRI, so I think the actual physiologic – pathophysiological cause, I can't tell you. But I think there is something more than symptoms alone as the cause.

Id. When asked why he thought there might have been a microanatomic injury, Dr. Blair responded that it was due to the temporal connection between the accident and the onset of

Claimant's symptoms. He felt it was significant that Claimant had no pre-existing medical records of low back complaints, and had consistently denied prior back issues of note.

30. Pressed to explain how Claimant's spondylolisthesis was aggravated by the work accident, Dr. Blair testified that while he could not say directly, he thought the incident would cause an abnormal force onto the spine due to an eccentric loading. Again, Dr. Blair could not articulate the pathophysiology.

31. In spite of the admitted fact that the scans evidenced no visible changes resulting from the work accident, Dr. Blair was clear in his opinion that Claimant suffered a pathological change, not just a change in her symptoms, as a result of the industrial accident. He further opined that the forces imparted on Claimant's spine in the accident were "severe enough to cause permanent aggravation" of Claimant's pre-existing lumbar spine condition. Blair Depo. p. 35. Dr. Blair admitted he relied on Claimant's continuing pain complaints to establish his belief that the forces were severe enough to cause permanent aggravation (and Claimant's continuing pain complaints).

Dr. Collins' Deposition Testimony

32. In addition to Dr. Collins' written report discussed above, he was deposed on September 27, 2018. Dr. Collins did acknowledge that Claimant's spondylolisthesis could cause pain and could possibly be improved with surgery. He reiterated his belief that any low back surgery contemplated for Claimant would not be causally connected to the industrial accident, but rather to her pre-existing progressive degenerative arthritis, which in turn is related to her age, weight, long-standing smoking habit, and multiple other factors.

33. Dr. Collins testified that Claimant told him she had experienced issues with back pain prior to the accident, which he felt would be consistent with the level of her degenerative

changes. Also, with time her low back complaints would get worse as the degeneration continued, so it did not surprise him that her pain complaints were worsening with time.

34. In cross examination Dr. Collins acknowledged Claimant was complaining of leg pain at her first medical visit post accident, but argued it would be hard to "sift through" the reason for such pain, given her "whole history" including her "significant vascular impairment in her lower extremities to the point she was losing her toes." Collins Depo. p. 28.

35. Dr. Collins testified at several points that Claimant's condition and need for surgery, if any, is simply due to a progression of her underlying degenerative changes, which were periodically symptomatic prior to her industrial accident and will continue to worsen with time. He saw no evidence of radiculopathy at the time of his examination, although he noted Claimant had intermittent radiculopathy, which he felt was completely consistent with her progressive degenerative condition. In short, Claimant's condition and any need for surgery had nothing to do with her work accident.

Medical Testimony Analysis

36. 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. *Swain v. Data Dispatch, Inc.* IIC 2005-528388 (February 24, 2012). 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. Loggin*g, 134 Idaho 603, 608, 7 P.3d 212, 217 (2000). "When 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." *Eacret v. Clearwater*

Forest Industries, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002). Claimant's burden of proof requires "a reasonable degree of medical probability" that her injury was caused by an industrial accident. *Anderson v. Harper's, Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). "The Commission may not decide causation without opinion evidence from a medical expert." *Id.*

37. In this case the two medical experts are pushing two starkly different opinions on causation. Both opinions are less than satisfying. Because Dr. Collins' opinion is easier to dissect, it will be addressed first.

38. Dr. Collins, like every other medical expert in this case, noted Claimant's degenerative low back condition, including her spondylolisthesis, pre-dated the industrial accident. Due to its degenerative nature, Claimant's low back condition will deteriorate with time. Dr. Collins relied on statements allegedly made by Claimant at the time of his examination that she had experienced back pain prior to the accident. He used that information to describe Claimant's condition as one which was symptomatic prior to the industrial accident, destined to get worse with time due to the nature of her condition, possibly leading to the need for surgery at some point. Claimant's industrial accident had no lasting effect on her lower spine degeneration; it neither permanently aggravated it, nor did it in any way influence her rate of degeneration.

39. Nowhere else in the record is there any evidence of Claimant having "numerous" (or any) prior low back "sprain/strain issues." CE L, p. 110. In fact, at hearing Claimant specifically denied ever having "any symptoms or issues" with her low back prior to this accident. Tr. pp. 25, 26. She also denied ever seeing any type of medical practitioner for her low back before the work accident, consistent with the medical documents produced in this case. Neither attorney specifically asked Claimant if she told Dr. Collins she had prior back issues.

40. Even if Dr. Collins' report is entirely accurate, Claimant reported her prior low back sprain/strain issues were "different" than the symptoms of her industrial injury. *Id.* The industrial injury pain was "much worse" and involved leg pain, unlike any prior occurrences. Dr. Collins acknowledged the records show Claimant was complaining of lower extremity pain from her first medical treatment onward. He had no satisfactory explanation as to why Claimant would be complaining of shooting leg pain soon after the accident, but not before.

