BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AURORA PEDRAZA, Claimant, v. SORRENTO LACTALIS, INC., Employer, and LM INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-025703** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED FEB 23 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on December 20, 2016. Clinton Miner represented Claimant. Matthew Vook represented Defendants Employer and Surety. The hearing was truncated after discovering that an interpreter was required but had not been requested. The parties presented documentary evidence and Claimant briefly testified. Her trial testimony was taken by deposition later. The case came under advisement on October 17, 2017 and is now ready for decision.

ISSUES

The following issues are to be decided at this time:

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

2. Whether Claimant is medically stable, and if so on what date; and

3. Whether and to what extent Claimant is entitled additional medical care.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends she injured her low back in a compensable accident at work on

September 27, 2011. She injured both the arch of her foot and a lumbar disc at that time. She suffers left foot and leg symptoms arising in her low back as a result. Despite her symptoms Claimant continued working until September 2, 2014 when Employer could no longer accommodate her condition. She needs surgery on a lumbar disc which R. Tyler Frizzell, M.D., has opined to be related to the industrial accident. She has been treated for pain management by Daniel Marsh, M.D. The Spanish/English language barrier has been significant in treatment and testimony. She is not yet medically stable because the disc injury has not been corrected.

Defendants contend that Claimant received treatment for a foot injury. Despite Claimant's testimony about describing pain in her leg and back from the date of the accident, the first medical record of such complaints was noted by a physician in 2014. A lumbar X-ray dated June 17, 2014 records a history of "low back pain radiating in the legs for 3 weeks." Orthopedic surgeon Timothy Doerr, M.D.,—who has a working knowledge of Spanish—evaluated Claimant in 2016 and reported that Claimant confirmed the substance of her medical records for history and symptoms. He found Claimant to be at maximum medical improvement then. Claimant is unable to carry her burden of establishing a causal link between the accident and any low back condition.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony of Claimant at hearing;
2. Claimant's exhibits 1 through 21;
3. Defendants' exhibits A through K; and
4. Post-hearing depositions of claimant.

Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for review and adoption by the Commission.

FINDINGS OF FACT

(The issues in this matter having been bifurcated, not all medical records are addressed herein. Nevertheless, the Referee analyzed the entire record carefully. No findings herein are intended to be applicable to potential future issues not identified above.)

1. On September 27, 2011, Claimant was switching between raised work stations when she did not fully get her foot onto a platform and fell.

2. On October 24, 2011 physician's assistant Alex Casebolt examined Claimant. PA Casebolt noted some mid-foot tenderness. He only examined Claimant's foot. Later 2011 visits do not show Claimant suggested any problem other than her foot or ankle. A November 14 note records that Claimant described a "l[eft] leg strain," and PA Casebolt diagnosed a "l[eft] foot strain." He recommended she wear arch supports, "inserts," during recovery. Physical therapist Kathy Dufur's notes for six sessions in November 2011 are consistent for a strain in the foot. In mid-November PA Casebolt released Claimant to return to work without impairment or restrictions.

3. More than two years passed before Claimant again sought relevant medical care.

4. On June 17, 2014 Harold Kunz, M.D. ordered lumbar Xrays upon a history from Claimant of "[l]ow back pain radiating into legs for 3 weeks." The Xrays showed, "No fracture or other acute abnormality." Some degenerative changes were noted.

5. On June 22, 2014 Claimant visited St. Al's ER in Nampa. The PA noted the Claimant presented for left lower leg pain and swelling, and that she "denies … any numbness, tingling, weakness or other concerns to her lower extremities." Claimant described intermittent left leg pain since an arthroscopic knee surgery in 2008.

6. On June 22, 2014 Claimant first visited William England, M.D. His examination

note shows Claimant complained of left leg pain which Claimant attributed to varicose veins, a longstanding problem. Claimant directed Dr. England to her left knee. She showed no left leg atrophy or other objective indicators of abnormality in the knee.

7. On June 23, 2014 St. Al's (Nampa) ER physician Mark Burriesci, M.D., examined Claimant and commented on her knee condition. He ruled out deep venous thrombosis. He did not record any complaints or findings related to her back.

