12-10-2012

Clark v. Shari's Management Corp. Agency's Record Dckt. 40393

1 2

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK,

Claimant/Appellant,

v.

SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety,

Defendants/Respondents.

LAW CLERK

SUPREME COURT NO. 40393-2012

AGENCY RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

PAUL T CURTIS
CURTIS & PORTER PA
598 NORTH CAPITAL AVE
IDAHO FALLS ID 83402

Attorney for Respondent

ROGER L BROWN
LAW OFFICES OF HARMON & DAY
PO BOX 6358
BOISE ID 83707-6358

40393

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant/Appellant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants/Respondents.	**SUPREME COURT NO. 40393-2012** **AGENCY RECORD**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant	PAUL T CURTIS CURTIS & PORTER PA 598 NORTH CAPITAL AVE IDAHO FALLS ID 83402
Attorney for Respondent	ROGER L BROWN LAW OFFICES OF HARMON & DAY PO BOX 6358 BOISE ID 83707-6358

TABLE OF CONTENTS

INDEX

LIST OF EXHIBITS

REPORTER'S TRANSCRIPT: **TAKEN JUNE 1, 2011 RE: DALLAS L. CLARK, TO BE LODGED WITH THE SUPREME COURT.**

CLAIMANT'S EXHIBITS:

DEFENDANTS' EXHIBITS:

I. Eastern Idaho Neurological Surgery/Dr. Stephen Marano and James Cook, PA-C chart notes dated 04/22/2009-07/01/2010 53-63
J. Eastern Idaho Regional Medical Center/Dr. Stephen Marano operative report and chart notes dated 06/08/2009-06/13/2009 64-67
K. Dr. Michael Hajjar IME, chart notes, and correspondence dated 12/17/2010-02/04/2011 68-77
L. Pocatello Orthopaedics and Sports Medicine/Dr. Benjamin Blair IME dated 05/04/2011 ..... 77A-85A
M. Orchard's Naturopathic Center/Justin T. Crook, D.C. chart notes and correspondence dated 02/04/08-05/10/11 ..... 86-90B
N. Claimant's personnel file 91-185
O. Claimant's Answers to Employer/Surety's Interrogatories and Requests for Production of Documents dated 03/02/2010 186-203
P. Transcript of Claimant's recorded statement dated 05/06/2009 204-215
Q. Transcript of Claimant's deposition taken on April 13, 2011 216-251
R. Daily logbooks dated October 31, 2008 through April 30, 2009 252-606

ADDITIONAL DOCUMENTS:

1. Deposition of Dallas L. Clark, taken April 13, 2011
2. Deposition of Benjamin Blair, M.D., taken October 19, 2011
3. Claimant's Opening Post-Hearing Brief, filed January 17, 2012
4. Defendants' Response Brief, filed February 16, 2012
5. Claimant's Post-Hearing Reply Brief, filed March 2, 2012

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S NAME	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Dallas Clark [redacted] Idaho Falls, ID 83401	Paul T. Curtis **CURTIS & BROWNING P.A.,** **598 N. Capital** **Idaho Falls, Idaho 83402**
EMPLOYERS NAME AND ADDRESS (at the time of injury) Sharis Restaurant 1330 Broadway Idaho Falls, Id	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707
CLAIMANT'S SOCIAL SECURITY NO. [redacted] / CLAIMANT'S BIRTHDAY [redacted]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE November 24, 2008
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho **Bonneville**	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE of: $ 4.60 + tips §72-419, IDAHO CODE

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

While in the course and scope of her employment, which required repetitive reaching, bending, twisting and lifting, the Claimant initially felt a twinge of pain while shifting her weight at the salad bar, which she communicated immediately to her supervisor, Michelle Morgan, who witnessed the first event. Later that night, the Claimant was putting a heavy silverware tray away on a top shelf, which required her to reach. In doing so she felt a sharp pain and pop in her back, which caused her to immediately drop. Subsequently her supervisor instructed her to go to Community Care.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Chronic low back pain;
Left leg pain;
Left hip pain;
Large left disc protrusion at L5-21 with radiating pain down left leg;
Mobility decreasing.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN
November 24, 2008	Supervisor Michelle L. Morgan

HOW NOTICE WAS GIVEN

X ORAL x WRITTEN __ OTHER, PLEASE STATE

ISSUE OR ISSUES INVOLVED

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and attorney's fees.

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S NAME	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Dallas Clark [redacted] Idaho Falls, ID 83401	Paul T. Curtis **CURTIS & BROWNING P.A.,** **598 N. Capital** **Idaho Falls, Idaho 83402**
EMPLOYERS NAME AND ADDRESS (at the time of injury) Sharis Restaurant 1330 Broadway Idaho Falls, Id	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707
CLAIMANT'S SOCIAL SECURITY NO. [redacted] / CLAIMANT'S BIRTHDAY [redacted]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE November 24, 2008
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Left leg pain;
Left hip pain;
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November 24, 2008	Supervisor Michelle L. Morgan

HOW NOTICE WAS GIVEN

X ORAL x WRITTEN __ OTHER, PLEASE STATE

ISSUE OR ISSUES INVOLVED

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and attorney's fees.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS?_____YES _X_NO IF SO, PLEASE STATE WHY

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL INDEMNITY FUND* MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS

Community Care — Dr. Gary Walker
Idaho Falls, Idaho — Idaho Falls, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? $_____ WHAT MEDICAL COSTS HAS YOU PAID, IF ANY? $_____

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE _x_Yes __No

DATE	SIGNATURE OF CLAIMANT OR ATTORNEY
November 19, 2009	for Paul T. Curtis

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT?
[] yes [] no	[] yes [] no

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2009, I caused to be served a true and correct copy of the foregoing Amended Complaint upon:

Employer:	WORKERS' COMPENSATION INSURANCE CARRIER'S
Sharis Restaurand 1330 Broadway Idaho Falls, Idaho 83402	Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707-1507

via: ___ Personal service of persons ___ Certified Mail

via: ___ Personal service of persons ___ Regular U.S. Mail

for Paul T. Curtis

INDUSTRIAL COMMISSION
P.O. BOX 83720
BOISE, ID 83720-0041

Patient Name:_____
Birth Date:_____
Address:_____
Phone Number:_____
SSN or Case Number:_____

Medical Record Number:_____
|| Pick up Copies || Fax Copies#_____
[] Mail Copies
ID Confirmed by:_____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name

TO:_____
(Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney.)

_____
Street Address

_____
City State Zip Code

Purpose or need for data (e.g. Worerk's Compensation Claim)

Information to be disclosed: Date(s) of Hospitalization/Care:_____

[] Discharge Sumary
[] History Physical Exam
[] Consultation reports
[] Operative Reports
[] Lab
[] Pathology
[] Radiology Reports
[] Entire Record
[] Other: Specify_____

I understand that the disclosure may include information relating to (check if applicable):

[] AIDS or HIV
[] Psychiatric or Mental Health Information
[] Drug/alcohol Abuse Inforamtion

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization won't be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. ***Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.*** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacty officer of the Provider specified above.

_____
Signature of Patient Date

_____
Signature of Legal Representative & Relationship to Patient/Authority to Act Date

_____
Signature of Witness Title Date

4

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

AMENDED
WORKERS' COMPENSATION
COMPLAINT

CLAIMANT'S NAME	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Dallas Clark [redacted] Idaho Falls, ID 83401	Paul T. Curtis **CURTIS & BROWNING P.A.,** **598 N. Capital** **Idaho Falls, Idaho 83402**
EMPLOYERS NAME AND ADDRESS (at the time of injury) Sharis Restaurant 1330 Broadway Idaho Falls, Id	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707
CLAIMANT'S SOCIAL SECURITY NO. [redacted] / CLAIMANT'S BIRTHDAY [redacted]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE November 24, 2008
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho **Bonneville**	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE of: $ 4.60 + tips §72-419, IDAHO CODE

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

While in the course and scope of her employment the Claimant felt a sharp pain in her low back while changing a salad bar, which required lifting stacks of plates weighing approximately 20 lbs., while repetitively: reaching, bending, twisting and stooping. Later that night the Claimant was putting a 15 lb., silverware tray away, which required her to reach, she immediately felt a "pop" followed by sharp low back pain radiating into her hip and leg, which caused her to drop to the floor. Subsequently her supervisor instructed her to go to Community Care.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Chronic low back pain;
Left leg pain;
Left hip pain;
Large left disc protrusion at L5-S1 with radiating pain down left leg;
Mobility decreasing.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN
November 24, 2008	Supervisor Michelle L. Morgan

HOW NOTICE WAS GIVEN

X ORAL x WRITTEN __ OTHER, PLEASE STATE

ISSUE OR ISSUES INVOLVED

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and attorney's fees.

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

AMENDED
WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S NAME	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Dallas Clark [redacted] Idaho Falls, ID 83401	Paul T. Curtis **CURTIS & BROWNING P.A.,** **598 N. Capital** **Idaho Falls, Idaho 83402**
EMPLOYERS NAME AND ADDRESS (at the time of injury) Sharis Restaurant 1330 Broadway Idaho Falls, Id	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707
CLAIMANT'S SOCIAL SECURITY NO. [redacted] / CLAIMANT'S BIRTHDAY [redacted]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE November 24, 2008
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DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN
November 24, 2008	Supervisor Michelle L. Morgan

HOW NOTICE WAS GIVEN

X ORAL x WRITTEN __ OTHER, PLEASE STATE

ISSUE OR ISSUES INVOLVED

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and attorney's fees.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS?_____YES _X_NO IF SO, PLEASE STATE WHY

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL INDEMNITY FUND* MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS

Community Care
2725 Channing Way
Idaho Falls, Idaho

Dr. Gary Walker
2321 Coronado
Idaho Falls, Idaho

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE _x_Yes __No

DATE
November 23, 2009

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT?
[] yes [] no	[] yes [] no

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2009, I caused to be served a true and correct copy of the foregoing Amended Complaint upon:

Employer:	WORKERS' COMPENSATION INSURANCE CARRIER'S
Sharis Restaurant 1330 Broadway Idaho Falls, Idaho 83402	Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707-1507

Employer	Surety
via: ___ Personal service of persons	via: ___ Personal service of persons
_x___ Regular Mail	_x___ Regular U.S. Mail

Paul T. Curtis

7

INDUSTRIAL COMMISSION
P.O. BOX 83720
BOISE, ID 83720-0041

Patient Name:_____
Birth Date:_____
Address:_____
Phone Number:_____
SSN or Case Number:_____

Medical Record Number:_____
|| Pick up Copies || Fax Copies#_____
[| Mail Copies
ID Confirmed by:_____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____to disclose health information as specified:
Provider Name

TO:_____
(Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney.)

_____
Street Address

_____
City State Zip Code

Purpose or need for data (e.g. Worerk's Compensation Claim)

Information to be disclosed: Date(s) of Hospitalization/Care:_____

[] Discharge Sumary
[] History Physical Exam
[] Consultation reports
[] Operative Reports
[] Lab
[] Pathology
[] Radiology Reports
[] Entire Record
[] Other: Specify_____

I understand that the disclosure may include information relating to (check if applicable):

[] AIDS or HIV
[] Psychiatric or Mental Health Information
[] Drug/alcohol Abuse Inforamtion

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization won't be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. ***Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.*** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacty officer of the Provider specified above.

_____
Signature of Patient Date

_____
Signature of Legal Representative & Relationship to Patient/Authority to Act Date

_____
Signature of Witness Title Date

8

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

ANSWER TO COMPLAINT

I. C. NO. 2009-011431 **ALLEGED INJURY DATE 11/24/08**

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
DALLAS CLARK 209 East 14th St., #2 Idaho Falls, ID 83401	PAUL T. CURTIS Curtis & Browning 598 N. Capital Ave. Idaho Falls, ID 83402
EMPLOYER'S NAME AND ADDRESS SHARI'S MANAGEMENT CORP. 9400 S.W. Gemini Dr. Beaverton, OR 97008	**WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS** LIBERTY NORTHWEST INS. CORP. 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 7507 Boise, ID 83707-6358
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) KIMBERLY A. DOYLE, #8312 LAW OFFICES OF HARMON, WHITTIER & DAY 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 6358 Boise, ID 83707-6358	**ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)**

X The above-named employer or employer/surety responds to Claimant's Complaint by stating:
__ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)		
Admitted	Denied	
	X	1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly __ entirely __ by an accident arising out of and in the course of Claimant's employment.
N.A.	N.A.	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
X		6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N.A.	N.A.	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	X	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: $UNKNOWN
X		9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant? NONE

(9)

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

A. Defendants deny all allegations of the Complaint not admitted herein.

B. Whether Claimant's condition is causally related to the alleged November 24, 2008 incident or is a result of a pre-existing or subsequent condition.

C. Whether Claimant is entitled to permanent partial impairment and/or disability in excess of impairment and appropriate apportionment.

D. Whether Claimant is entitled to TTD/TPD benefits.

E. Whether Claimant is entitled to additional medical benefits pursuant to I. C. §72-432.

F. Whether Claimant is entitled to retraining benefits.

G. Whether Claimant is entitled to attorney fees pursuant to I. C. §72-804.

H. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I. C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. __YES __NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No

Amount of Compensation Paid to Date			**Dated**	**Signature of Defendant or Attorney**
PPI	TTD	Medical	12/10/09	Kimberly Kaufman
$-0-	$-0-	$-0-		

PLEASE COMPLETE **CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of Dec., 2009, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S ATTORNEY:

Paul T. Curtis
Curtis & Browning
598 N. Capital Ave.
Idaho Falls, ID 83402

via: __personal service of process
_X regular U.S. Mail

Kimberly Kaufman
Signature

Kimberly A. Doyle (ISB 8312)
LAW OFFICES OF HARMON & DAY
6213 N. Cloverdale Road, Ste. 150
P.O. Box 6358
Boise, ID 83707-6358
Telephone (208) 327-7561
Fax (800) 972-3213
Employees of the Liberty Mutual Group
Attorneys for Defendant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Dallas Clark, Claimant, v. Sharis Management Corporation, Employer, and Liberty Northwest Insurance Corp., Surety, Defendants.	I.C. No. 2009-011431 **DEFENDANTS' EXPEDITED MOTION TO AMEND NOTICE OF HEARING** FILED MAY 24 2011 INDUSTRIAL COMMISSION

COME NOW the Defendants, Shari's Management Corporation and Liberty Northwest Ins. Corp., by and through their attorney of record Kimberly A. Doyle, pursuant to Rule III(E) of the Judicial Rules and Practice of Procedure and move for an Order amending the issues for the hearing currently set in this case for June 1, 2011. In support thereof Defendants state as follows:

1. A Notice of Hearing ("Notice") was issued in this case by the Industrial Commission on January 27, 2011 identifying the following issues to be heard:

a) Whether Claimant sustained an injury from an accident arising out of and in the course of employment;

b) Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;

c) Whether and to what extent Claimant is entitled to medical care; and

d) Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

2. Defendants respectfully move the Industrial Commission to add the following issue to those already noticed above:

a) Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through 72-706 and whether these limitations are tolled pursuant to Idaho Code § 72-604.

This Motion is made and based on the pleadings and documents on file with the Commission herein.

DATED this 24th day of May, 2011.

LAW OFFICES OF HARMON & DAY

By: Kimberly A. Doyle
Kimberly A. Doyle
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2011, I caused a copy of the foregoing document to be served by facsimile and by first class mail, postage prepaid, upon the following:

Paul T. Curtis
Curtis & Porter, P.A.
598 N. Capitol
Idaho Falls, ID 83402
FAX: 208.542.6993

Kimberly A. Doyle

Paul T. Curtis SB #6042
CURTIS & PORTER P.A.,
598 Capital Avenue
Idaho Falls, ID 83402
Telephone: (208) 542-6995
Facsimile: (208) 542-6993

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Dallas Clark, Claimant, vs. Sharis Management Corporation, Employer, and Liberty Northwest Insurance Corp., Surety, Defendants.	IC No. 2009-011431 OBJECTION TO DEFENDANTS' MOTION TO AMEND NOTICE OF HEARING

COMES NOW, the above-named Claimant, Dallas Clark, by and through her counsel of record, Paul T. Curtis Esq., of Curtis and Porter Law Office P.A., objects to the Defendants' Motion to Amend Notice of Hearing issues based on the following:

1. Claimant filed a Complaint on November 19, 2009, attached hereto.

2. Defendants' "Answer" dated December 10, 2009, attached hereto, clearly admits that the notice of the accident causing the injury or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.