41. The sudden emergence of shooting leg pain immediately after the accident, which continued unabated through the time of hearing, does not fit well with Dr. Collins' theory that Claimant's current condition is simply a continuation of her pre-existing degenerative condition and the work accident was essentially a nonfactor in her current condition. Other than an injury of some type occasioned by the accident, there has been no alternative theory advanced for Claimant's sudden complaints of shooting leg pain, whether or not it represents a true radiculopathy.

42. Dr. Blair also admits Claimant's observable low back degenerative condition pre-dates her work accident, and is progressive. He further admits he cannot point to any acute abnormalities in any diagnostic studies. He cannot state what anatomical injury was caused by the accident. He does have a theory that there "might be a microanatomic injury" which is not visible on MRI, and is the catalyst for Claimant's ongoing symptoms.

43. Dr. Blair opined that in his opinion the spine around the nerve roots at L4-5 and L5-S1 was narrowed to a point that it was almost pinching the nerve, and the disc slippage with movement resulted in the nerve compression. *See* Blair Depo. p. 30. While that opinion alone does not explain causation, Dr. Blair further opined that he believed the dynamics of the accident put into play sudden abnormal eccentric loading forces severe enough to permanently injure

Claimant's already-compromised spine. The aftermath of these forces was not apparent in any diagnostic films, but Dr. Blair believed the injury exists. He admittedly relied heavily on his understanding that Claimant was asymptomatic prior to the accident in question. He points to Claimant's ongoing pain as "proof" that such forces in fact caused permanent, but unidentifiable injury to Claimant.

CAUSATION DETERMINATION

44. Claimant argues Dr. Blair's opinion should be given the greater weight because it is "rooted in established workers' compensation principles that an asymptomatic condition that becomes symptomatic is compensable." Claimant's Brief, p. 13. Claimant cites to no authority for such statement, contrary to JRP 11C. (Whenever a party asserts a point of law, such assertion must be supported by citation to appropriate legal authority….). Claimant's arguments in favor of causation center on the fact Claimant was "essentially asymptomatic prior the accident and subsequently required treatment." *Id.* Standing alone, the fact a claimant was essentially asymptomatic prior to the accident, but symptomatic thereafter has never been enough to award benefits. Rather, causation is proven with the weight of medical evidence linking the accident to the condition, as noted in citations above.

45. Claimant discounts Dr. Collins' testimony; she argues his opinion improperly relied on the fact that Claimant had prior low back issues and her current condition was simply a continuation of progressing symptoms unrelated to her industrial accident. Claimant notes Dr. Collins could point to no medical records documenting Claimant's pre-existing low back complaints, and had no explanation for her leg pain post accident.

46. Defendants argue Dr. Blair's testimony does not provide a causal link between the accident and Claimant's current condition.[4] They frame the issue as whether Claimant's low back strain brought about the need for a surgery which only addresses Claimant's pre-existing degenerative condition. Defendants assert that the proposed surgery is designed to address only pre-existing conditions. No new pathology or anatomical change resulted from the accident; all that changed was Claimant's symptoms, despite Dr. Blair's "theory" that maybe "microanatomic" injuries are to blame for Claimant's ongoing pain. Dr. Blair admits his opinion that Claimant's pre-existing conditions were permanently aggravated by the accident is based on the fact Claimant has ongoing pain complaints and no history of such complaints prior to the accident. In short, Dr. Blair's opinion is nothing more than speculation, based on the theory that she must have been permanently injured because she reports pain now and did not report pain prior to the accident. Speculation is not a medical opinion, even if it comes from a physician.

47. Defendants point to *Fife v. The Home Depot*, 2010 IIC 0332 (June 8, 2010) to support their position. *Fife* also dealt with an "aggravation of pre-existing condition" opinion. The Commission ruled against the claimant. On appeal at *Fife v. The Home Depot*, 151 Idaho 509, 260 P.3d 1180 (2011), the Court noted that "injury must result in violence to the physical structure of the body" so the Commission was "free to reject" the claimant's physician's testimony "because the physician could not identify any anatomical findings that were likely related to the subject accident." *Id* at 151 Idaho 514.

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[4] Defendants also question whether Claimant has even proven a need for surgery at this time, regardless of causation. In light of Dr. Collins' deposition testimony, this argument has little merit and will not be discussed further.

