BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SCOTT RAZWICK, Claimant, v. MDM CONSTRUCTION, INC., Employer, and ALASKA NATIONAL INSURANCE CO., Surety, Defendants.	**IC 2016-032272** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED: 10/21/19**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas Donohue. He conducted a hearing in Coeur d'Alene on December 19, 2018. Stephen Nemec represented Claimant. Eric Bailey represented Employer and Surety. The parties presented oral and documentary evidence and took post-hearing depositions. They submitted briefs. The case came under advisement on October 7, 2019 and is ready for decision.

ISSUES

The issues to be decided are:

1. Whether the condition for which claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant is entitled to the following benefits:

    a. Medical care, specifically L4-5 fusion surgery;
    b. Temporary disability; and

c. Attorney fees; and

3. Whether Claimant has engaged in injurious practices that tend to imperil or retard his recovery justifying a suspension or reduction of benefits under Idaho Code §72-435.

All other issues were reserved.

The parties agree that the primary issue is whether Claimant should be allowed an L4-5 fusion surgery. Issue three relates to Claimant's smoking and, upon representation that he had quit before an earlier surgery, was withdrawn.

CONTENTIONS OF THE PARTIES

Claimant contends that he needs an L4-5 fusion surgery following other unsuccessful treatment for a compensable back injury. Defendants have unreasonably denied this surgery. Treating surgeon Dr. Dirks has recommended a fusion. Surety's expert, Dr. Larson, has opined both ways at different times. Dr. Montalbano—who did not examine Claimant—has provided inconsistent opinions before and after a bone scan and has espoused differing sets of restrictions before and after he became aware Claimant suffered foot drop.

Employer and Surety contend that Claimant has received all appropriate medical care due him to date for this injury. Surety has paid medical care, including two surgeries. Dr. Montalbano has opined that fusion is unnecessary and unreasonable here. Claimant's need, if any, for L4-5 fusion surgery is entirely related to a preexisting condition. The condition which needs stabilization predates the accident. Stabilization will be merely palliative. His treating physicians were not informed of a preexisting condition. Dr. Dirks has a pattern of recommending fusion after his other back surgeries have failed. Alternative to fusion surgery, if causal and reasonably needed, an orthotic would suffice.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and his partner Toni Meyer;

2. Joint exhibits 1 through 25; and

3. Post-hearing depositions of Bret Dirks, M.D., Paul Montalbano, M.D., and Jeffrey Larson, M.D.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked for Employer as an operator. On Thursday November 17, 2016, Claimant was operating a backhoe constructing silt fences. He felt sudden low back pain unlike any prior pain. He gave timely notice of the injury. Surety agreed this constituted a compensable accident and injury. He was unable to work the next day.

2. On November 21, 2016, he sought treatment from Charles Swayze, D.C. whom he had been seeing as recently as November 10. The November 21 examination recorded a positive straight-leg-raising test on the left, a finding which had appeared intermittently in prior examinations, but other objective findings were consistent with prior reports. Wholly subjective symptoms were reported as significantly increased.

3. On November 22, 2016, Claimant visited Michael Abrahams, M.D. at Northwest Family Medicine. This record reports a history of "no focal trauma or episode" preceding Claimant's recent pain increases despite having "awoke last Friday with the worst" pain. Examination confirmed the positive left straight-leg-raising test. X-rays showed degenerative changes. Dr. Abrahams diagnosed acute sciatica.

4. Also on November 22, 2016, Claimant visited Leonard Guth, M.D. at CDA Urgent Care. He reported "Don't Know—Bend (over)" (Claimant's parentheses) to the question how his injury occurred, noted he was at work when it happened, and noted it came on

"gradually." In another document for the same visit, Dr. Guth noted Claimant reported it "started suddenly" but without describing how. Claimant denied a prior history of back or leg pain. In a review of symptoms Claimant also denied a prior history of certain conditions which prior medical records had positively diagnosed. Dr. Abrahams reviewed the X-rays and concurred they showed a degenerative condition.

5. On November 28, 2016, Stuart Denny, M.D. at Kootenai Occupational Medicine noted a history of a work accident November 17 "with no clear inciting event." After examination, Dr. Denny recommended an MRI and neurosurgery referral based upon radicular symptoms. He also recommended physical therapy. Physical therapy was minimally helpful.