8. On June 30, 2014 Claimant first mentioned low back pain. By history, she was unsure when it began, but tentatively attributed to standing long hours at work. Claimant reported this to a physical therapist assigned by Harold Kunz, M.D. The physical therapist noted spinal scoliosis and a flattened arch in her left foot. The physical therapist suggested, without diagnosing, possible alternative conditions—bursitis or a bulging disc—which might be consistent with Claimant's complaints. Clamant followed-up with this physical therapist throughout July 2014.

9. A June 17, 2014 Xray showed no acute problem, but did show a mildly degenerative lumbar spine. An MRI that day was consistent, showing degeneration at L3 through S1. The degenerative disc bulge at L5-S1 did contact the left S1 nerve root. Dr. Frizzell reviewed the MRI and opined Claimant's condition did not warrant surgery.

10. A July 28, 2014 note by Dr. Kunz offers a history no better than any provided earlier. After examination Dr. Kunz diagnosed lumbar radiculopathy into the left leg, hypothyroidism, and degenerative lumbar disc disease. A July 30 MRI was consistent with the mid-June 2014 imaging. Dr. Kunz specifically noted that the disc was impinging the left S1 nerve root.

11. On September 4, 2014 to Dr. Frizzell, Claimant reported her low back and left leg

pain began at the date of her 2011 industrial injury. This is the earliest record of Claimant suggesting any link between the accident and her low back condition. Claimant went on to describe to Dr. Frizzell a second incident at work "a couple of months ago," bending to pick up some cheese, which exacerbated the back and leg pain she recalled having felt since the 2011 accident. Dr. Frizzell stated, "Based on my review of the records and her history, these appear to be related to her industrial inciden[ts]."

12. On October 6, 2014 Monte Moore, M.D., having reviewed records and conducted an examination of Claimant upon referral from Dr. Frizzell, wrote to Dr. Frizzell. Dr. Moore reported that Claimant complained her lower lumbar and left leg pain "has been present since a work related injury in 2011" and that she "felt pain immediately in the low back and the arch o[f] her left foot." He opined she suffered a non-surgical degenerative condition and added, "Most likely this has nothing to do with the industrial injury."

13. Claimant continued to receive treatment from Dr. Kunz and others.

14. On February 10, 2015 pain management physician Daniel Marsh, M.D., first visited with Claimant. He provided ongoing treatment. He opined her lumbar condition was "secondary to a work related injury." He specifically noted a "re-exacerbation in approximately 7/2014." In deposition, he explained that his opinion was largely based upon her history—that is she didn't have back pain before the 2011 industrial accident and afterward she did.

15. On July 29, 2015 Michael Hajjar, M.D., performed a consulting examination at Dr. Frizzell's request. He considered her mechanical back pain to be degenerative in origin and waffled about whether surgery might be indicated.

16. On June 30, 2016 Richard Radnovich, D.O., examined Claimant at her request. Claimant reported her "symptoms have been consistently like this since the original injury."

He opined her back condition was neither stable nor rateable, but did not have access to the diagnostic imaging. He tentatively considered her a surgical candidate, depending on what the imaging showed. He opined, more likely than not, the problem arose from the 2011 industrial injury.

17. On July 28, 2016 Timothy Doerr, M.D., reviewed records and examined Clamant at Surety's request. He expressly noted the absence of secondary gain or other such indicators in Claimant's history or examination. He opined Clamant was medically stable for her foot condition. He noted the condition might require palliative arch supports, but did not order them. This injury produced no impairment or restrictions. He opined her low back complaints were more likely than not unrelated to the 2011 industrial accident. He opined all treatment in 2014 and thereafter related to her back was unrelated to the 2011 industrial accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

18. 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). 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, 603 P.2d 575 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

19. Claimant appeared for so brief a period at hearing that the Referee makes

no findings regarding demeanor except to say that she appeared calm and quiet, and that no obvious signs of dissembling were noted.

Communication

20. In briefs Claimant asserts several specific points about Hispanic people's and/or Spanish language speakers' communication. She points to these as a basis to reconcile the dissonance between her memory and medical records. No language or cultural experts testified. No persuasive evidence of record supports Claimant's assertions about how others like her think and talk. The Referee was not asked to take judicial notice of the truth of these points and has no basis upon which to do so.