48. The problem with comparing *Fife* to the current case is that in *Fife* the claimant rushed to surgery less than three weeks after the accident. A physician for the defendants had convincingly opined that the claimant suffered only a strain in the work accident. He also opined that conservative care would have resolved the claimant's complaints had the claimant not rushed to surgery. As such, the claimant's surgery was, and had to be, to correct a problem other than the muscle strain caused by the accident. The surgery was not compensable, given that the defendants' physician's opinion was afforded more weight than that of the surgeon who claimed the accident permanently aggravated the claimant's pre-existing symptomatic low back condition. On appeal, the Court simply pointed out that there was a basis to give more weight to the defendants' physician (a discretionary determination) than the claimant's doctor because the claimant's physician could not identify any anatomical findings related to the accident.

49. *Fife* does not stand for the proposition that a physician *must* be able to identify a specific anatomical change from the accident in order to have that physician's opinion considered; it merely affirms the Commission's right and duty to assign weight to competing physician opinions.

50. It is true Dr. Blair could not specifically identify any anatomical findings related to the subject accident. However, unlike the physician in *Fife*, Dr. Blair did not admit that the only change to Claimant post accident was her symptoms; he steadfastly maintained there was an anatomical change which occurred due to the forces exerted on Claimant's spine when she suddenly had to catch a patient to prevent that patient from falling. Dr. Blair rejected the idea that because the injury could not be seen in diagnostic films it did not exist. Granted, he relied heavily on Claimant's pain complaints and history in making his determination,

but he did opine on the loading forces which Claimant would have experienced during her work accident. He noted that if the injury was transient it would not have persisted for three years and counting, and should have responded to conservative treatment.

51. Admittedly, Dr. Blair's opinion is not strong. It would be much nicer to see an acute finding, but such does not always happen. However, Dr. Blair does give a medical explanation on a medically more probable than not basis as to why Claimant suffered more than a temporary muscle strain. Because Dr. Blair cannot point to the exact spot where Claimant suffered violence to the structure of her body does not mean it did not occur.

52. In *McCrea v. Idaho Youth Ranch, Inc.,* IC 2012-026908 (December 3, 2013), the Commission was faced with a situation where there was no objective medical evidence supporting the occurrence of an industrial injury, and no medical testimony describing the nature of the injury which the claimant was thought to have suffered. Inferences had to be drawn from circumstantial evidence including the fact that the claimant was asymptomatic for several months prior to the work accident (he had a prior back injury from which he had just recently recovered), worked a physically demanding job without difficulty for a month prior to the accident, and was not a surgical candidate just prior to the industrial accident. The claimant experienced immediate low back and lower extremity symptoms following the accident. Finally, the claimant did not respond to conservative care, and did not return to baseline after the accident. The Commission found the facts listed above were sufficient to support the conclusion that the work accident did permanently aggravate the claimant's condition by causing damage of some unknown type to the physical structure of the claimant's body sufficient to explain his symptoms.

53. As in *McCrea*, the Claimant herein worked a physically demanding job without difficulty before this accident, was not a surgical candidate just prior to the accident, (see Dr. Blair Depo. pp. 40, 41), and was symptom free for some time prior to the accident (even if Dr. Collins' report is considered). She experienced immediate pain in her low back and lower extremity(ies), which did not respond to conservative treatment, and did not return to baseline with time.

54. Dr. Collins' opinion cannot account for the sudden and unrelenting leg pain Claimant experienced from the date of the accident onward, which weighs against natural progression of an ongoing degenerative condition as the sole cause of Claimant's current complaints, and thus is also not a strong opinion. Opinions that do not account for all relevant facts must be discounted to a degree.

55. When the totality of the evidence is considered, Dr. Blair's opinion is afforded more weight. This finding is consistent with the findings in the recent and similar case of *Kobrock v. The Franklin Group*, IC 2015-009878 (January 25, 2019). As determined therein and equally applicable to the present case, the Referee is more persuaded by the testimony and opinions of Dr. Blair. The evidence supports the assertion that Claimant did suffer a permanent injury to her lumbar spine as a consequence of the industrial accident in question, even though the medical evidence leaves this Referee unable to identify the precise location and nature of the injury. The undersigned is satisfied, as was Dr. Blair, that a permanent aggravation of Claimant's pre-existing condition occurred.

56. Claimant is entitled to additional medical care up to and including surgery as may be required for care of her work-related injuries.

57. All other issues are reserved.

CONCLUSION OF LAW

Claimant has proven she is entitled to additional reasonable medical care up to and including surgery as may be required for the care of her industrial injuries of December 4, 2015.

RECOMMENDATION

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

DATED this 7th day of March, 2019.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2019, 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 PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83707

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KIMBERLEY BOSWELL, Claimant, v. EDGEWOOD VISTA, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2015-033326** **ORDER** **Issued 3/15/19**

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 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 conclusion of law as its own.

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

1. Claimant has proven she is entitled to additional reasonable medical care up to and including surgery as may be required for the care of her industrial injuries of December 4, 2015.

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

DATED this 15th day of March, 2019.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
Aaron White, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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