(14)

3. The hearing is set for June 1, 2011, which is less than a week away and Claimant will be severely prejudiced in her defense if this Motion is granted.

DATED this 26rd day of May, 2011.

Paul T. Curtis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26rd day of May, 2011, I the undersigned served a true and correct copy of the foregoing document by U.S. Mail, Postage prepaid, to the following:

Kimberly Doyle
6213 N Cloverdale Road
P.O. Box 6358
Boise, ID 83707-6358

[ ] First class mail
[ ] Hand-Delivery
[x] Facsimile

Paul T. Curtis
Attorney for the Claimant

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

2011 MAY 26 P 12: 19

RECEIVED
INDUSTRIAL COMMISSION

WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S NAME		CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Dallas Clark 209 East 14th #2 Idaho Falls, ID 83401		Paul T. Curtis **CURTIS & BROWNING P.A.,** **598 N. Capitol** **Idaho Falls, Idaho 83402**
EMPLOYERS NAME AND ADDRESS (at the time of injury) Sharis Restaurant 1330 Broadway Idaho Falls, Id 83402		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707
CLAIMANT'S SOCIAL SECURITY NO. 529-06-5134	CLAIMANT'S BIRTHDAY July 5, 1970	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE November 24, 2008
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho Bonneville		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE of: $ 4.60 + tips §72-419, IDAHO CODE

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

While in the course and scope of her employment the Claimant felt a sharp pain in her low back while changing a salad bar, which required lifting stacks of plates weighing approximately 20 lbs., while repetitively: reaching, bending, twisting and stooping. Later that night the Claimant was putting a 15 lb., silverware tray away, which required her to reach, she immediately felt a "pop" followed by sharp low back pain radiating into her hip and leg, which caused her to drop to the floor. Subsequently her supervisor instructed her to go to Community Care.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Chronic low back pain;
Left leg pain;
Left hip pain;
Large left disc protrusion at L5-S1 with radiating pain down left leg;
Mobility decreasing.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER	TO WHOM NOTICE WAS GIVEN
November 24, 2008	Supervisor Michelle L. Morgan

HOW NOTICE WAS GIVEN

X ORAL x _ WRITTEN __ OTHER, PLEASE STATE

ISSUE OR ISSUES INVOLVED

PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and attorney's fees.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS?_____YES _X_NO IF SO, PLEASE STATE WHY

NOTICE: COMPLAINTS AGAINST THE *INDUSTRIAL INDEMNITY FUND* MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS

Community Care — Idaho Falls, Idaho

Dr. Gary Walker — Idaho Falls, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? $_____ WHAT MEDICAL COSTS HAS YOU PAID, IF ANY? $_____

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE _x_Yes __No

DATE	SIGNATURE OF CLAIMANT OR ATTORNEY
November 19, 2009	for Paul T. Curtis

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT?
[] yes [] no	[] yes [] no

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2009, I caused to be served a true and correct copy of the foregoing Amended Complaint upon:

Employer:	WORKERS' COMPENSATION INSURANCE CARRIER'S
Sharis Restaurand 1330 Broadway Idaho Falls, Idaho 83402	Liberty Northwest 6213 N. Cloverdale Road P.O. Box 7507 Boise, Idaho 83707-1507

Employer — via: ___ Personal service of persons ___ Certified Mail

Surety — via: ___ Personal service of persons ___ Regular U.S. Mail

for Paul T. Curtis

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

ANSWER TO COMPLAINT

I. C. NO. 2009-011431 ALLEGED INJURY DATE 11/24/08

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
DALLAS CLARK 209 East 14th St., #2 Idaho Falls, ID 83401	PAUL T. CURTIS Curtis & Browning 598 N. Capital Ave. Idaho Falls, ID 83402
EMPLOYER'S NAME AND ADDRESS SHARI'S MANAGEMENT CORP. 9400 S.W. Gemini Dr. Beaverton, OR 97008	**WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS** LIBERTY NORTHWEST INS. CORP. 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 7507 Boise, ID 83707-6358
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) KIMBERLY A. DOYLE, #8312 LAW OFFICES OF HARMON, WHITTIER & DAY 6213 N. Cloverdale Rd., Ste. 150 P.O. Box 6358 Boise, ID 83707-6358	**ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)**

X The above-named employer or employer/surety responds to Claimant's Complaint by stating:
The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)		
Admitted	Denied	
	X	1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly __ entirely __ by an accident arising out of and in the course of Claimant's employment.
N.A.	N.A.	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
X		6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N.A.	N.A.	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	X	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: $UNKNOWN
X		9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant? NONE

18

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

A. Defendants deny all allegations of the Complaint not admitted herein.

B. Whether Claimant's condition is causally related to the alleged November 24, 2008 incident or is a result of a pre-existing or subsequent condition.

C. Whether Claimant is entitled to permanent partial impairment and/or disability in excess of impairment and appropriate apportionment.

D. Whether Claimant is entitled to TTD/TPD benefits.

E. Whether Claimant is entitled to additional medical benefits pursuant to I. C. §72-432.

F. Whether Claimant is entitled to retraining benefits.

G. Whether Claimant is entitled to attorney fees pursuant to I. C. §72-804.

H. Defendants reserve the right to amend this Answer since discovery in this matter has only just begun.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I. C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. __YES __NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPI	TTD	Medical	12/10/09	[signature]
$-0-	$-0-	$-0-		

PLEASE COMPLETE CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of Dec., 2009, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S ATTORNEY:

Paul T. Curtis
Curtis & Browning
598 N. Capital Ave.
Idaho Falls, ID 83402

via: __personal service of process
_X regular U.S. Mail

[signature]
Signature

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, v. SHARIS MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-011431** **ORDER RE: MOTION TO AMEND NOTICE OF HEARING** FILED INDUSTRIAL COMMISSION

On May 24, 2011, Defendants filed Defendants' Expedited Motion to Amend Notice of Hearing, requesting that the Commission add to the Notice of Hearing in this matter the issue of whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701—72-706 and whether these limitations are tolled pursuant to Idaho Code § 72-604. On May 26, 2011, Claimant filed an Objection to Defendants' Motion to Amend Notice of Hearing. A telephone conference regarding Defendants' motion was held May 31, 2011.

Pursuant to the pleadings and the telephone conference held with the parties, Defendants' motion is hereby DENIED on the grounds that 1.) Defendants waived the issue by admitting in their Answer that notice had been timely provided by Claimant and 2.) Claimant would be prejudiced if the notice issue were added on the eve of the hearing. Defendants' motion was filed barely eight days

before hearing, long after an adequate opportunity had passed for Claimant to investigate or prepare her case on this issue.

DATED this 31st day of May, 2011.

INDUSTRIAL COMMISSION

LaDawn Marsters, Referee

ATTEST:

Stephanie Christensen
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2011, a true and correct copy of the foregoing **ORDER RE: MOTION TO AMEND NOTICE OF HEARING** was served by regular United States mail upon each of the following persons:

PAUL T CURTIS – (208) 542-6993

KIMBERLY A DOYLE – (800) 972-3213

sc

Stephanie Christensen

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, v. SHARIS MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-011431** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Idaho Falls, Idaho on June 1, 2011. Claimant, Dallas L. Clark, was present in person and represented by Paul T. Curtis, of Idaho Falls. Defendant Employer, Sharis Management Corporation, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kimberly A. Doyle, of Boise at the hearing. Thereafter, Roger Brown, also of Boise, substituted for Ms. Doyle on Defendants' briefing. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on March 6, 2012.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of her employment;

2. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury or condition;

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

4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

Eight days prior to the hearing, Defendants moved to add notice issues. Claimant objected, and that motion was denied. Defendants did not argue the point further in their post-hearing briefing.

CONTENTIONS OF THE PARTIES

Claimant contends that she suffered a herniated disc at L5-S1 due to a workplace accident on November 24, 2008, in which she felt a sudden sharp pain in her low back when she lifted a heavy silverware tray up to a head-height shelf. As a result, she is entitled to workers' compensation benefits for medical care, including reimbursement for past treatment which includes spinal decompression surgery, as well as future treatment, including a second surgery, to repair her recurrent herniation. Claimant also argues that she is entitled to an award of attorney fees for unreasonable denial of her claim. She relies upon her own testimony and that of Aaron Swenson, as well as the independent medical evaluation (IME) report and deposition testimony of Benjamin Blair, M.D., an orthopedic surgeon.

Defendants counter that Claimant did not assert her low back pathology was the result of a workplace accident until she learned she required surgery, about five months after she first obtained medical treatment. They contrast Claimant's early statements, reflected in her First Report of Injury (FROI) and her initial medical records, with her later statements to Surety and

in these proceedings, to assert that Claimant is not a credible witness. They also rely upon the independent medical evaluation report of Michael Hajjar, M.D., a neurosurgeon.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Dallas L. Clark taken April 13, 2011;
2. Claimant's Exhibits 1 through 12 and 15 through 19 admitted at the hearing;
3. Defendants' Exhibits A through R admitted at the hearing;
4. The testimony of Claimant and Aaron Swenson, a coworker, taken at the hearing; and
5. The post-hearing deposition testimony of Benjamin Blair, M.D., taken October 19, 2011.

OBJECTIONS

At the hearing, Defendants objected to Claimant's Exhibits numbered 13 and 14 because they were affidavits from witnesses who Defendants had no opportunity to cross-examine. The affiant of Exhibit 13 is Michelle Morgan, Claimant's supervisor during the relevant period, who has resided in Germany since sometime before Claimant was deposed, on April 13, 2011. The affiant of Exhibit 14 is Billie Rowan, who Claimant had not disclosed as a potential witness in discovery, and who Defendants had not heard of in the context of these proceedings before receiving Claimant's Rule 10 exhibits, about a week prior to the hearing. The Referee took these objections and motions to exclude under advisement and now, having reviewed the record and the parties' briefs, finds good cause to grant Defendants' motions. Allowing these affidavits into the record, to the extent that the contents thereof are relevant, would be more prejudicial than probative given that Defendants were unable to cross-examine these witnesses. Therefore, this

evidence is not sufficiently reliable to assist the Referee in resolving the issues in dispute. Further, Claimant does not refer to the contents of either affidavit in her briefing.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

BACKGROUND

1. Claimant was an original hire when Employer opened in September 2008. An expert server, Claimant came to Employer with a great deal of experience. She very much liked serving, particularly the customer service aspect of her job. Claimant was soon placed on the graveyard shift, from 10:00 p.m. until 6:00 a.m., because she could manage the front of the house on her own, which many servers were incapable of doing. In addition to her regular duties, Claimant also trained other servers.

2. Educationally, Claimant quit school sometime during her ninth grade year. She told Surety she has a GED, but in her deposition she testified that she is working on it. Medically, she has no significant history of low back pain.

3. Claimant was 38 years of age when she began receiving medical treatment for low back symptoms, which she attributes to a workplace accident on or about November 24, 2008.

ACCIDENT

4. **First Report of Injury.** Claimant completed a First Report of Injury on April 24, 2009, in which she reported an ache in her lower back, with onset on November 24, 2008, while "standing" and "making a salad." DE A, p. 2. More specifically, Claimant wrote that she was "standing there and back began hurting." *Id.* As a result, Surety denied Claimant's claim on

May 18, 2009, because her injury was not due to a workplace accident. "Ms. Clark did not associate any injuries or trauma to the onset of her pain." DE K, p. 68.

5. Claimant testified at the hearing that Surety later paid for some random medical expenses associated with her injury. There is no evidence in the record to support Claimant's assertion, which is contrary to Surety's position that it denied her claim. Claimant has failed to establish that Surety paid any medical benefits associated with the instant claim.

MEDICAL RECORDS

6. Chiropractic Care. Claimant first obtained treatment following her alleged accident at Orchard's Naturopathic Center, L.L.C., on December 11, 2008. The corresponding chart note consists of handwriting on a check-box form only a third-of-a-page long. It mentions nothing about symptom onset, but it does state a diagnosis of sciatica.

7. Claimant returned for two more treatments – one in November 2009 and one in February 2010. The notes pertaining to these visits do not provide evidence of any causal facts.

8. Then, on May 10, 2011, Justin T. Crook, D.C., opined that Claimant's sciatica was work-related. He based his opinion on Claimant's description of a lifting and twisting event at work that triggered her symptoms.

9. Community Care and EIRMC. On December 16, 2008, when the chiropractic treatment failed to relieve her symptoms, Claimant sought medical treatment at Community Care. She followed up on December 19 and 24, when she was referred to Dr. Walker. Sciatica was diagnosed and medications were prescribed. The December 16 note indicates Claimant had been suffering left leg pain for about three weeks. On December 19, Claimant also sought pain relief from the emergency room at Eastern Idaho Regional Medical Center (EIRMC). The record of that visit indicates pain onset "several days ago." DE D, p. 10.

10. None of the documentation related to Claimant's above-described visits to Community Care or EIRMC indicates any cause or triggering event for her low back symptoms. No attempts to bill a workers' compensation provider for any of these visits are evident.

11. Gary C. Walker, M.D. On December 29, 2008, Claimant was examined by Dr. Walker. He recorded onset of Claimant's symptoms as of early November, associated with work, that sharpened over time, with no inciting injury. "Ms. Clark's history dates back to early November. She did not recall any particular injury but noted the onset of left lower extremity pain associated with work. It became sharper over time and has continued to worsen." DE E, p. 19.

12. Claimant ultimately underwent an MRI on December 29, 2008, and Dr. Walker diagnosed a left-sided herniated disc at L5-S1 with root compression. Claimant underwent a course of cortisone injections, which provided only temporary relief from her symptoms.

13. On July 28, 2010, Dr. Walker prepared a permanent partial impairment (PPI) rating at the request of Surety. Dr. Walker assumes without explanation in his introductory sentence that Claimant's low back-related impairment is work-related.

14. Physical Therapy. On March 19, 2009, Claimant began a course of physical therapy. The intake note, like Dr. Walker's, indicates Claimant could not recall an injury related to onset of her low back symptoms. Inconsistent with Dr. Walker's note, however, Claimant now reported that her pain came on suddenly. "She states the pain came on suddenly, but she is unaware of any specific injury to cause her pain. She denies any background or previous history of low back pain and contributes this episode to being a server/bartender for many, many years catching up to her and her not taking care of her body." DE G, p. 41.

15. Stephen Marano, M.D./James L. Cook, PA-C. On April 22, 2009, Claimant was examined by Mr. Cook, who is a physician assistant to Stephen Marano, M.D., a neurosurgeon. Dr. Marano was present during the intake interview and examination, but Mr. Cook authored the chart note. Again, Claimant identified onset as of early November 2008 and could not identify any inciting injury. She posited that her symptoms occurred spontaneously, perhaps from standing at an odd angle. "This lady states that she began having some left sided low back and left hip pain at work in early November. She cannot associate any injuries or trauma to the onset of her pain. She said that it just kind of started out of the blue. She thought maybe it was due to standing funny. Over the next couple of days the pain got worse." DE I, p. 53.

16. On June 8, 2009, Claimant underwent microsurgical disc excision, root decompressive foraminotomy and annular repair at L5-S1. She suffered complications from that surgery, including drop foot on the left. Subsequently, she suffered a recurrent disc herniation at L5-S1.

17. **Claimant's statements.** Claimant's description of how she first came to require medical treatment for low back pain is recorded in her early medical records, above, as well as in her later statements made to Surety on May 21, 2009, during her deposition on April 13, 2011, and during her hearing testimony on June 1, 2011.