21. In post-hearing deposition Claimant described how Spanish words she used to describe anatomy may have been imprecise or misunderstood by physicians in 2011. She testified that she conveyed, or intended to convey to physicians, complaints of low back pain with radiation into her left leg in 2011.

22. Claimant's argument is not well taken that miscommunications—whether culturally based or merely idiosyncratic to Claimant—explain the absence of medical corroboration of Claimant's current insistence that she has suffered from low back pain ever since the date of injury. Claimant was examined by PA Casebolt on October 24, 2011, October 31, 2011, and November 14, 2011 and there is no report of back pain. Claimant underwent physical therapy by Kathy Dufur on November 1, 3, 4, 8, 9, and 11 of 2011 with no report of back pain. The November 9 note specifically states "she relates that there is nothing that she cannot do, including stairs and prolonged standing." These 2011 medical records establish a contradiction to Claimant's memory. Moreover, Claimant herself told at least one physician in 2014 that her back and leg pain "started about three weeks ago." Claimant did

not testify that miscommunication or a language barrier caused a misunderstanding about this point.

23. Medical records made contemporaneously with the treatment provided carry more weight than Claimant's now distant recollection. The absence of medical records from December 2011 to June 2014 is more consistent with the 2011 records than with Claimant's memory of consistent, continuing low back pain with radiation into the left leg.

Causation

24. A claimant must prove that she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only the physician's plain and unequivocal testimony opining that events are causally related is required. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2001).

25. Dr. Frizzell's September 2014 causation opinion was based expressly, in part, upon Claimant's history as she reported it at that time. The record demonstrates it to be likely that Claimant initially correctly remembered her history as one having back pain for about three weeks, but later incorrectly recalled that low back pain and radiation had been constant since 2001. Moreover, he attributed her condition to the "industrial inciden[ts]." Whether he would have attributed it to the 2011 incident without the 2014 incident is an unasked question.

The 2014 incident mentioned in a physician's note is not a subject here.

26. Opinions of doctors Marsh and Radnovich suffer by over relying upon Claimant's revised memory ("constant since 2011") rather than her initial 2014 memory ("started three weeks ago").

27. Of the later-arriving physicians, Dr. Doerr's medical records review was most complete. He well explained his basis for opining it unlikely that the 2011 industrial accident was linked to her current low back condition.

Medical Care

28. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013). One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also, Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* may have suggested its articulated factors were exclusive.)

29. Dr. Doerr's suggestion for continued palliative use of shoe inserts or arch supports represents the only future treatment of record which is related to Claimant's 2011 industrial accident. His suggestion is well taken.

CONCLUSIONS

1. Claimant suffered a compensable industrial accident in 2011 which resolved, without impairment or restrictions, and with maximum medical improvement as of

November 14, 2011;

2. Claimant's low back condition is likely not related to that accident;

3. Claimant is entitled to medical care provided in 2011 and to future palliative care in the form of inserts or arch supports as suggested by Dr. Doerr; and

4. **All other issues have been reserved.**

RECOMMENDATION

Based on 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 25TH day of JANUARY, 2018.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:
/S/_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 23RD day of FEBRUARY, 2018, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

CLINTON E. MINER
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dkb

/S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AURORA PEDRAZA, Claimant, v. SORRENTO LACTALIS, INC., Employer, and LM INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-025703** **ORDER** **FILED FEB 23 2018**

Pursuant to Idaho Code § 72-717, Referee Douglas 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 industrial accident in 2011 which resolved, without impairment or restrictions, and with maximum medical improvement as of November 14, 2011;

2. Claimant's low back condition is likely not related to that accident;

3. Claimant is entitled to medical care provided in 2011 and to future palliative care in the form of inserts or arch supports as suggested by Dr. Doerr; and

4. **All other issues have been reserved.**

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

DATED this 23RD day of FEBRUARY, 2018.

INDUSTRIAL COMMISSION

/S/_____
Thomas E. Limbaugh, Chairman

/S/_____
Thomas P. Baskin, Commissioner

/S/_____
Aaron White, Commissioner

ATTEST:
/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23RD day of FEBRUARY, 2018, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

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