6. On December 1, 2016, a lumbar MRI showed an L4-5 left lateral disc extrusion compressing the left L4 nerve root along with generalized degenerative disease.

7. On December 14, 2016, neurosurgeon William Ganz, M.D. examined Claimant. The exam was consistent with a lumbar neuropathy. He reviewed the MRI, noted a transitional lumbar vertebra, and confirmed the disc herniation compressing the left L4 or L5 (depending upon designation of the transitional vertebra) nerve root. He recommended surgery to be performed soon to avoid permanent neurological deficit. While he considered fusion a possibility, he recommended only the decompressive aspects of surgery.

8. On January 16, 2017, Dr. Ganz performed a hemilaminectomy and microdiscectomy. The foramen was examined and found to be well decompressed. Nevertheless, Claimant's symptoms increased afterward. On February 7, 2017, Dr. Ganz's physician assistant recommended a repeat MRI.

9. On February 10, 2017, a repeat MRI showed that residual disc material and ligamentum flavum thickening impinged the nerve root.

10. In March 2017, Dr. Ganz offered epidural steroid injections which Claimant refused. Later records show Claimant did receive three. Dr. Ganz considered the ongoing difficulty a possible result of the duration of the nerve root compression. He opined "nothing obvious" pointed toward additional surgery. He opined there was no residual disc material intruding. Soon after, Claimant returned to work under Dr. Ganz's light-duty release.

11. Also beginning March 7, 2017, Claimant received additional physical therapy. This continued through May 3, 2017. On May 3, the physical therapist noted Claimant "has hit a plateau" and his return to work had increased symptoms.

12. On April 6 and May 16, 2017, Claimant underwent second and third injections. He reported modest improvement in low back symptoms.

13. On May 11, 2017, he reported to Dr. Ganz that work had aggravated his symptoms. He reported specific left foot pain and dysesthesia. Dr. Ganz noted Claimant's significant anger related to his return to work. Dr. Ganz felt the physician/patient relationship had broken down. He did recommend a second injection.

14. Claimant visited Richard Samuel, M.D. in June 2017. Dr. Samuel opined Claimant could not travel to Boise to attend an IME. As a result, Dr. Montalbano performed only a records review.

15. On June 29, 2017, Claimant sought a second opinion from Bret Dirks, M.D. After examination and review of the earlier MRI he diagnosed recurrent disc with residual fragments and neural foraminal stenosis. He recommended fusion surgery. Dr. Dirks' next note is dated January 30, 2018.

16. A July 8, 2017 MRI showed a focal left foraminal disc bulge at L4-5 with "significant" stenosis.

17. On August 8, 2017, Dr. Jeffrey Larson, M.D. reviewed records and evaluated Claimant on behalf of Surety. His report date is August 15. He opined Claimant's condition was work related and not permanently resolved by the first surgery. He opined Claimant suffered a recurrent disc herniation almost immediately after the first surgery. He recommended another MRI and likely a surgical reexploration.

18. On August 10, 2017, another MRI was obtained and compared to the July 8, 2017 MRI. The abnormality was consistent but this radiologist called it L5-S1 as a result of the presence of the transitional lumbar vertebra.

19. On August 23, 2017, Jeffrey Larson, M.D. performed a second surgery. His operative report describes a significant decompression procedure involving three nerve roots. He recorded, "Both (left L4 & L5 nerve roots) were compressed from what appeared to be disc herniation and scar tissue. … Left L5 nerve root was severely compressed and there appeared to be chronicity to this compression. … Three nerve roots [were decompressed]." Follow-up visits state Claimant reported significant pain reduction but continuing left foot weakness and numbness in the L5 nerve distribution. Claimant testified that he developed drop foot after this surgery.

20. During September 19-27, 2017, more physical therapy was provided. The physical therapist did not observe foot drop.

21. On December 20, 2017, another MRI showed the degenerative condition and surgical changes, an absence of compression on nerve roots, and the growth of scar tissue around the left L5 and S1nerve roots which was not compressing the nerve.

22. On December 21, 2017, Dr. Larson's examination was significant for a negative straight-leg-raising test. But pain and numbness remained. Dr. Larson opined that because the

MRI showed axial instability and a loss of L4-5 disc space as a result of the two surgeries, he recommended fusion. Claimant's anatomy requires an anterior approach to fusion. He prescribed an external brace.