18. Claimant's later statements are inconsistent with those recorded in her early medical records with respect to the details surrounding onset of her symptoms. Her later statements are also inconsistent *with each other* on key points, including the onset of her pain and the circumstances under which she says her supervisor told her to go to the doctor.

a. Onset of Pain.

i. *According to her statement to Surety,* Claimant's earliest recollection is that her low back pain began around the beginning of her shift on November 24, 2008, when she was talking with Michelle Morgan, her supervisor. Claimant thought she was just standing wrong, and she joked with Michelle that her weight might have something to do with it. Later, Claimant felt a sharp pain in the same area in her low back when she was lifting a heavy silverware tray up to a head-height shelf. Due to the pain, she set the tray down and did not try to lift it, full, again. Claimant set her tables, then placed the empty tray on the shelf.

> ...[A]nd when I went to put that up there it just like a sharp pain in the same area and I drop...dropped and so I just laid it there [*sic*] set it down on the counter where I was (*several words unintelligible*) and, um, just set my tables, from there I didn't try to put the container up there I set all my tables from there and then went to the tray that was just about empty I just set it up on the top...

DE P, p. 207-208.

ii. *According to her deposition testimony,* however, Claimant's low back pain began when she was cleaning the salad bar reach-ins. Then, when only Claimant and Aaron Swenson, a cook, were working, Claimant felt a pain like an ice pick being shoved into her low back while lifting a heavy silverware tray up to a head-height shelf. The pain caused Claimant to lose her balance and the weight of the tray caused her to fall to the ground, spilling the silverware. Upon hearing the loud clatter, Aaron came out of the kitchen, helped Claimant to a booth and

picked up the silverware. He also tried to call a manager. Claimant remained on shift, but due to the pain, she rested. Until the end of her shift, Claimant only punched orders into the computer, while Aaron served her food for her.

iii. *According to Claimant's hearing testimony,* her back pain started when she stood up while cleaning the salad bar reach-ins. Later, when only Claimant and Aaron were working, Claimant felt a sharp pain in her low back that went down her leg while lifting a heavy silverware tray up to a head-height shelf. The rest of her hearing testimony is materially consistent with her deposition testimony.

b. Why Claimant Sought Medical Treatment.

i. *According to her statement to Surety,* at some unspecified later shift, Claimant was reaching for the scheduling book, but could not bend over to grab it, so Michelle told her to go to the doctor.

ii. *According to her deposition testimony,* Claimant went in the next day and spoke to Michelle, who told her to take the night off. When Claimant did not feel better the next day, Michelle told her to go to Community Care. Claimant "showed them her prescription" and obtained treatment, then took the next two days off. Tr., p. 47.

iii. *According to her hearing testimony,* Claimant worked "at least the next five days" because she had no other income. Tr., p. 54. She guessed that she probably went seven or eight days before she determined that the constant pain was not improving and decided to go

to the chiropractor. He taped her ankles, but did not want to touch her spine because he did not think he could improve the pain she described. Claimant worked for a couple of days with taped ankles. The taping took some pressure off Claimant's back, but she was still in pain. At this point, Claimant called in sick and told Michelle that she had gone to the chiropractor and was not improving. Michelle told her to go to the doctor, so Claimant went to Community Care the next day.

19. There is also evidence in the record that Claimant intentionally embellished her testimony at the hearing. In her statement to Surety, Claimant related how a Community Care physician told her, after the accident, how to properly carry heavy items. Then, at her deposition, Claimant recalled that she was carrying the silverware tray at stomach-height, just before the accident, *because* she was following the advice of the Community Care physician:

> Q. And when you were carrying it, about how high was it? According to your body, in other words, how high was it?
>
> A. I was trying to carry it because they told me – the doctor I went to at the Community Care, he said to try to always keep my shoulders center with my knees, you know, not to try to bend outside of that area. And so I tried - - I always would carry - - I would carry it towards my body.

Tr., p. 43. Claimant's testimony and her medical records establish that she had not received medical care for her back from Community Care (or anywhere) before the accident she alleges, so there is no prior time when Claimant would have received this advice. Even if this were not the case, the context of Claimant's comments indicates she was testifying about her post-accident visit to Community Care. Yet, Claimant asserts that she had this admonition in mind while carrying the tray *before* the alleged accident. This temporal inconsistency does not prove that Claimant was not carrying the tray or that she was not injured at work. However, it is sufficient

to establish that, on at least one occasion during these proceedings, Claimant testified inaccurately so as to place herself in a more favorable light.

20. **Aaron Swenson.** As mentioned above, Aaron Swenson was a cook on graveyard shift, the only other employee on duty when Claimant alleges her accident occurred. Claimant called him as a witness at the hearing.

21. Aaron worked with Claimant at Employer's before and after the time of her alleged accident, but he voluntarily left in mid-June 2010 because he was unhappy with management. He believed management did not treat employees with the care they deserved.

22. Claimant's son was an acquaintance of Aaron's, but Aaron denied a close relationship with Claimant.

23. Aaron testified that he recalled working with Claimant the night she hurt her back. He said he was in the kitchen, around 1:00 or 2:00 a.m., when he heard a "big bang out in the lobby" so he came out to see what happened. Tr. p. 25-26. He found Claimant among a bunch of "plates, silverware, and stuff" and helped her to a seat. Tr., p. 24. Aaron testified that Claimant had slipped or tripped and fallen with a full dish bucket, so he helped her to a seat. He said he assisted her with her duties through her shift that night, as well as many future graveyard shifts, until she was eventually moved to days.

24. Aaron did not report the event to management because, he explained, the managers all already knew about it. He testified that all of the managers had asked him about it. Claimant also testified that she reported her injury to management. However, this assertion is otherwise unsupported in the record.

25. About a month after that night, Aaron referred Claimant to her current attorney. Aaron had previously hurt his shoulder at work and was happy with the legal services he received. Claimant had never before made a workers' compensation claim.

26. **Daily Manager's Log Book.** The daily manager's log book was kept by supervisors to communicate noteworthy events that occurred on each shift. A broad array of topics are evident from a review of the log book, like individual employee performance (mostly concerns, but kudos on a couple of occasions), building and machine maintenance (i.e., plumbing leak, gas malfunction, extra telephone line, signage lights, cleanliness, ice tea machine malfunction), general employee issues (i.e., terminations, till shortages, uniform issues, sick calls and shift coverage), food issues (i.e., preparation, waste, apportionment, orders), and extraordinary customer issues. Some workplace injuries and, in one instance, details of a non-work-related illness were also recorded. All of the workplace injuries recorded involved a need for medical care (i.e., head bleeding after hitting it on kitchen door, finger cut and skin was coming off, slipped on butter and sprained back, burned fingers and skin was peeling). While the breadth of issues to be recorded and the newness of the staff at the time Claimant says she was hurt at work certainly could explain a failure to record a minor on-the-job injury that did not require treatment, it is unlikely that a significant workplace injury that affected staffing needs over several weeks or months would not be noted.

27. No log book entry states that Claimant was hurt at work. The first entry referencing any difficulties Claimant was having appears on December 18, 2012. "Dallas called in again. Jesse will cover. Terry will work Fri & Sat for Dallas if need be." DE R, p. 359. Subsequent entries indicated Claimant was sometimes unable to come to work, but none of them indicate that she thought she had incurred a workplace accident or that Employer had

recommended medical treatment through the date of the last log entry in evidence (April 30, 2009). In fact, the last entry states that Claimant was being placed back on the work schedule because she was unable to schedule her surgery because she was still waiting on "insurance info", with no mention of any topics related to workers' compensation. DE R, p. 606.

28. The failure of the log book to reflect that Claimant's low back pain resulted from a workplace injury is far from dispositive of the causation issue, but it does imply that Claimant did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009.

INDEPENDENT MEDICAL EVALUATIONS

29. **Michael V. Hajjar, M.D.** On January 5, 2011, Dr. Hajjar, a neurosurgeon, performed an IME at Surety's request. In preparing his report, Dr. Hajjar reviewed Claimant's relevant medical records, conducted an interview and performed an examination.

30. With respect to work-relatedness, Claimant reported that her symptoms began following a workplace accident. Dr. Hajjar, however, opined in his report and in two follow-up letters to Surety, both dated February 4, 2011, that Claimant's medical records and clinical presentation were inadequate to establish a causal connection with a workplace activity on November 24, 2008. In his report, Dr. Hajjar opined, "Based on Dallas's medical record, it is somewhat difficult to tie the original herniation and report of injury dated December 16, 2008, to the work-related injury which was noted three weeks earlier without any treatment in that three week period." DE K, p. 72. In his follow-up letters, Dr. Hajjar unambiguously opined that Claimant's low back condition was not caused by an accident on November 24, 2008, because her symptoms did not commence until three weeks later.

31. Dr. Hajjar was apparently unaware of Claimant's visit to the chiropractor on December 11, 2008, or her pain complaints preceding her visit to Community Care on December 16, 2008. Dr. Hajjar's opinion is not particularly persuasive on the issue of causation due to its weak foundation. It cannot be construed, however, to support Claimant's position.

32. **Benjamin Blair, M.D.** On May 4, 2011, Dr. Blair, an orthopedic spine surgeon, conducted an IME at Claimant's request. Prior to rendering his opinion, Dr. Blair and his nurse each took an intake history from Claimant. In addition, Dr. Blair reviewed Claimant's related medical records, including her imaging films, and conducted an examination of her low back complaints. Claimant's chiropractic records were provided later. On May 18, 2011, Dr. Blair indicated to Claimant's attorney in a check-box letter that he had reviewed those records and that they did not change his opinion, which is discussed below.

33. Prior to his examination, Claimant's attorney, via a May 3, 2011 letter, encouraged Dr. Blair to base his causation finding on Claimant's "incident with the 'silverware tray', where she dropped to the floor, which one of the cook's [*sic*] witnessed." DE L, p. 77B. Claimant's attorney also represented that Surety had accepted the claim and had paid benefits until Claimant requested approval for surgery, at which time it denied her claim on causation grounds, which it had never before questioned. In actuality, Claimant did not file a FROI until after the surgical recommendation was made, and it is undisputed that Surety never paid Claimant any benefits through December 11, 2009. Although Claimant has asserted that Surety paid some random medical benefits after that date, as discussed above, she has failed to prove this point.

34. Dr. Blair opined that Claimant's report of her accident was both credible and consistent with her "recorded medical statement":[1]

> Ms. Clark gives a very convincing history of a work related injury including lifting of a heavy object and as reaching to do so, felt an immediate sharp pain. This is very consistent with herniated nucleus pulposus. In addition, I have reviewed her recorded medical statement which is also consistent with such.

DE L, p. 83.

35. Dr. Blair opined that Claimant sustained a herniated nucleus pulposus of the lumbar spine at L5-S1, from the below-described silverware-lifting injury:

> She was pulling out a tub of silverware. As she was lifting it up, she felt a sharp pain in her back, "like stabbed in the back with a knife." She dropped the silverware tray. The cook at the restaurant helped her to sit. She finished the remainder of that shift; however, she remained markedly symptomatic and had marked difficulty throughout her shift, particularly with left lower extremity radicular pain.

Id.

36. Dr. Blair based his opinion on the assumption that Claimant "was in a normal state of good health until 11/24/08 while at work at night as a server." DE L, p. 82. He also assumed that, "For a few days prior to this injury, she did have a dull ache in her back; however, she had no radicular pain and was able to function at a fairly high level." *Id.* This conclusion is somewhat inconsistent with Dr. Blair's aforementioned statement that Claimant was in good health prior to her accident. Further, it is directly inconsistent with Dr. Walker's December 29, 2008, chart note recording left lower extremity pain since early November 2008. Dr. Blair does not offer any explanation for these inconsistencies. He also does not attempt to reconcile Claimant's early reports regarding back pain onset recorded in her medical records with the causation scenario he relied upon, proposed by Claimant's attorney.

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[1] Dr. Blair is probably referring to Claimant's statement to Surety on April 13, 2009.

DISCUSSION AND FURTHER FINDINGS

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).

CAUSATION

The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

The 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 medical testimony supporting the claim for compensation to a reasonable degree of medical probability. 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. Drapo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

The Idaho Supreme Court has held that 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).

37. There is little doubt, based upon the medical evidence, that Claimant had no history of lumbar spine pathology until she sustained a herniated disc in her low back in late 2008. The pivotal question is whether or not that herniated disc was the result of a workplace accident.

38. Claimant alleges she sustained a workplace accident on November 24, 2008. However, the contemporaneously compiled documentation, through April 22, 2009, which includes Claimant's FROI, the daily manager's log and Claimant's medical records, together establish that Claimant did not attribute her low back pain to any particular event during this period. She told Dr. Walker and her physical therapist, in December 2008 and March 2009, respectively, that no injury coincided with the onset of her symptoms. She explained to her physical therapist that she thought her work as a server and bartender for many years, combined with not taking care of her body, was finally catching up with her. As late as April 22, 2009, Claimant reported to Dr. Marano/Mr. Cook that her pain just kind of started out of the blue. At the most, this evidence proves that Claimant felt a pain in her low back while standing and chatting, which worsened with work.

39. Then, after Dr. Marano recommended surgery and sought Surety's approval, Claimant told Surety, in her recorded statement in May 2009, that her symptoms began either when she was cleaning the salad bar reach-ins or when she attempted to lift a heavy silverware tray to a head-height shelf. By the time of her deposition in April 2011, Claimant's silverware-lifting description grew to include an elaborate recitation of how she dropped the silverware tray as she fell to the ground, creating a clamor that brought Aaron from the kitchen. She had not

previously divulged this dramatic fact, not to her many treating medical providers, and not in response to direct questioning by Defendants about how she incurred her back pain. Instead, she told Surety in May 2009 that she set the tray down. Claimant's hearing testimony was even more detailed than her deposition testimony regarding the silverware-dropping/falling-to-the-ground event. Yet, she fails to provide a persuasive explanation why she did not report this event until after surgery was recommended.

40. Further, Claimant's explanation at her deposition, that she was carrying the silverware tray before her accident at stomach-height, according to the Community Care physician's instructions, is clearly an inaccurate embellishment because her prior statement to Surety establishes that she did not see that physician until after she alleges her accident occurred.

41. There is no explanation in the record why Claimant would have reported to Surety that she did not drop the silverware tray if, as she later claimed, she did. The record also fails to provide a reasonable basis for why Claimant had such disparate recollections of how Michelle first told her to go to a doctor.

42. On its face, Aaron's testimony corroborates Claimant's later assertions. However, he recalled that Claimant dropped a *dish tub* and that he saw *plates*, as well as silverware, on the ground. In addition, he did not mention making a telephone call to Michelle, which, according to both Claimant's deposition and hearing testimony, he did. Conversely, Aaron did claim to have driven Claimant home that night, which Claimant never mentioned. Further, Aaron thought very highly of Claimant and so poorly of Employer's poor employee relations that he quit. In addition, Aaron had knowledge and experience related to his own prior workers' compensation claim which prompted him to recommend his attorney to Claimant.

43. Claimant takes exception to the fact that Defendants did not interview any witnesses prior to denying her claim. However, by the time Claimant filed her FROI, on April 24, 2009, Michelle was no longer an employee and Claimant did not reveal any other potential witnesses during her recorded statement to Surety. She said she set the tray down and she did not mention anything about Aaron coming out of the kitchen or helping her. It was not until her deposition, in April 2011, that she related dropping the tray, causing a loud clatter that brought Aaron out of the kitchen. Based upon the information it had as of May 2009, Surety did not unreasonably deny Claimant's claim.

44. Under the circumstances presented by the record, Aaron's testimony is consistent with an intentional plan to assist Claimant in misleading this tribunal. There is inadequate evidence to establish this as a fact; however, Aaron's testimony alone is not credible to corroborate Claimant's testimony about what happened on the night of her alleged accident.

45. At the hearing, Claimant was cooperative and non-defensive, and she appeared credible. However, there are serious factual discrepancies among her various reports of onset of her low back pain and other facts that cannot be reconciled based upon the evidence in the record. Claimant's statements reflected in documents prepared after April 22, 2009 are not credible. Even combined with the bulk of evidence in the record, they fail to rebut her earlier statements recorded in her FROI, her medical records, and the negative inference created by the absence of any notation in the daily manager's log linking Claimant's low back injury to her work. Although the accident now described by Claimant could have caused the injury of which she complains, the evidence, considered as a whole, fails to establish the occurrence of the claimed accident.

46. No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment. There is credible evidence that work worsened Claimant's back pain over time. However, this evidence is inadequate to establish Claimant's herniated disc is the result of a workplace accident.

47. Claimant has failed to adduce sufficient evidence to prove that her low back injury was caused by an accident arising out of and in the course of her employment.

48. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment.

2. All other issues are moot.

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 7th day of March, 2012.

INDUSTRIAL COMMISSION

LaDawn Marsters, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2012, 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:

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sjw

Sara Slater

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, v. SHARIS MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-011431** **ORDER**

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 that her low back condition was caused by an accident arising out of and in the course of her employment.

2. All other issues are moot.

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

DATED this 13th day of March, 2012.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2012, 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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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 CLAIMANT'S REQUEST FOR RECONSIDERATION/REHEARING

COMES NOW the Claimant, DALLAS L. CLARK, by and through her attorney of record, Paul T. Curtis of CURTIS & PORTER, P.A., and, pursuant to I.C. §72-718, hereby respectfully requests that the Commission reconsider its Findings of Fact, Conclusions of Law and Recommendation (Decision) in this matter filed on March 13, 2012, and/or order a rehearing in the matter.

45

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ORIGINAL

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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This Request is on the basis that the Findings of Fact in the Decision is not based on substantial and competent evidence since the Referee, in coming to her decision, overlooked important evidence and misunderstood other important evidence, leading her to an erroneous conclusion.

ARGUMENT

1. The First Reports of Injury were not prepared by Claimant.

In this bifurcated hearing, the issue was causation and whether or not there was an industrial accident. One of the reasons for this Request is because the Referee wrongly thought that the First Report of Injury dated April 24, 2009, had been completed by the Claimant. This assumption contributed to the Referee's erroneous belief that "Claimant did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009;" [Decision, par. 28] that "Claimant's statements reflected in documents prepared after April 22, 2009 are not credible"; [Decision, par. 45] and she never reported anything to her employer more than "simply standing and talking at work" that triggered her back pain. [Decision, par. 46]

At page 4 of the Recommendation, par. 4, the Decision states:

> 4. **First Report of Injury**. Claimant completed a First Report of Injury on April 24, 2009, in which she reported an ache in her lower back, with onset on November 24, 2008, while "standing" and "making a salad." DE A, p. 2. More specifically, Claimant wrote that she was "standing there and back began hurting." *Id.* As a result, Surety denied Claimant's claim on May 18, 2009, because her injury was not due to a workplace accident. "Ms. Clark did not associate any injuries or trauma to the onset of her pain." DE K, p. 68.

At the hearing the Claimant testified that she had never seen the typewritten FROI before the hearing. [DE p 1] [HT p. 79, lines 3-11; p. 81, l. 25 to p. 82, l. 1] With respect to the

handwritten FROI, [DE p 2] the Claimant testified her signature is the *only* thing she wrote on the paper - and that was signed *before* the rest was completed. [HT p. 79, line 12 to p. 84, line 16] This first-person testimony remains unrebutted by defendants.

Defendants have *never* disputed the fact that the Claimant did not fill out the handwritten FROI and, contrary to the Referee's assumption otherwise, there is absolutely no evidence that she did fill it out. In fact, the evidence is to the contrary. The fact is that the *employer*, not the Claimant, completed the FROI, and it constitutes an *admission* that the employer knew about the accident by December 15, 2008. The *employer* is the one who delayed sending in the FROI, not the Claimant, and the Claimant provided the employer the requisite 60-day notice. Furthermore, Defendants' "Answer" dated December 10, 2009, expressly *admits* that the notice of the accident causing the injury or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease. Defendants cannot argue, and it is obvious error for the Referee to find (or even consider), that the first time Claimant notified her employer of a work place accident was "after April 30, 2009."

The typewritten FROI [DE p 1] substantiates employer's admissions and Claimant's version of events. Obviously the Claimant never typed this FROI. This was prepared by Ms. Jean L. Freuler, Human Resources, on April 28, 2009, as indicated on the bottom. It also admits that the employer was notified on December 15, 2008, and the injury date was November 24, 2008. The employer also knew it was more than merely a *standing* incident, since they officially call it a *reaching* accident. This fact is absolutely clear as the employer noted code number "58" in the "CAUSE OF INJURY CODE" located on DE 1, which refers to a "Reaching" cause.

The Referee goes on to say that, based on DE K, p. 68, the Surety denied the claim because "Mrs. Clark did not associate any injuries or trauma to the onset of her pain." DE K p. 68 "DE K p. 68" is a letter from Liberty Northwest's insurance adjuster to defendants' IME doctor, Dr. Hajjar, dated December 17, 2010. The statement is not testimony as it is merely the adjuster's spin to Dr. Hajjar as to what the Claimant actually said about her accident. In her recorded statement the Claimant clearly testifies regarding a lifting/reaching incident putting silverware up into the water station.

This adjuster also admitted in the letter to Dr. Hajjar that "On 12/15/08 she [Claimant] requested a claim be filed under workers' comp." There can be no dispute as to whether or not Claimant gave her employer the requisite 60-day notice as this letter is also a direct admission by defendants that they received said notice of the claimed injury.

Regardless whether or not the accident is considered a lifting, reaching or even twisting or stooping incident, it is absolutely clear in describing an incident at her work where Claimant injured her back. The unquestioned date of injury is November 24, 2008. As briefed previously, "lifting", "reaching" and "twisting" incidents are covered "accidents" for workers compensation purposes even when there is no so-called "trauma" involved.

2. The Referee is simply wrong in concluding that "there is no evidence in the record" demonstrating the fact that the Surety accepted the accident claim and paid some related bills.

The Referee clearly failed to acknowledge the hearing testimony and review the Claimant's exhibits when she concluded that there was no evidence in the record supporting Claimant's assertion that the Surety did as a matter of record pay for some of the Claimant's medical bills.

This is an important point because, as the Referee expresses, if the Surety actually paid some of the Claimant's medical bills, the actions are "contrary to Surety's positions that it denied her claim."

At page 5 of the Recommendation, par. 4, the Decision states:

> 5. Claimant testified at the hearing that Surety later paid for some random medical expenses associated with her injury. There is no evidence in the record to support Claimant's assertion, which is contrary to Surety's position that it denied her claim. Claimant has failed to establish that Surety paid any medical benefits associated with the instant claim.

At the hearing the Claimant testified that the Surety paid at least part of Dr. Walker's bills; they paid for an EMG study he ordered; they paid for an MRI and for an orthodic/prosthesis provided by Rocky Mountain Limb and Brace. [HT p. 74 line 19 to p. 76 line 23] Further, Claimant's Exhibit 19, pages 2 and 3 are part of the record, were not objected to, not rebutted, and corroborate Claimant's hearing testimony.

The record is clear and unambiguous that defendants paid for some of Claimant's medical bills associated with her work-related accident.

Also included herewith as an offer of proof if a rehearing is allowed, attached to the Affidavit of Diane Wilding, copies of additional medical bills showing the Surety did in fact pay for random medical expenses associated with the Claimant's injury.

3. The Referee erroneously does not appear to accept the fact testified to by Claimant and witness Aaron Swenson that management and others knew about the accident (Decision p.11] Further, it was error for the Referee to exclude the Affidavits of Michelle Morgan and Billie Rowan. [CE 13]

In her Decision, par. 24, the Referee states:

> 24. Aaron did not report the event to management because, he explained, the managers all already knew about it. He testified that all of the managers had asked him about it. Claimant also testified that she reported her

injury to management. However, this assertion is otherwise unsupported in the record.

Claimant refers to, and incorporates herein her above argument regarding the FROI's prepared by management and the admissions by defendants contained therein, and the fact that in their filed Answer defendant's ADMIT they received the 60-day Notice.

Furthermore, Claimant directs the Commission to the top of page 4 of the Referee's Decision. As part of her reasoning in excluding the Affidavit of Michelle Morgan, the Referee states Claimant does not refer to the contents of [either] affidavit in her briefing. Since when does not referring to evidence in briefing constitute a basis for excluding it? This is an administrative proceeding, and the Idaho Rules of Evidence do not apply. Affidavits of unavailable witnesses are commonly allowed in administrative proceedings and the finder of fact, rather than excluding the evidence, just considers the weight he or she chooses to give the evidence.

In this case, Claimant contends it was error for the Referee to exclude the Affidavit of Michelle Morgan. She was out of the country at the time of the hearing, and was Claimant's supervisor during the "relevant period." Her testimony would assist the trier of fact, and much of her statement was not debatable even if she were cross-examined on it. The trier of fact should have considered the Affidavit and the weight she chose to afford it.

In her Affidavit, Michelle Morgan stated in no uncertain terms that she became aware of Claimant's work injury on or about December "15th or 16th." This is completely in agreement with the FROI's prepared by management and discussed above and defendants' filed Answer. She states that she did record the injury in the daily log book. She further states that "Dallas's communication with management was clear" regarding the injury.

Certainly Michelle Morgan's live testimony would have been helpful in this case. Claimant respectfully requests a rehearing so that Michelle Morgan can testify live and reassure the trier of fact that Claimant not only suffered a work-related injury, but she communicated that fact to management long before April 30, 2009, and Ms. Morgan recorded the injury in the daily log book.

Billie Rowan's Affidavit was also stricken, and it was stricken for the same reasons as Michelle Morgan's, except that he had apparently not been disclosed as a witness in discovery.[1] Mr. Rowan's Affidavit also supports the fact that management and other employees were aware of Claimant's injury long before the FROI was submitted by management. Certainly in these administrative proceedings the affidavit corroborates Claimant, Aaron Swenson and Michelle Morgan's testimony and is helpful to the trier of fact. It should have been admitted by the trier of fact with the trier deciding the weight to be given it. Billie Rowan's live testimony at a rehearing would also be requested.

The standard as to whether or not to admit an affidavit is not whether or not the opposing party had an "opportunity to cross-examine." The threshold issue in an administrative proceeding is even less formal than that in a summary judgment motion which is controlled by I.R.C.P. Rule 56(e). The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. *Jesus Herrera v. Pedro Estay, Rock Creek Development, LLC*, ID Supreme Court Docket No. 34085, 2008 Opinion No. 119, citing *Dulaney v. St. Alphonsus Reg. Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002). Certainly the facts cited by both Ms. Morgan and Mr. Rowan are

not irrelevant, immaterial, unduly repetitious, inadmissible on constitutional or statutory grounds, or protected by some sort of privilege. The facts so stated are of a type commonly relied upon by prudent persons in the conduct of serious affairs and are of that type based on personal knowledge that would even be admissible in a court of law, let alone this administrative proceeding.

Included with this Request is an Affidavit of Zach Dummermuth.[2] He was subpoenaed by defendants to testify live at the hearing on June 1, 2011, but never showed. Claimant expected him to be a witness for the defense and was prepared to question him at the hearing. It turned out that the defense produced no witnesses at all. As indicated in the Affidavit, Mr. Dummermuth's live testimony at hearing would also assist the trier of fact regarding the issue of notice and causation since he was the General Manager for the company during the relevant time period.

4. The Manager's Log Book:

At page 13 of the Referee's Decision, par. 28, the Referee states:

> 28. The failure of the log book to reflect that Claimant's low back pain resulted from a workplace injury is far from dispositive of the causation issue, but it does imply that Claimant did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009.

Claimant refers to, and incorporates herein, her arguments above regarding notice and that it is Michelle Morgan's testimony that she did in fact record the injury in the log book.

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[1] Defendants could not have been prejudiced by any failure to disclose, since Mr. Rowan was their employee and defendants never interviewed anyone except Claimant regarding the accident anyway.
[2] Offered herewith as an "Offer of Proof" as to what he could be expected to testify regarding at a rehearing.

Notwithstanding whether or not the accident was recorded in the log book, as discussed above it is irrelevant because it is conclusively established in the record that the Employer had notice of the accident/injury within 60 days afterwards, and not "after April 30, 2009."

5. Medical Opinions:

Clearly there is more than adequate medical testimony connecting the injury to the alleged industrial accident.

There are four doctors who gave opinions regarding causation: Hajjar, Blair, Walker and Crook. Of these, only Dr. Hajjar has an opinion that can be construed as adverse to Claimant.

It is our opinion that Dr. Hajjar thought the Claimant's "initial exposure occurred in front of a house while standing." [3] DE K p. 69 Clearly, Dr. Hajjar was mislead that the Claimant initially injured herself outside of work, since the record is clear that the "house" is the kitchen and dish area of the restaurant. [HT p. 53, lines 1-11] Dr. Hajjar's opinions regarding causation are entirely taken from the FROI that, as explained above, was not prepared by Claimant. Nowhere does Dr. Hajjar state that the Claimant told him she injured her back at work "while "standing and talking."

It is Dr. Justin Crook, DC's opinion that the herniated disc was "a direct result of the injury she sustained at work while lifting and twisting." CE 2, p. 4 He had seen the Claimant previously and was the first medical provider to examine her after her work injury.

The Community Care records beginning on 12/16/08 indicate an onset date of 11/24/08, and worsening over the three weeks intervening. On 12/19/08, she was referred to EIRMC by Dr. Brower "for further treatment." CE 3, p. 3

Although the EIRMC record of 12/19/08 indicates pain onset "several days ago" as referenced in the Decision, par. 9, she was clearly there as a result of being referred by her Community Care doctor - and those records clearly reflect an earlier onset date.

The bottom line with Dr. Walker is that he clearly associates Claimant's initial injury as being associated with work. In his IME report he gives his unequivocal opinion, that "Ms. Clark had the onset of pain complaints on November 24, 2008." CE 6, p. 9

The physical therapy notes of March 19, 2009, show that, although they do not refer to a specific incident, the record indicates the "pain came on suddenly."

Dr. Marano's record of April 22, 2009, is the one the Referee apparently relies on to conclude that there was no compensable accident. Claimant contends that she did hurt her back at work, and the record reflects it was not due a *traumatic* event - but due to lifting and/or reaching or bending and twisting. At the hearing, Claimant denied she hurt her back "standing." She stated:

> "...it makes no sense. How can you hurt your back making a salad? I'm sorry. I mean, that's just the truth. I mean, standing there making a salad, you just toss in some salad in a bowl. You know, when I'm changing out the salad bar and doing the reach-ins, then I'm bending and I'm stretching and I'm lifting and I'm turning. But as far as standing making a salad, that just makes no sense to me." [HT p. 10, lines 14-23]

She makes sense. There is no medical opinion from Dr. Marano that Claimant's herniated disc was *not* caused at her work as a waitress. If a rehearing is allowed, Claimant believes James Cook, PA-C and/or Dr. Marano would support her. Certainly the deposition of James Cook PA-

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[3] We know this was a misunderstanding as the "house" to which he refers is really the kitchen and dish area of the restaurant, and not a non-workplace location.

C and/or Dr. Marano, would be taken to clear up any misunderstandings created from their records.

Lastly, Dr. Blair reviewed all of the above records and interviewed the Claimant. It is his clear opinion that the herniated disc was caused by a lifting incident at work.

The bottom line is that the medical records all are consistent in that they reflect the back problem is related to Claimant's work for Defendant Shari's. It is unreasonable and not supported by substantial and competent evidence for the Referee to conclude that the Claimant injured her back "standing and talking" at work, and not lifting, reaching, bending, stooping, twisting, as is common knowledge is included in a waitresses duties.