23. On January 30, 2018, Dr. Dirks again examined Claimant. He noted the foot drop. He again recommended anterior fusion.

24. On February 14, 2018, Dr. Montalbano opined after his review of records. He opined a third surgery, including fusion, "is warranted." He identified conditions perquisite which could be shown on X-rays and/or a bone scan to confirm the reasonableness of a fusion. He recommended no fusion be performed until Claimant had ceased smoking for six weeks. He disputed whether a posterior approach to fusion was precluded by Claimant's anatomy.

25. On March 7, 2018, X-rays showed normal alignment without subluxation. A bone scan showed uptake at L4-5.

26. On March 20, 2018, Dr. Samuel opined an anterior fusion would be required along with an additional facetectomy.

27. On May 5, 2018, Dr. Montalbano reviewed the X-rays and bone scan. He opined the bone scan indicators were insufficient to require a fusion and that the X-rays did not indicate in favor of fusion. He opined Claimant had "reached medical stability and should return to gainful employment." In August, he added that no "work related" restrictions were appropriate. He did not comment on whether restrictions should be imposed for Claimant's overall back condition. He recommended a PPI of 6% whole person, without apportionment.

28. On November 26, 2018, John McNulty, M.D. reviewed records and examined Claimant at Claimant's request. He agreed with recommendations for fusion and noted an additional decompression surgery would destabilize the spine which as a result would also

require a fusion.

29. In deposition, Dr. Larson opined that an anatomical variant—a conjoined nerve root—requires an anterior rather than posterior approach to fusion. The radiculopathy resulting from nerve compression cannot be surgically ameliorated at this late date, but fusion may significantly reduce his pain by stabilizing his L4 and L5 vertebrae. Dr. Larson believes an orthotic would help with the radiculopathy. He believes pain is limiting Claimant's ability to work and that fusion would improve that. Fusion would restore disc height, prevent mechanical irritation, and preserve room for the scar tissue that has accumulated. After reviewing Dr. Swayze's records, Dr. Larson opined the first surgery was likely caused by the preexisting degenerative condition and not by an industrial accident. Under similar reasoning, a fusion would not be industrially related either.

30. Dr. Larson stated he has changed his opinion about axial instability. It also preexisted the industrially related problems.

31. In deposition, Dr. Dirks opined Claimant would not have been able to endure working his usual job from May to November 2016 if the disc herniation had been present before the date of accident. The conjoined nerve root precludes a posterior approach to fusion. He cannot opine it likely either way whether fusion will or will not be able to reverse the radiculopathy at this late date. Anterior fusion will likely allow a return to work, if the nerve damage can be ameliorated. Dr. Dirks recommends four to six weeks of tobacco abstinence before a fusion should be performed. Postoperative recovery can be expected to take up to three months.

32. In depositions, both Drs. Dirks and Larson, cautioned against "Monday morning quarterbacking" the prior surgeries. They stated Dr. Ganz acted appropriately on the information

he had at the time. Specifically, not being able to tell how much disc herniation versus conjoined nerve root was present before surgery was a factor in his surgical decisions. Similarly, Dr. Dirks speculated that Dr. Larson's decision to reexplore and decompress rather than immediately fuse the area was the best decision under the facts known at the time.

33. In deposition, Dr. Montalbano opposed a fusion because X-rays do not show instability with flexion and extension and because the bone scan was "essentially normal." He denied he had ever recommended a fusion alone, only as part of a third decompression surgery if diagnostic imaging showed further decompression was necessary. He does not recommend any additional surgery at this point. If undertaken, a posterior fusion remains a possibility if one puts a big cage on the contralateral side from the conjoined nerve root. Regardless, given the diagnostic imaging, any fusion is unlikely to provide an anatomical improvement.

34. Also in deposition, Dr. Montalbano opined that the first surgery was work related. Dr. Swayze's records do not necessarily show preexisting radiculopathy. Claimant could return to work without restrictions as he is now. Fusion likely will necessitate work restrictions. He expressly opined that fusion was not reasonable or necessary here. If Claimant still suffers foot drop an orthotic would be reasonable and necessary and would facilitate return to work.