5. The Referee's Decision is not supported by substantial and competent evidence.

At paragraphs 45 through 47 of her Decision, the Referee concludes that:

> 45. At the hearing, Claimant was cooperative and non-defensive, and *she appeared credible*. However, there are serious factual discrepancies among her various reports of onset of her low back pain and other facts that cannot be reconciled based upon the evidence in the record. Claimant's statements reflected in documents prepared after April 22, 2009 are not credible. Even combined with the bulk of evidence in the record, they fail to rebut her earlier statements recorded in her FROI, her medical records, and the negative inference created by the absence of any notation in the daily manager's log linking Claimant's low back injury to her work. Although the accident now described by Claimant could have caused the injury of which she complains, the evidence, considered as a whole, fails to establish the occurrence of the claimed accident.
>
> 46. No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment. There is credible evidence that work worsened Claimant's back pain over time. However, this evidence is inadequate to establish Claimant's herniated disc is the result of a workplace accident.
>
> 47. Claimant has failed to adduce sufficient evidence to prove that her low back injury was caused by an accident arising out of and in the course of her employment.

At page 37 of the Decision, the Referee concludes that Claimant "sustained a herniated disc in her low back in late 2008." She goes to state, however, that "[T]he pivotal question is whether or not that herniated disc was the result of a workplace accident."

In the above discussion, we have proved conclusively that neither FROI was prepared by the Claimant and it was error for the Referee to assume the same. We have also proved that the defendants have admitted that the Claimant reported her accident and injury to them within the 60-day period required by law, and it was therefore error for the Referee to consider any contradictory facts. We have also proven that any apparent failure of the manager's log to record an accident or injury is irrelevant to the matter since the employer knew about the accident and injury early on regardless. It was therefore error for the Referee to consider any sort of "negative inference" to Claimant's case "created by the absence of any notation in the daily manager's log linking Claimant's low back injury to her work." [Decision par. 45]

The only other evidence considered by the Referee in coming to her findings relate with the statements made by the Claimant, witness Aaron Swenson, and those recorded in the medical records.

The Claimant made three statements that were not hearsay addressing the accident: to the Surety on May 6, 2009 [CE 11]; in her deposition of April 13, 2011 [CE 16]; and her hearing testimony. Although her recitation of the details may change a little over the years, each statement taken directly from the Claimant describes a compensable work-related accident. That an earlier statement was not taken by the Surety is the employer's fault and not Claimant's. By

admission the employer knew of the injury in mid December, 2008, and yet no statement was taken from Claimant until nearly 5 months later.[4]

In the case of *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho at 329, 179 P.3d at 292, the Supreme Court found that the Referee's findings with regard to the Claimant's credibility were not supported by substantial and competent evidence because, although there may have been slight differences or additions at the hearing, the claimant's testimony regarding how he was injured had remained consistent, and any differences in his testimony did not support the Referee's conclusion that the claimant was not credible. Differences or additions in testimony over the years, while substantive testimony regarding the accident or injury remains consistent, is not grounds to dismiss a Claimant's testimony. *Id.* at 331, 179 P.3d at 294.

In contrast to that case, in this case, the Referee finds Claimant *to be a credible* witness [Decision, par. 45] and yet does not accept *any* of her first-person accounts of her injury. Instead she relies *entirely* on third-person accounts in the medical records or FNOI's that someone else had written regarding his or her understanding of what the Claimant may have told him.

A consistent thread in all medical records, and in all accounts for that matter, is that the Claimant hurt herself at work on November 24, 2008.

The Referee states in par. 46 of her Decision that "No physician opined that Claimant incurred her lumbar spine injury while simply standing and talking at work, and Claimant has failed to prove that she was doing anything else at work that triggered her back pain or otherwise signaled a need for treatment." She goes on to contradict herself by concluding in the next sentence, however, that "There is credible evidence that work worsened Claimant's back pain

[4] Neither the Surety nor employer took any statements from other witnesses or employees even though the Claimant

over time." So, according to the Referee, waitressing certainly aggravated Claimant's back, but it could not have caused her back problem in the first place. These two sentences alone prove that the Referee's Decision is not based on substantial and competent evidence. The evidence in the record is that Claimant was an excellent worker. It is common knowledge that waitressing involves substantially more than "standing and talking," and it is in fact difficult work involving constant bending, stooping, lifting and reaching. It is disingenuous indeed for the Referee to believe that the Claimant told her medical providers and others that she injured herself doing nothing else but "standing and talking at work," but the bending, twisting, reaching, stooping and other demanding waitress work only "worsened" it. Any evidence that "work worsened Claimant's back over time" is also evidence that Claimant injured her back at work, since the same activities that might worsen a back problem could also be a cause of a herniated disc. It would be more probable that a waitress would injure her back lifting or reaching or bending or stooping, which would be a covered "accident," than "standing and talking."

Furthermore, taken in context of the fact that Claimant has less than a 8th grade education, and that she admittedly did not suffer a serious trauma in the form of a blow by a foreign object or a fall from a height, a motor vehicle accident or such, but her injury is due to a lifting or reaching incident [See HT p. 101, lines 10-23] the medical records are not nearly as damaging to her testimony as defendants' might argue.

Claimant contends that a reasonable person would not disregard the first-person testimony of the Claimant and replace them solely for the third person statements in the medical records.

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identified at least three witnesses in her recorded statement - Zach, Rick and Lisa. [CE 11, p. 2]

The Referee's dismissal of the first-person testimony of Aaron Swenson at the hearing to not be credible is also not supported by substantial and competent evidence.

As in the *Stevens-McAtee* case cited above, even though the Referee may be correct in that the testimony of Mr. Swenson nearly three years after the incident differed from Claimant's version, "such is to be expected." Mr. Swenson recalled it was a "*dish tub* and that he saw *plates,* as well as silverware, on the ground" and he "did not mention making a phone call to Michelle" and he mentioned he recalled driving Claimant home that night and Claimant didn't. [Decision p. 18, par. 42] However, the *substantive* portions of his testimony corroborate Claimant's version.

In her direct testimony the Claimant *never* stated that she "incurred her lumbar spine injury while simply standing and talking at work" and the Referee's conclusion is not supported by substantial and competent evidence.

CONCLUSION

The Referee's Decision is based on clear errors in fact and said Decision is not supported by substantial, competent evidence. For example:

- It was error for the Referee to consider any facts that the employer did not receive timely notice of the accident;

- It was error for the Referee to consider the manager's log books' failure to reflect an accident as being adverse to Claimant's case since the employer admitted it had timely notice of the accident - even in it's Answer to Claimant's Complaint;

- It was error for the Referee to conclude that there was no evidence in the record supporting Claimant's contention that, contrary to their alleged denial, the employer paid some of her medical bills;

- It was error for the Referee to exclude the Affidavits of Michelle Morgan and Billie Rowan;

- It was error for the Referee to find Claimant to be a credible witness, and then reject her first-person statement, her deposition, and her hearing testimony;

- And it was unreasonable and defies common sense for the Referee to conclude that, although the medical records reflect a work-related incident, this "expert server" [FOF par. 1] more than likely injured herself "standing and talking" rather than reaching, lifting, bending, stooping, and otherwise doing all of the things that are common knowledge that good waitresses are constantly engaged in.

Recently in the case I.C. Case No. 06-003863, (the Honorable Alan Taylor, Referee) all matters had been briefed and post-hearing depositions taken, when defendants allegedly discovered some "new" information and moved to "re-open" the case. Over my (the undersigned attorney's) objections the motion was granted so the Referee could make an informed decision.

Also just recently, in the I.C. Case No. 2008-033440, (the Honorable Rinda Just, Referee) the defendants moved to continue a hearing so that their doctor could perform additional tests. Again, over our objections the motion was granted so the Referee could make an informed decision.

We request the same considerations afforded defendants in other cases.

In this instance, we proved our case. The defendant had every opportunity to produce live witness testimony or take post hearing medical depositions and they chose not to. There is evidence not considered by the Referee and yet available and her remaining factual questions could be resolved at a rehearing. In light of the Referee's false assumptions on which, in whole or in part,

she based her factual findings, Claimant is entitled to a rehearing, or, at a minimum, a reconsideration, based on the facts conclusively established in the record.

The ramifications of the Referee's erroneous Decision could not be much more devastating to the Claimant at this time. The medical record is in complete agreement that her injury occurred on the job, she suffers from a drop-foot, and immediately needs another surgery for a recurrent disc herniation. The longer she waits for this second surgery, the more likely the drop-foot problem will become permanent.

Claimant therefore requests a rehearing, or at least a reconsideration of this matter.

Dated: 4/2/12

Respectfully submitted,

Paul T. Curtis

PAUL T. CURTIS, Claimant's Attorney

Certificate of Service

I hereby certify that on the 2 day of April, 2012, a true and correct copy of the foregoing **CLAIMANT'S REQUEST FOR RECONSIDERATION OR REHEARING** was served upon the following attorneys of record by the method indicated:

Mr. Roger Brown	[x] First class mail
LAW OFFICES OF HARMON & DAY	[x] Fax: 800-972-3213
P. O. Box 6358	[ ] Hand-delivery
Boise, ID 83707-6358	[ ] Express Mail

Paul T. Curtis

Paul T. Curtis

Paul T. Curtis ISB#: 6042
CURTIS & PORTER, P.A.
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Telephone: (208) 542-6995
Facsimile: (208) 542-6993

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 AFFIDAVIT OF ZACH DUMMERMUTH

I, Zach Dummermuth, being duly sworn, depose and says, I have personal knowledge of the following facts, that they are true and correct to the best of my knowledge and I would be competent to testify thereto if called at hearing with respect to the following facts:

1. I have worked for Sharis Restaurants as General Manager for approximately eight years.

2. I was employed in the capacity as General Manager in the Fall of 2008, and during the

(64)

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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 AFFIDAVIT OF ZACH DUMMERMUTH

I, Zach Dummermuth, being duly sworn, depose and says, I have personal knowledge of the following facts, that they are true and correct to the best of my knowledge and I would be competent to testify thereto if called at hearing with respect to the following facts:

1. I have worked for Sharis Restaurants as General Manager for approximately eight years.

2. I was employed in the capacity as General Manager in the Fall of 2008, and during the

65

entire year of 2009.

3. I knew about Dallas Clark's work accident in November of 2008.

4. As General Manager of Sharis, some of my duties included rescheduling around employees who had emergencies, sickness and absentees who couldn't be at work. I do remember scheduling employees to cover Dallas's shift after the accident.

5. As far as the First Report of Injury forms, they are partially filled out by Melody Morehouse at Liberty Northwest before they come to Sharis. On April 24, 2009, I prepared a First Report of Injury regarding Dallas's accident. Dallas Clark had signed the blank form before I received it. Either Melody or I completed everything except for Dallas's signature.

6. I filled out the portion that talks about the occurrence in the lower boxes and Melody Morehouse filled out the top boxes and the "Date Employer Notified" in the center right hand box.

7. I don't know how many employees knew about Dallas' back injury, but I do know that the other managers, Michelle Morgan (assistant manager at the time) and Rick knew. At least a few of the waitresses knew about the accident because they covered her shifts for her and helped her do the heavy stuff afterward. It is my understanding that Aaron Swensen, our night shift cook, actually helped her the night of the accident.

8. Melody Morehouse filled in the box "Date Administrator Notified" stating "Around 12-15-08" and the other initial information.

9. We all knew of Dallas's injury before 12-15-08, including Melody Morehouse at Liberty

Mutual.

10. Dallas Clark did not complete the portions of the Notice of Injury describing the "Occurrence" or "Employee."

11. On the First Notice of Injury Report, I wrote that Dallas was "making salad" because I recall she said she was at the salad bar when it happened. Dallas' shift starts at 6:00 p.m. and that's when the salad bar is changed out. Changing out the salad bar requires putting all of the product into clean pans and refilling them from produce kept in refrigerators below the salad bar, which does require bending up and down and twisting.

12. I wrote on the Injury Report that Dallas was "standing" because she had first noticed her back pain while she was standing, in front of the salad bar. Of course she had just changed the salad bar as I had referenced above. I understood that Dallas had also hurt her back later on in her shift while she was lifting up the silverware tray and the silverware spilled all over the floor but it was still her back. I should have also put while lifting.

13. I wrote on the report that that she "possibly" had the injury on the premises because I didn't see it happen.

14. Dallas was a hard worker and a good server. Based on my observance, her ability to work and keep moving before the accident was excellent. After she had hurt her back at work, it was obvious she was having difficulties with her work.

15. Dallas continued to try to work after the accident, but not in the same capacity. Her back just continued to get worse until she had her surgery.

16. After I prepared my portion of the First Notice of Injury on April 24, 2009 it was faxed back to Melody Morehouse, Workers Compensation Manager for Shari's, in Beaverton, Oregon on April 28, 2009.

17. Dated this 30 day of March, 2012.

Zach Dummermuth

SUBSCRIBED AND SWORN to before me this 30th day of March, 2012, that Zach Dummermuth executed the above document.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public

Commission Expires:

Residing: Idaho Falls, Idaho 83402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of April 2012, I the undersigned served a true and correct copy of the foregoing Affidavit of Zach Dummermuth by the method following:

Roger Brown [x] Facsimile: 1-800-972-3213

Paul T. Curtis
Attorney for the Claimant

Paul T. Curtis ISB#: 6042
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598 N. Capital Ave.
Idaho Falls, Idaho 83402
Telephone: (208) 542-6995
Facsimile: (208) 542-6993
Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 AFFIDAVIT OF DIANE WILDING

State of Idaho)
) ss.
County of Bannock)

I, Diane Wilding, being duly sworn, depose and say, I have personal knowledge of the facts as follows and will testify at hearing with respect to the following events:

1. I am a paralegal for Curtis & Porter at 598 North Capital, Idaho Falls, Idaho.
2. Mr. Curtis has requested that I prepare an Affidavit regarding "Aaron Swensen" and how he came about testifying at hearing.

ORIGINAL

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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 AFFIDAVIT OF DIANE WILDING

State of Idaho)
) ss.
County of Bannock)

I, Diane Wilding, being duly sworn, depose and say, I have personal knowledge of the facts as follows and will testify at hearing with respect to the following events:

1. I am a paralegal for Curtis & Porter at 598 North Capital, Idaho Falls, Idaho.
2. Mr. Curtis has requested that I prepare an Affidavit regarding "Aaron Swensen" and how he came about testifying at hearing.

(71)

3. In preparation for discovery, Ms. Clark couldn't remember Aaron's last name so we put "Aaron the cook". Dallas had contacted some friends at Sharis and was told his last name was Swensen, but he had left Sharis and didn't know where he was.

4. In preparation for hearing, we prepared a Subpoena to be served on Aaron Swensen but we had no idea where he was.

5. Our process server found and served Aaron a week before hearing. After the fact, I ran into Aaron at a restaurant in Idaho Falls. I didn't recognize him at first. Aaron recognized me and came up to say hello. He asked what was going on with Dallas. I said "Sharis is claiming that Dallas didn't hurt herself at work". He said "it **did** happen, I didn't see it but I heard it, when I heard the bang I came out to see what was going on and found her hurt, I helped her to a booth. I helped her, I drove her home." I asked him if he was coming to the hearing. He said it's been so long I don't remember much. I told him to just tell what he remembered.

6. The morning of the hearing, Mr. Swensen called several times as he was on 17th street and couldn't find the Industrial Commission. He was concerned as he was scheduled to talk to Mr. Curtis but never showed. He was nervous as he didn't know what to expect.

7. To say that there was any sort of scheme between Dallas and Aaron to concoct a story is unfounded. Mr. Swensen conveyed to me that he hadn't talked to Dallas in two years.

8. Dallas's biggest problem is she has an 8th grade education and has problems with processing and formulating her thoughts but the specific events have always been

consistent.

9. The referee had also mentioned that there was no evidence to support that Liberty Northwest had paid any bills. This is incorrect, Liberty Northwest paid for a brace and Dr. Walkers bill together with a few nerve conduction studies. I have attached them hereto.