Prior Medical Care

35. On March 16, 2016, Claimant visited Charles Swayze, D.C. for gradually increasing symptoms throughout his spine and down his legs. After a detailed description of the examination, Dr. Swayze's relevant diagnosis was lumbago with sciatica bilaterally. On May 12 after 17 visits, Claimant's visits reduced to monthly treatments. After some waxing and waning of symptoms, Claimant last saw Dr. Swayze on August 15 for these issues.

36. On November 2, 2016, Claimant returned to Dr. Swayze. Claimant reported two

months of gradually increasing left low back pain with more recent inclusion of leg symptoms. After examination, Dr. Swayze again diagnosed lumbago with sciatica on left. Another visit on November 10 is of record but no others before the November 17 industrial accident. A November 21 exam, described earlier herein, reports the industrial accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

37. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

38. Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

39. Here Claimant gives a good first impression as a hard-working, willing worker. He is credible when describing subjective conditions. He does not appear to exaggerate or obfuscate.

Causation

40. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be 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. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

41. On two visits to doctors relatively soon after the alleged accident, Claimant described an event which would constitute an accident. His inconsistent declarations, both before and after these visits, in which he stated he did not remember any specific event, complicates the issue and may have affected Surety's approach to Claimant's claim. However, those early descriptions were consistent with testimony he provided at hearing.

42. A compensable accident occurred which caused injury to his low back.

43. The preponderance of physician opinions shows that although he sought treatment for back and leg pain before the accident, the accident immediately and significantly increased his symptoms. Whether a new injury or a permanent exacerbation and aggravation of a preexisting condition, Claimant's condition at hearing is industrially related.

Medical Care

44. Reasonable medical care is statutorily provided by Idaho Code 72-432.

45. Claimant has shown by a preponderance of evidence that physicians believe his condition, pain, and potential return to work will be improved with an anterior fusion surgery. Only Dr. Montalbano disagrees. Other physicians were in a better position to opine—they have

seen and examined Claimant and they were present nearer to the time of the injury.

46. The preponderance of evidence shows the two surgeries and resulting scar tissue have changed Claimant's anatomy in a way that fusion becomes a reasonable procedure to ameliorate pain and preserve spacing between the L4 and L5 vertebrae. Dr. Montalbano's skepticism about how likely it may be efficacious was carefully considered, but deemed an insufficient basis for finding the procedure to be unreasonable.

47. Claimant has shown he is entitled to additional medical care, including an anterior fusion.

48. As temporary disability benefits are directly referable to whether the fusion is performed, finding the fusion to be reasonable naturally results in a finding that temporary benefits during recovery will be compensable.

Attorney Fees

49. An award of attorney fees is governed by Idaho Code § 72-804. Claimant's initial inconsistent reporting of his history and the spectrum of physician opinions about fusion surgery show that Surety's reluctance to approve a fusion was reasonably based. Surety did pay for earlier medical care despite the historical ambiguity documented in early medical records.

50. Claimant failed to show an award of attorney fees would be appropriate with regard to the question of fusion surgery.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable injury in the alleged accident of November 17, 2016;

2. Additional medical care, including a fusion surgery constitutes a reasonable medical benefit together with temporary disability during recovery from surgery; and

3. Claimant failed to show he is entitled to attorney fees for Defendants' refusal to authorize the fusion.

RECOMMENDATION

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

DATED this 10th day of October, 2019.

INDUSTRIAL COMMISSION

/s/
Douglas A. Donohue, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2019, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STEPHEN J. NEMEC
1626 LINCOLN WAY
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ERIC S. BAILEY
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tlc /s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SCOTT RAZWICK, Claimant, v. MDM CONSTRUCTION, INC., Employer, and ALASKA NATIONAL INSURANCE CO., Surety, Defendants.	**IC 2016-032272** **ORDER** **FILED: 10/21/19**

Pursuant to Idaho Code § 72-717, Referee Doug A. Donohue 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 suffered a compensable injury in the alleged accident of November 17, 2016;

2. Additional medical care, including a fusion surgery constitutes a reasonable medical benefit together with temporary disability during recovery from surgery; and

3. Claimant failed to show he is entitled to attorney fees for Defendants' refusal to authorize the fusion.

DATED this 21st day of October, 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 21st day of October, 2019, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STEPHEN J. NEMEC
1626 LINCOLN WAY
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tlc /s/