Diane Wilding

SUBSCRIBED AND SWORN to before me this 2nd day of April, 2012, that Diane Wilding executed the above document.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public
Commission Expires: 03/04/14
Residing: Idaho Falls, Idaho 83402

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of April 2012, I the undersigned served a true and correct copy of the foregoing Affidavit of Diane Wilding by the method following:

Roger Brown [x] Facsimile: 1-800-972-3213

Paul T. Curtis
Attorney for the Claimant

Dallas Clark
Bills paid by Liberty Northwest
In support of Affidavit of Diane Wilding

74

03-30-2012

WALKER SPINE AND SPORTS SPEC.
Transaction History
Case # A - All Cases included

Page 1

542.1993

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	I
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1	01-05-09	12-30	(0)62311	ESI LUMBAR	610.00		403.14	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
2	01-05-09	12-30	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
3	01-05-09	12-30	(0)99212-25	OFFICE VISIT	82.50		52.70	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
4	01-05-09	12-29	(0)99243	OFFICE CONSULTATION	250.00		133.77	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
5	01-08-09	01-08	(0)CASH	CASH PAYMENT	-15.00			
6	01-08-09	01-08	(0)CASH	CASH PAYMENT	-15.00			
7	01-21-09	01-21	(0)CASH	CASH PAYMENT	-15.00			
8	01-27-09	01-19	(0)99212	OFFICE VISIT	82.50		52.70	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
9	02-02-09	01-29	(0)64483	TRANSFORAMIN ESI LUMBA	750.00		602.06	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
10	02-02-09	01-29	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
11	02-04-09	02-04	(0)INS	DOS 12/29, 12/30/08	0.00			
12	02-04-09	02-04	(0)INS	DOS 12/29, 12/30/08	-341.35			
13	02-06-09	02-06	(0)STMT	STATEMENT SENT	0.00			
14	02-23-09	02-23	(0)INS	DOS 1/29/09	0.00			
15	02-23-09	02-23	(0)INS	DOS 1/29/09	-181.40			
16	02-26-09	02-26	(0)INS	INS PMT	0.00			
17	02-26-09	02-26	(0)INS	INS ADJ	-29.80			
18	03-10-09	03-10	(0)CASH	CASH PAYMENT	-15.00			
19	03-10-09	03-10	(0)STMT	STATEMENT SENT	0.00			
20	03-11-09	03-09	(0)99212	OFFICE VISIT	82.50		52.70	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
21	03-16-09	03-12	(0)64483	TRANSFORAMIN ESI LUMBA	750.00		617.06	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
22	03-16-09	03-12	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
23	04-07-09	04-07	(0)COLL	Sent Letter NXT1	0.00			

03-30-2012 WALKER SPINE AND SPORTS SPEC. Page 2

Transaction History

Case # A - All Cases included

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	I
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	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
2	04-09-09	04-09	(0)SC	SERVICE CHARGE	9.91		9.91	C
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
3	04-09-09	04-09	(0)STMT	STATEMENT SENT	0.00			
4	04-15-09	04-15	(0)CASH	CASH PAYMENT	-15.00			
5	04-30-09	04-30	(0)INS	INS PMT	0.00			
6	04-30-09	04-30	(0)INS	INS ADJ	-211.20			
7	05-06-09	05-06	(0)COLL	Sent Letter NXT1	0.00			
8	05-08-09	05-08	(0)SC	SERVICE CHARGE	20.36		20.36	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
9	05-08-09	05-08	(0)STMT	STATEMENT SENT	0.00			
10	05-26-09	05-26	(0)INS	DOS 4/7/09	0.00			
11	05-26-09	05-26	(0)INS	DOS 4/7/09	-29.80			
12	06-03-09	06-03	(0)SC	SERVICE CHARGE	20.36		20.36	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
13	06-04-09	06-04	(0)STMT	STATEMENT SENT	0.00			
14	06-09-09	06-09	(0)COLL	Sent Letter NXT7	0.00			
15	07-08-09	07-08	(0)COLL	Sent Letter NXT7	0.00			
16	07-09-09	07-09	(0)SC	SERVICE CHARGE	31.71		31.71	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
17	07-09-09	07-09	(0)STMT	STATEMENT SENT	0.00			
18	07-31-09	07-31	(0)99080	DDS	15.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
19	08-06-09	08-06	(0)STMT	STATEMENT SENT	0.00			
20	08-31-09	08-31	(0)DDS	DDS	-15.00			
21	09-04-09	09-04	(0)STMT	STATEMENT SENT	0.00			
22	10-06-09	10-06	(0)STMT	STATEMENT SENT	0.00			
23	11-06-09	11-06	(0)STMT	STATEMENT SENT	0.00			

03-30-2012

WALKER SPINE AND SPORTS SPEC.
Transaction History
Case # A - All Cases included

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	I
				Balance Forward		0.00	2218.79	
1	12-04-09	12-04	(0)STMT	STATEMENT SENT	0.00			
2	01-08-10	01-08	(0)STMT	STATEMENT SENT	0.00			
3	07-28-10	07-28	(0)99455	DISABILITY EXAMINATI	850.00		850.00	DY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
4	09-08-10	08-31	(0)95860	EMG 1 EXTREMITY	258.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
5	09-08-10	08-31	(0)95900	MOTOR W/O F WAVE	580.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
6	09-08-10	08-31	(0)95904	SENSORY	145.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
7	10-18-10	10-11	(1)99213	OFFICE VISIT EST	135.00		135.00	DY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
8	10-21-10	10-21	(0)WC	DOS 8/31/10	-765.04			
9	10-21-10	10-21	(0)WC	DOS 8/31/10	-217.96			

End of Report. Patient/Change
Requested by PAT and completed at 10:20AM on Mar 30 2012

03-30-2012

WALKER SPINE AND SPORTS SPEC.
Transaction History
Case # A - All Cases Included

Page 1

$42.693

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	I
				Balance Forward		0.00	0.00	
1	01-05-09	12-30	(0)62311	ESI LUMBAR	610.00		403.14	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
2	01-05-09	12-30	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
3	01-05-09	12-30	(0)99212-25	OFFICE VISIT	82.50		52.70	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
4	01-05-09	12-29	(0)99243	OFFICE CONSULTATION	350.00		133.77	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
5	01-08-09	01-08	(0)CASH	CASH PAYMENT	-15.00			
6	01-08-09	01-08	(0)CASH	CASH PAYMENT	-15.00			
7	01-21-09	01-21	(0)CASH	CASH PAYMENT	-15.00			
8	01-27-09	01-19	(0)99212	OFFICE VISIT	82.50		52.70	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
9	02-02-09	01-29	(0)64483	TRANSFORAMIN ESI LUMBA	750.00		602.06	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
10	02-02-09	01-29	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
11	02-04-09	02-04	(0)INS	DOS 12/29, 12/30/06	0.00			
12	02-04-09	02-04	(0)INS	DOS 12/29, 12/30/08	-341.35			
13	02-06-09	02-06	(0)STMT	STATEMENT SENT	0.00			
14	02-23-09	02-23	(0)INS	DOS 1/29/09	0.00			
15	02-23-09	02-23	(0)INS	DOS 1/29/09	-181.40			
16	02-26-09	02-26	(0)INS	INS PMT	0.00			
17	02-26-09	02-26	(0)INS	INS ADJ	-29.80			
18	03-10-09	03-10	(0)CASH	CASH PAYMENT	-15.00			
19	03-10-09	03-10	(0)STMT	STATEMENT SENT	0.00			
20	03-11-09	03-09	(0)99212	OFFICE VISIT	82.50		52.70	CY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
21	03-16-09	03-12	(0)64483	TRANSFORAMIN ESI LUMBA	750.00		617.06	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
22	03-16-09	03-12	(0)77003-26	FLUORO GUIDANCE	105.00		56.54	CY
	Location:MOUNTAIN VIEW OUT PT Doctor:GARY C WALKER, MD							
23	04-07-09	04-07	(0)COLL	Sent Letter NXT1	0.00			

(5)

(78)

03-30-2012

WALKER SPINE AND SPORTS SPEC.
Transaction History
Case # A - All Cases included

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	I
				Balance Forward		0.00	2083.75	
1	04-08-09	04-07	(0)99212	OFFICE VISIT	82.50		52.70	DY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
2	04-09-09	04-09	(0)SC	SERVICE CHARGE	9.91		9.91	C
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
3	04-09-09	04-09	(0)STMT	STATEMENT SENT	0.00			
4	04-15-09	04-15	(0)CASH	CASH PAYMENT	-15.00			
5	04-30-09	04-30	(0)INS	INS PMT	0.00			
6	04-30-09	04-30	(0)INS	INS ADJ	-211.20			
7	05-06-09	05-06	(0)COLL	Sent Letter NXT1	0.00			
8	05-08-09	05-08	(0)SC	SERVICE CHARGE	20.36		20.36	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
9	05-08-09	05-08	(0)STMT	STATEMENT SENT	0.00			
10	05-26-09	05-26	(0)INS	DOS 4/7/09	0.00			
11	05-26-09	05-26	(0)INS	DOS 4/7/09	-29.80			
12	06-03-09	06-03	(0)SC	SERVICE CHARGE	20.36		20.36	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
13	06-04-09	06-04	(0)STMT	STATEMENT SENT	0.00			
14	06-09-09	06-09	(0)COLL	Sent Letter NXT7	0.00			
15	07-08-09	07-08	(0)COLL	Sent Letter NXT7	0.00			
16	07-09-09	07-09	(0)SC	SERVICE CHARGE	31.71		31.71	
	Location:WALKER SPINE SPORTS SPECDoctor:WALKER SERVICE CHARGE							
17	07-09-09	07-09	(0)STMT	STATEMENT SENT	0.00			
18	07-31-09	07-31	(0)99080	DDS	15.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
19	08-06-09	08-06	(0)STMT	STATEMENT SENT	0.00			
20	08-31-09	08-31	(0)DDS	DDS	-15.00			
21	09-04-09	09-04	(0)STMT	STATEMENT SENT	0.00			
22	10-06-09	10-06	(0)STMT	STATEMENT SENT	0.00			
23	11-06-09	11-06	(0)STMT	STATEMENT SENT	0.00			

(79) (6)

03-30-2012 WALKER SPINE AND SPORTS SPEC. Page 3
Transaction History
Case # A All Cases Included

13946 - CLARK, DALLAS L
209 E 14TH #2
IDAHO FALLS ID 83404

Account Balance > 3203.79

No	Acc/Date	Ser/Dt	Code	Description	Org/Amt	Ins/Bal	Pat/Bal	T
				Balance Forward		0.00	2218.79	
1	12-04-09	12-04	(0)STMT	STATEMENT SENT	0.00			
2	01-08-10	01-08	(0)STMT	STATEMENT SENT	0.00			
3	07-28-10	07-28	(0)99455	DISABILITY EXAMINATI	850.00		850.00	DY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
4	09-08-10	08-31	(0)95860	EMG 1 EXTREMITY	258.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
5	09-08-10	08-31	(0)95900	MOTOR W/O F WAVE	580.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
6	09-08-10	08-31	(0)95904	SENSORY	145.00			FY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
7	10-10-10	10-11	(1)99213	OFFICE VISIT EST	135.00		135.00	DY
	Location:WALKER SPINE SPORTS SPECDoctor:GARY C WALKER, MD							
8	10-21-10	10-21	(0)WC	DOS 8/31/10	-765.04			
9	10-21-10	10-21	(0)WC	DOS 8/31/10	-217.96			

End of Report. Patient/Change
Requested by PAT and completed at 10:20AM on Mar 30 2012

(80) 4

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Fax (800) 972-3213
Employees of the Liberty Mutual Group
Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Dallas Clark, Claimant, v. Shari's Management Corporation, Employer, and Liberty Northwest Insurance Corp., Surety, Defendants.	I.C. No. 2009-011431 **DEFENDANTS' RESPONSE TO CLAIMANT'S MOTION FOR RECONSIDERATION**

COMES NOW, Defendants, Shari's Management Corporation, Employer, (hereinafter, "Shari's") and Liberty Northwest Insurance Corporation, Surety, (hereinafter, "Liberty") by and through their attorney of record, Roger L. Brown, and hereby Respond to Claimant's Motion for Reconsideration filed April 2, 2012.

Any decision made by the Industrial Commission will stand "in the absence of fraud" and "shall be final and conclusive as to all matters adjudicated by the Commission upon filing the decision." *I.C. §72-718.* The Industrial Commission issued its final Order in this matter on March 13, 2012, based upon all facts presented. The

81

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82

Commission ultimately determined that Claimant failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment, and declared all other issues moot.

A motion for reconsideration must "present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. Davidson v. H.H. Keim Co., 110 Idaho 758, 718 P.2d 1196 (1986).

Claimant's Motion for Reconsideration sets forth a recitation of a number of factual findings with which she takes issue. Claimant first argues that the Commission should have found that the First Notice of Injury was prepared by the employer on April 24, 2009, rather than the Claimant. Not only does Claimant's assertion related to the Notice requirement fail to rise to the level of legal error, it also does not form the basis for the Commission's decision against Claimant.

Claimant's second contention, that Liberty's payment of a few of Claimant's medical bills constituted "acceptance" of the claim, whether proven by Claimant or not, is based on an incorrect interpretation of what constitutes claim acceptance. Said payments were made "conditionally" while the claim was under investigation, and certainly did not have the effect of binding Liberty to an acceptance of this claim.

Claimant next expresses displeasure with the Commission's finding that Claimant and Claimant's witness, Aaron Swenson, were not credible. However, it is well

established that assessment of witness credibility is committed to the expertise of the Commission, not to be disturbed on appeal unless clearly erroneous. In its decision, the Commission clearly articulates the basis upon which it determined that the witness was not credible. While the Referee mentioned that, at the hearing, Claimant was cooperative and non-defensive, and she "appeared" credible, the Referee goes on to note "serious factual discrepancies among Claimant's various reports of onset of her low back pain that could not be reconciled based upon evidence in the record."

Claimant next alleges that rather than excluding the affidavits of Michelle Morgan and Billie Rowen (submitted by Claimant's counsel) due to unavailability of the witnesses for cross-examination, the Referee should have considered the Affidavits, then assessed the appropriate evidentiary weight. The Commission's decision clearly articulates its finding that allowing the affidavits into the record, to the extent the contents were relevant, would be more prejudicial than probative, given that Defendants were unable to cross-examine the witnesses. As such, the evidence was not sufficiently reliable to assist in resolving the issues in dispute. Further, the Referee noted Claimant did not refer to the contents of either affidavit in her briefing.

Finally, Claimant continues to challenge the Commission's assessment of the employer log books and the medical providers' chart notes regarding the history of Claimant's injury, arguing that the Commission should have found these records to be supportive of Claimant's allegations. However, the decision is well-supported by substantial and competent evidence of record.

Claimant's Motion for Reconsideration does not allege fraud or any other evidence that could be construed as deceptive in support of her request that the

Commission reconsider its Findings of Fact, Conclusions of Law, and Order. Claimant has filed her Motion solely based upon factual disputes with the Commission's findings, rather than upon legal error. Claimant 's Motion is an attempt to reweigh the evidence and presents no new legal or factual information. For the foregoing reasons, Defendants respectfully request that the Commission reject Claimant's Motion for Reconsideration.

DATED this 16th day of April, 2012.

LAW OFFICES OF HARMON & DAY

By: Roger L. Brown
Roger L. Brown
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of April, 2012, a true and correct copy of the foregoing document was served upon the following by first class mail, postage prepaid at the address indicated:

Paul T. Curtis
Curtis & Porter, PA
598 N. Capitol
Idaho Falls, ID 83402

Roger L. Brown
Roger L. Brown

Paul T. Curtis ISB#: 6042
CURTIS & PORTER, P.A.
598 N. Capital Ave.
Idaho Falls, Idaho 83402

Telephone: (208) 542-6995
Facsimile: (208) 542-6993

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 CLAIMANT'S REPLY TO DEFENDANTS' RESPONSE TO CLAIMANT'S REQUEST FOR RECONSIDERATION OR NEW HEARING FILED APR 26 2012 INDUSTRIAL COMMISSION

COMES NOW the Claimant, DALLAS L. CLARK, by and through her attorney of record, Paul T. Curtis of CURTIS & PORTER, P.A., and responds to Defendants' Response to Claimant's Request for Reconsideration or New Hearing, as follows:

///

///

Paul T. Curtis ISB#: 6042
CURTIS & PORTER, P.A.
598 N. Capital Ave.
Idaho Falls, Idaho 83402

Telephone: (208) 542-6995
Facsimile: (208) 542-6993

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 CLAIMANT'S REPLY TO DEFENDANTS' RESPONSE TO CLAIMANT'S REQUEST FOR RECONSIDERATION OR NEW HEARING

COMES NOW the Claimant, DALLAS L. CLARK, by and through her attorney of record, Paul T. Curtis of CURTIS & PORTER, P.A., and responds to Defendants' Response to Claimant's Request for Reconsideration or New Hearing, as follows:

///

///

BACKGROUND

Defendants contend that "Claimant's Motion is an attempt to reweigh the evidence, and presents no new legal or factual information." Defendants' Response, p. 4

Defendants are not correct. Claimant has pointed out obvious and clear errors of fact relied on by the Referee in arriving at her conclusions. The Referee's decision must be reconsidered after these errors have been corrected and the matter decided in light of these corrected facts.

"A claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005). The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code §72-718. *See Dennis v. School District 91*, 135 Idaho 94, 15 P.3d 329. A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. The Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

ARGUMENT

We should not lose sight of the forest for the trees. The big picture shows this case involves a *waitress* with an undisputed *excellent* work history with no history of serious back problems until after an incident she describes occurred at work. She was considered to be a *credible* witness by the referee. The Claimant's statement was taken, her deposition was taken,

and she testified at the hearing. She *consistently* testified that she injured herself in a reaching/lifting incident at work. *There is no evidence that Claimant's injury did not occur at work.* The real issue is whether it occurred lifting/reaching or "standing and talking." The Referee's conclusion that the Claimant first claimed she injured herself "standing and talking at work," and then changed her story after April 30, 2009, when she found out she needed surgery, is wrong and not supported by any substantial and competent evidence in the record.

Workers' compensation law is to be *liberally* construed in *favor* of the injured worker, *and any doubts are to be resolved in favor of the worker.* Common sense dictates that, absence a heavy, heavy weight of contrary evidence (not provided in this case), *a waitress is not likely to be injured "standing and talking" at work.*

The Commission should not throw common sense out the window, and the Claimant respectfully requests the Commission to reconsider the matter in light of the clear errors of fact relied upon by the Referee in arriving at her decision.

In her Motion for Reconsideration/Rehearing, the Claimant set forth specific errors of fact relied on by the Referee.

Without re-stating the entire brief, it is significant that the handwritten Notice of Injury was not prepared by the Claimant as the Referee wrongfully assumes. It is Zach Dummermuth's writing and words that the injury occurred, "standing there and back began hurting" - and *not Claimant's.* DE 2

The typewritten Notice of Injury that mentions "standing up" was also not prepared by the Claimant. DE 1

Although Dr. Marano's records indicate "She cannot associate any injuries or trauma to the onset of her pain..." and that "maybe it was due to standing funny" - that same record clearly indicates the onset of pain began "at work." The Claimant explained that it is true there was no "traumatic event" because to her it was the result of a lifting/reaching incident as opposed to a fall or car accident.

And "Notice" is not an issue - in other words, the Referee mistakenly thought all the time that the first time the Claimant claimed a work-related injury was *after* she found out she needed surgery. As has been shown, the true, undisputed fact is, it was *the defendants who did not take the matter seriously until after the Claimant told her she needed surgery, not the other way around.* There can be no dispute that the Claimant gave her employer timely notice of her claim, and the defendants delayed completing and submitting the Notices of Injury until months later. It is not supported in the record for the Referee to find otherwise.

Any references to the injury occurring while standing and talking come from only a few records, and none of them was prepared by the Claimant. All records reference the low back problem originating at work.

The Referee's illogical finding that it is more likely Claimant's injury occurred "standing and talking" at work, rather than from the normal and everyday active duties of a hard working waitress, is the clear result of the Referee's reliance on errors of fact.

Clearly this Claimant is an "injured worker" and the Commission should give the benefit of the doubt and set aside the Referee's unreasonable decision and give the Claimant the benefits to which the law entitles her.

///

CONCLUSION

The Claimant is not asking the Commission to re-weigh the evidence with no new or additional facts. The Referee made numerous false assumptions and clear errors of fact which have been pointed out. These errors led her to an unreasonable finding that resulted in an illogical conclusion - that is, that, this hard-working, excellent waitress and credible witness may have injured herself "standing and talking" at work, but not bending, stooping, reaching, twisting, lifting, etc., that we all know waitresses do day in and day out.

The record is clear that the injury occurred at work while Claimant was engaged in her duties as a waitress. Claimant's contention that her injury occurred lifting and reaching is the only plausible finding that is supported by substantial and competent evidence.

As such, the Claimant respectfully requests a rehearing, or, in the alternative, that the Commission reconsider the matter in light of the correct facts, and not the erroneous facts and assumptions relied on by the Referee that led to her illogical decision.

Dated:

4-26-12

Respectfully submitted,

PAUL T. CURTIS, Claimant's Attorney

Certificate of Service

I hereby certify that on the 26 day of April, 2012, a true and correct copy of the foregoing **CLAIMANT'S REPLY TO DEFENDANTS' RESPONSE TO CLAIMANT'S REQUEST FOR RECONSIDERATION/NEW HEARING** was served upon the following attorneys of record by the method indicated:

Mr. Roger Brown	[ ] First class mail
LAW OFFICES OF HARMON & DAY	[X] Fax: 800-972-3213
P. O. Box 6358	[ ] Hand-delivery
Boise, ID 83707-6358	[ ] Express Mail

Paul T. Curtis

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-011431** **ORDER DENYING RECONSIDERATION AND REHEARING** FILED AUG 28 2012 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's March 13, 2012 decision in the above-captioned case. Claimant argues that the decision is not based on substantial and competent evidence, because the Referee overlooked or misinterpreted key evidence, improperly excluded other evidence, and made "obvious and clear" factual errors. Claimant requests reconsideration or rehearing of the case so that additional witnesses may testify. Defendants object to the motion, arguing that the decision is supported by substantial and competent evidence and that Claimant's motion is merely asking the Commission to reweigh and reinterpret evidence already considered.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must "present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128

P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party's favor.

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

DISCUSSION

I.

Factual and Procedural History

In the decision, the Commission held that Claimant failed to prove the occurrence of an industrial accident. Our review of the record on reconsideration confirms that the substantial and competent evidence supports this conclusion.

Claimant, a waitress, testified at hearing that she suffered a herniated disc on November 24, 2008 as she attempted to lift a heavy silverware tray onto a high shelf. Claimant's hearing testimony was contradicted by earlier accounts of how her back pain began. She first sought treatment for back and leg pain from a chiropractor on December 11, 2008. She told the chiropractor that she had been suffering pain for about three weeks. Chiropractic care failed to alleviate Claimant's symptoms, and on December 16, 2008, she presented to Community Care, an urgent care and injury center in Idaho Falls. Claimant was diagnosed with sciatica. She was prescribed medication, but her pain continued, and on December 19, she returned to Community Care, which referred her to the emergency room at Eastern Idaho Regional Medical Center. Claimant's chief complaint at the emergency room was back pain, with an onset of "several days ago." D.E. D, p. 10. Claimant informed emergency room personnel that she had suffered from "similar symptoms previously," though it is unclear from the medical records when these prior

symptoms occurred. *Id.* Claimant was diagnosed with lumbar strain and treated with medication. There is no mention, in the records, that her pain began after a workplace accident.

On December 29, 2008, Claimant began to treat with Dr. Gary Walker, a specialist in physical medicine and rehabilitation. Dr. Walker's records from Claimant's initial visit state that Claimant's history of back and leg pain

> dates back to *early* November. [Claimant] did not recall any particular injury but noted the onset of left lower extremity pain associated with work. It became sharper over time and has continued to worsen.

D.E. E, p. 19 (emphasis added). Based on the nature of Claimant's symptoms, Dr. Walker suspected a "radicular process, most likely related to underlying disc herniation given her age." *Id.* at 20. Dr. Walker prescribed medication and ordered an MRI, noting that, based on the findings, an epidural steroid injection or surgical consultation might be appropriate.

On December 30, 2008, Claimant underwent an MRI, which revealed a large left paracentral disc extrusion at L5-S1 impacting the S1 nerve root. Dr. Walker discussed Claimant's options with her, and she indicated that she would prefer to avoid surgery if possible. Claimant received a series of epidural steroid injections, and Dr. Walker prescribed physical therapy. Claimant chose not to attend physical therapy, because the injections succeeded in significantly reducing her pain.

However, in early March, Claimant's pain began to increase again, and she returned to Dr. Walker. She told him that her preference was still to avoid surgery. Claimant received another injection on March 12, and Dr. Walker again recommended that Claimant participate in physical therapy. Claimant presented to Stephanie Liddle, physical therapist, on March 19, 2009. Ms. Liddle noted that Claimant

> has had a four-month history of pain into her left leg. She states the pain came on suddenly, but she is unaware of any specific injury to cause her pain. She denies any background or previous history of low back pain and contributes [*sic*] this episode to being a

> server/bartender for many, many years catching up to her and her not taking care of her body....She states she works graveyard at Shari's and is on her feet for 10 hours at a time. She sleeps when she gets home following her shift and does not do any type of maintenance or exercise for fear she may increase her pain.

D.E. G, p. 41. Claimant participated in a few sessions of physical therapy, but returned to Dr. Walker on April 7, 2009 because her pain would not resolve. Dr. Walker recommended surgical consultation, and Claimant informed Dr. Walker that she was "leaving town for a week but [would] check her insurance plan to see who is a participant." D.E. E, p. 24. There is no indication in the medical records that Claimant, at this time, had made a workers' compensation claim with Employer, or intended to have her potential surgery covered by workers' compensation.

On April 22, 2009, Claimant consulted with Dr. Stephen Marano, neurosurgeon, and James Cook, physician's assistant. Mr. Cook noted that Claimant

> began having some left sided low back and left hip pain at work in *early* November. She cannot associate any injuries or trauma to the onset of her pain. She said that it just kind of started out of the blue. She thought it was maybe due to standing funny.

D.E. I, p. 53 (emphasis added). After discussing her diagnosis and prospects with Dr. Marano and Mr. Cook, Claimant agreed to proceed with surgery.

On April 24, 2009, a First Report of Injury or Illness was completed on Claimant's behalf by Zach Dummermuth, general manager for Employer. This document was signed by Claimant. The report states that on November 24, 2008, Claimant experienced an ache in her low back while she was "standing" and "making salad." In describing the specific sequence of events in how the injury occurred, the report states, "standing there and back began hurting." The report cites December 15, 2008 as the date that Employer was notified of the accident.

The First Report was received by Surety on April 28, 2009. Surety's claims investigator, Bradley Armstrong, conducted an interview with Claimant on May 6, 2009. Mr. Armstrong

asked Claimant to describe what happened on November 24, 2008:

> Bradley Armstrong: Now I have a date of injury of 11/24/2008. Was there a specific accident that happened that day or were you just kind of, was that when you started to feel the pain in your back?
>
> Claimant: Um, I was at work and my manager Michelle Miller [*sic*, Morgan]...and I were standing there [by] the salad bar [and] I noticed a pain and so I thought that it was because I was standing on it wrong, put all my weight on it wrong and so we were kind of joking around about my weight. [...] Then later on that evening ... I was bringing silverware out from the kitchen and I went to put it up in the water station number two and [when] I went to put that up there it just like a sharp pain in the same area and I drop...dropped and so I just laid it there set it down on the counter where I was [and] just set my tables.

D.E. P, p. 207. Claimant did not mention any witnesses besides Michelle Morgan.

On May 19, 2009, Mr. Armstrong, after completing his investigation, sent Claimant a letter informing her that her claim was being denied because "there was no accident associated with" the claim. D.E. B, p. 5. Despite the denial, Claimant proceeded with surgery, a disc excision, root decompressive foraminotomy and annular repair at L5-S1 performed by Dr. Marano. Claimant has since suffered complications from surgery and a recurrent disc herniation at L5-S1.

On November 23, 2009, Claimant filed a workers' compensation complaint with the Commission. By the time of her deposition on April 13, 2011, her account of the accident had changed substantially. Asked by defense counsel how exactly the accident occurred, Claimant testified:

> I had been doing the salad bar reach-ins, which is down underneath our cabinets. And there was a pain, but I didn't think it was more than a pain of just bending and stretching.
>
> And then later on that night, probably around 1:30, 2:00 in the morning — it was when I was working graveyard — I was carrying a tray of silverware — a full tray of silverware out to put it into the water station.
>
> And as I was coming out of the water station to lift it above to where the shelf is, which is above the water spout — so it was

just about a little higher than my shoulders — I just felt a sharp pain. And I dropped the tray, and I fell.

And Aaron, he came out. The cook came out — running out and helped me up. And he was like, "What's going on?" And I told him that something happened. "Something is wrong with my back." And he told me — he helped me up to the booth and told me just to sit still for a little bit and that he was going to try to call Michelle. And then he picked up the silverware for me off the floor and told me just to stay there.

Claimant's Deposition, pp. 35-36. Though Claimant had mentioned Michelle Morgan as a witness to Surety's investigator, she had not mentioned Aaron Swenson, the cook.

Defense counsel then asked Claimant to clarify what she meant by "doing the salad bar reach-ins." Claimant testified that the reach-ins were refrigerators below the salad bar where salad makings are stored. Claimant stated that she was cleaning out the salad bar trays, putting the salad makings in clean dishes, and replenishing the salad bar. Claimant testified that this required significant bending, reaching, lifting, and twisting. Defense counsel then asked Claimant to describe the silverware incident in more detail:

Q. Now, you said that you dropped the tray and you fell; is that correct?

A. Yes. Well, actually, when I went to put it up there, it felt like somebody had taken, like, an ice pick and hurt my back. And so when I went to put it up there and it felt, like, the stabbing, the silverware tray fell. And, of course, then the weight of it — it fell, like, towards me. So I tried to, like, stop that from falling, and then I fell. And then I was trying to, like, stop that from coming, but it was *coming down on me*.

Claimant's Deposition, pp. 43-44 (emphasis added). Claimant went on to testify that, following her accident, she had two hours left in her shift. According to Claimant, Mr. Swenson served tables for her. She did not work for the rest of her shift, other than putting orders into the computer. This contradicts her statement to Surety that, following the silverware accident, Claimant set tables.

Claimant gave yet another discrepant account of the accident at hearing before the Referee. Asked by her attorney to describe what happened, Claimant testified:

> I was cleaning the reach-ins, which are the refrigerators underneath the salad bar....As I was standing up, I felt — I felt a dull pain into my back as I straightened up.
>
> I went along with my duties through the night. And it was approximately — I want to say it was closer to 2:00 or 3:00 in the morning rather than 1:00 or 2:00. And I was carrying out a full silverware — tub full of silverware from the dish area, which is in the kitchen.
>
> And as I was coming into Water Station 1 or Station 2, I went to put the tub of silverware up on the ledge where the silverware goes. And as I was lifting the tub up, I felt a sharp pain in the lower part of my back that went down my leg. And it caused me to drop the silverware, and it actually landed onto the water station itself. And then the weight of it had dropped it to the floor.
>
> And I caught myself as I was, like, going forward. I used the ledge of the water station to hold myself, but I was still — I was almost to the bottom of it, to the end of the floor.

Tr. 48-49. Claimant testified that Mr. Swenson helped her to a booth, cleaned up the silverware, and served customers while she rested. Claimant said that she put orders in the computer and handled money at the register for the remainder of her shift.

Aaron Swenson also testified at hearing. He stated that he did not see the accident, but heard a loud crash and discovered Claimant on the floor. He said that he helped Claimant "get her stuff picked up" and then helped her "get to a seat." Tr. 24. He further testified that Claimant told him that she had "slipped." Tr. 26. Mr. Swenson testified specifically that Claimant had dropped a "dish bucket" that was full of "dishes" — i.e., "plates, silverware, and stuff." Tr. 24, 26. Mr. Swenson could not remember whether he tried to call someone after the accident, and he could not remember when, approximately, the accident occurred. He testified that, due to Claimant's injury, he had to drive her home that night.

After considering the testimonial and documentary evidence in the record, as well as the briefs of the parties, the Referee issued her findings of fact, conclusions of law, and recommendation, which were approved, confirmed, and adopted by order of the Commission on

March 13, 2012. Claimant disputes the accuracy of several findings of fact and now moves for reconsideration or rehearing.

II.

A.

Reconsideration

Claimant contends that the Referee erred in finding 1) that Claimant herself "completed" the First Report of Injury or Illness; 2) that Surety did not accept Claimant's claim and pay some related expenses; 3) that Employer was not aware of Claimant's accident and injury until late April 2009; and 4) that Claimant's accident was not recorded in Employer's log book. Additionally, Claimant argues that the Referee's findings, as a whole, are not supported by substantial and competent evidence, because while Claimant's various accounts of the accident might have changed "a little over the years," the inconsistencies are minor and should not overshadow the fact that Claimant's accounts of the accident are substantially similar. Claimant's Request for Reconsideration/Rehearing, p. 12 [*hereinafter* Claimant's Request]. Finally, Claimant objects to the Referee's finding that Claimant and Mr. Swenson are not credible witnesses, arguing that it was error for the Referee to accept "hearsay" evidence, in the form of medical records and the First Report, over Claimant's credible, first-person statements and testimony about what happened. These arguments are addressed below.[1]

First, Claimant is correct that there are some errors in the findings of fact. Claimant did not complete or write the First Report herself, as stated in Finding of Fact No. 4; she signed the First Report, but Mr. Dummermuth prepared it for her. *See Clark v. Shari's Management Corp.*, 2012 IIC 0023.1, 0023.3 (March 13, 2012); D.E. A, p. 2. Also, it does appear that Surety, through mistake or otherwise, did pay some medical expenses associated with Claimant's claim,

[1] Claimant also argues that the medical opinions support a conclusion that Claimant's injury is consistent with the described accident; however, since we conclude that Claimant has failed to prove an accident, we do not need to address the issue of medical causation.

contrary to the conclusions in Finding of Fact No. 5. *See Clark*, 2012 IIC at 0023.3; C.E. 18, pp. 2-3.[2] Defendants argue that these are harmless errors, in that they do not form the basis of the Commission's decision against Claimant. We agree. We found against Claimant because she failed to prove that an industrial accident occurred. This conclusion does not change because someone other than Claimant completed the First Report.

Claimant argues that some of the information contained within the First Report is inaccurate — specifically, the description of Claimant's accident — and that this inaccurate information led the Referee to her conclusion that Claimant was not credible. However, as made clear in the decision, the medical records and Claimant's own contradictory statements were primarily responsible for leading the Referee to conclude that Claimant was not credible:

> 17. **Claimant's statements**. Claimant's description of how she first came to require medical treatment for her low back pain is recorded in her early medical records, above, as well as in her later statements made to Surety on May 21, 2009,[3] during her deposition on April 13, 2011, and during her hearing testimony on June 1, 2011.
>
> 18. Claimant's later statements are inconsistent with those recorded in her early medical records with respect to the details surrounding onset of her symptoms. Her later statements are also inconsistent *with each other* on key points, including the onset of her pain and the circumstances under which she says her supervisor told her to go to the doctor.
>
> a. Onset of Pain.
>
> i. *According to her statement to Surety*, Claimant's earliest recollection is that her low back pain began around the beginning of her shift on November 24, 2008, when she was talking with Michelle Morgan, her supervisor.

[2] This does not mean, as Claimant apparently believes, that Surety "accepted" the claim. Nothing in the workers' compensation law would support the conclusion that once a surety pays benefits, it automatically accepts liability for a claim. Indeed, the policy of the law — to provide sure and certain relief to injured workers — encourages permitting sureties to make preliminary payments of benefits while investigating a claim. In this way, an injured worker in financial duress would not have to wait for approval or denial of his or her claim before seeking medical care. *See* Idaho Code § 72-201 (describing the purpose of the workers' compensation law).

[3] May 21, 2009 is actually the date on which the statement was transcribed; Claimant gave the statement to Surety on May 6, 2009.

> Claimant thought she was just standing wrong, and she joked with Michelle that her weight might have something to do with it. Later, Claimant felt a sharp pain in the same area in her low back when she was lifting a heavy silverware tray up to a head-height shelf. Due to the pain, she set the tray down and did not try to lift it, full, again. Claimant set her tables, then placed the empty tray on the shelf.
>
> ...[A]nd when I went to put that up there it just like a sharp pain in the same area and I drop...dropped and so I just laid it there [*sic*] set it down on the counter where I was (*several words unintelligible*) and, um, just set my tables, from there I didn't try to put the container up there I set all my tables from there and then went to the tray that was just about empty I just set it up on the top....

DE P, p. 207-208.

ii. *According to her deposition testimony*, however, Claimant's low back pain began when she was cleaning the salad bar reach-ins. Then, when only Claimant and Aaron Swenson, a cook, were working, Claimant felt a pain like an ice pick being shoved into her low back while lifting a heavy silverware tray up to a head-height shelf. The pain caused Claimant to lose her balance and the weight of the tray caused her to fall to the ground, spilling the silverware. Upon hearing the loud clatter, Aaron came out of the kitchen, helped Claimant to a booth and picked up the silverware. He also tried to call a manager. Claimant remained on shift, but due to the pain, she rested. Until the end of her shift, Claimant only punched orders into the computer, while Aaron served her food for her.

iii. *According to Claimant's hearing testimony*, her back pain started when she stood up while cleaning the salad bar reach-ins. Later, when only Claimant and Aaron were working, Claimant felt a sharp pain in her low back that went down her leg while lifting a heavy silverware tray up to a head-height shelf. The rest of her hearing testimony is materially consistent with her deposition testimony.

b. Why Claimant Sought Medical Treatment.

i. *According to her statement to Surety*, at some unspecified later shift, Claimant was reaching for the scheduling book, but could not bend over to grab it, so Michelle told her to go to the doctor.

ii. *According to her deposition testimony*, Claimant went in the next day and spoke to Michelle, who told her to take the night off. When Claimant did not feel better the next day, Michelle told her to go to Community Care. Claimant "showed them her prescription" and obtained treatment, then took the next two days off. Tr., p. 47.

iii. *According to her hearing testimony*, Claimant worked "at least the next five days" because she had no other income. Tr., p. 54. She guessed that she probably went seven or eight days before she determined that the constant pain was not improving and decided to go to the chiropractor. He taped her ankles, but did not want to touch her spine because he did not think he could improve the pain she described. Claimant worked for a couple of days with taped ankles. The taping took some pressure off Claimant's back, but she was still in pain. At this point, Claimant called in sick and told Michelle that she had gone to the chiropractor and was not improving. Michelle told her to go to the doctor, so Claimant went to Community Care the next day.

Clark, 2012 IIC at 0023.6-0023.7 (emphasis in original). Though the Referee also mentioned the First Report in some of her findings, her apparent belief that Claimant completed the First Report did not, by itself, lead the Referee to conclude that Claimant lacked credibility.

Claimant tries to gloss over her inconsistencies by asserting, first, that her accounts of the accident are substantially similar, differing only in the minor details, and second, that the medical records are "hearsay" and any statements contained within them are not as credible as Claimant's own testimony. In support of her first argument, Claimant cites to *Stevens-McAtee v.*

Potlatch, 145 Idaho 325, 179 P.3d 288 (2008) and discusses that case at length. In *McAtee*, the Idaho Supreme Court reversed a decision by the Commission, holding that the Commission erred in finding that the claimant's testimony about his accident was not credible. The claimant's earlier statements about his accident had been vague; he said that his "injury arose from the jostling and vibrations of his forklift." *McAtee*, 179 P.3d at 294. Later, at hearing, he specified that his back began hurting when he hit a drain ditch. *Id.* at 292. The Commission found that the claimant's testimony was not credible because it improved and enhanced his prior accounts by the addition of the drain ditch detail. *Id.* However, the Court found that this detail was consistent with the claimant's earlier accounts of his accident; i.e., the claimant's hearing testimony was *more detailed* than his earlier accounts, but was not *inconsistent*.

Here, Claimant argues that her testimony, as in *McAtee*, was simply more detailed than her earlier statements, but as noted by the Referee, Claimant's later accounts *contradict* her earlier accounts. In the early days of her back pain, she failed to mention a workplace accident to her medical providers. More than simply not mentioning it, Claimant stated that her pain began "out of the blue." She thought it was maybe due to "standing funny." According to Stephanie Liddle, the physical therapist, Claimant attributed the pain to her many years as a waitress and bartender catching up to her and to not taking care of her body.

Claimant characterizes the medical records as "hearsay," implying they are not credible, or at least, not as credible as Claimant's first-person statements about the matter. Claimant argues that she "made three statements that were not hearsay addressing the accident: to the Surety on May 6, 2009; in her deposition of April 13, 2011; and her hearing testimony." Claimant's Request, p. 12. Hearsay is defined as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). We note that "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

source thereof" are a hearsay exception pursuant to I.R.E. 803(4). Likewise, records of a regularly conducted activity (such as medical examinations) constitute a hearsay exception under I.R.E. 803(6). We further note that the Commission, as an administrative agency, is not bound by the same formal rules of evidence and procedure that bind trial courts; "strict adherence to the rules of evidence is not required in Industrial Commission proceedings, and admission of evidence in such proceedings is more relaxed." *Stolle v. Bennett*, 144 Idaho 44, 50, 156 P.3d 545, 551 (2007) (*citing Hagler v. Micron Technology*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990)). The Commission "should have the discretionary power to consider any type of reliable evidence having probative value, even though that evidence may not be admissible in a court of law." *Id.* (*citing Hite v. Kulhenak Building Contractor*, 96 Idaho 70, 72, 524 P.2d 531, 533 (1974)). This point was acknowledged by Claimant's counsel at hearing, when Defendants objected to two of Claimant's exhibits:

> Mr. Curtis: [I]t's an administrative proceeding; therefore, you know, the technical rules of evidence don't apply, and the [Commission] can give the weight that they choose to give them.

Tr. 9, ll. 17-21. Finally, we note that the Commission's own rules specifically allow for the admission of medical reports at hearing, and the "fact that such [a report] constitutes hearsay shall not be grounds for its exclusion from evidence." J.R.P. 10(G). However, here, it is irrelevant whether or not the medical records are hearsay, because *Claimant did not object to their admission*, and the records, as such, are evidence before the Commission. *See* Tr. 13, ll. 9-25.

Once hearsay evidence is in the record, the Commission may rely on it, provided that it is substantial and competent. *Fisher v. Bunker Hill*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). *See also Colpaert v. Larson's*, 115 Idaho 825, 828, 771 P.2d 46, 49 (1989) (Commission properly relied on hearsay evidence in reaching conclusions). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Stolle*,

144 Idaho at 48, 156 P.3d at 549 (*citing Neihart v. Universal Joint Auto Parts*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005)). As Claimant's counsel stated above, it is for the Commission, as the finder of fact, to determine whether evidence should be given any weight. In other words, "credibility of evidence is a matter within the province of the Commission." *McAtee*, 179 P.3d at 292 (*citing Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999)).

There are three reasons why we find the information in the medical records more credible than Claimant's later statements and testimony. First, the medical records from December 2008 to April 2009 are more contemporaneous to the onset of Claimant's back pain than statements and testimony delivered after April 2009. Second, statements made during litigation, or even during the course of making a workers' compensation claim, are inherently self-serving; this does not make them *per se* untrue, but it does make them more suspect than statements made for the sole purpose of receiving appropriate medical care. Indeed, the Idaho Rules of Evidence recognize that statements made for purposes of medical care have a "circumstantial [guarantee] of trustworthiness"; that is why they are an exception to the rule that hearsay is inadmissible. *See* I.R.E. 803(24) (providing that statements not covered by any express hearsay exceptions but having "equivalent circumstantial guarantees of trustworthiness" are admissible). Third, Claimant's later accounts of her accident, both in her statement to Surety and in her testimony, are so contradictory as to be unreliable. Claimant's descriptions of the accident are not just progressively more detailed, as in *McAtee* above; Claimant's descriptions actively conflict with each other. In her interview with Surety, she stated that 1) she first felt a twinge of back pain while she was *standing by the salad bar* with Michelle, her supervisor, and that in response to the pain, she joked about her weight; and 2) she later felt a sharp pain while lifting the silverware tray, so she set down the tray, set her tables, and then lifted the almost-empty tray onto the shelf.

Later, at deposition, Claimant testified that 1) she first felt pain while she was *bending* to clean the salad bar reach-ins, and 2) that she later felt pain while lifting the silverware tray. Only

this time, instead of putting down the tray and setting tables, Claimant fell and the *tray came down on top of her*. Aaron Swenson heard the noise and came rushing out to help Claimant. He picked up the silverware and helped Claimant to a booth, where she sat for the rest of her shift, punching orders into the computer.

Finally, at hearing, Claimant testified that 1) she first felt pain after *standing up* while cleaning the salad bar reach-ins, and 2) she later felt a sharp pain while lifting the silverware tray, which caused her to drop it. The tray landed on the water station, but its momentum carried it to the floor, and though Claimant herself was falling, she was able to catch herself on the water station's ledge.

We understand that memory is an imperfect device, and that the details of an accident resulting in an injury can be forgotten or misremembered as time passes. We understand, too, that even credible witnesses have a desire to present themselves in the best possible light, and may subconsciously massage certain details without a malicious intent to deceive. Thus, when determining whether a witness is credible, we do not look for perfect consistency. Rather, we look for substantial consistency supported by the other evidence in the record.

Here, Claimant's accounts are not substantially consistent. Either she fell, or she did not fall; either she fell to the floor, or she was able to catch herself; either she dropped the tray, or she set it down; either she set tables after the accident, or she rested in a booth for the remainder of her shift; either the silverware tray actually "came down on" Claimant, or it fell without impacting her — these are not minor details, easily misremembered; these are material facts about how the accident occurred. A heavy silverware tray "coming down on" a fallen person could easily cause injury, perhaps even serious injury, depending on how heavy it was and what part of the body was impacted, and it defies belief that if this actually happened, Claimant would have neglected to mention it to Surety.

We, like the Referee, find it suspicious that Claimant's description of a lifting accident, by the time of her deposition,

> grew to include an elaborate recitation of how she dropped the silverware tray as she fell to the ground, creating a clamor that brought Aaron from the kitchen. She had not previously divulged this dramatic fact, not to her many treating medical providers, and not in response to direct questioning by Defendants about how she incurred her back pain. Instead, she told Surety in May 2009 that she set the tray down.

Clark, 2012 IIC at 0023.12. This is not merely providing more detail as contemplated by the holding in *McAtee*. This is a direct contradiction, and it calls into question the veracity of Claimant's testimony as a whole.

The substantial evidence in the record does not support a conclusion that Claimant's accident occurred as described at deposition or hearing. It does not support a conclusion that Claimant's accident occurred as described in her initial interview with Surety. In fact, the substantial evidence in the record does not support a conclusion that Claimant's accident occurred at all. She did not mention any such accident to her medical providers from December 2008 to April 2009. It is true, as Claimant points out, that she "associated" her pain with work — but only in the general sense of her years of work "catching up to her," not in the specific sense of suffering a workplace accident. Claimant pleads that she has "less than an 8th grade education," that her understanding of words such as "injury" and "trauma" are different than a lawyer or doctor's understanding, and that it is therefore unremarkable that the medical records state that Claimant reported no injuries or trauma associated with the onset of her pain. Claimant's Request, p. 14. This argument might be more compelling if the records did not also contain the statement that Claimant's pain began "out of the blue." One does not need to be a lawyer, a doctor, or a highly educated person to be able to explain that her back began hurting when she lifted a heavy tray at work. Claimant was certainly able to say those words in her interview with Surety's investigator, as well as at deposition and hearing. The Commission does

not expect Claimant to use "magic words," nor does the Commission expect Claimant to have a doctor or lawyer's understanding of the significance of the words "injury" or "trauma," but the Commission does expect patients to give a reasonably accurate history of the onset of their symptoms to their medical providers.

Claimant argues that the medical records contain, not her own statements, but rather the statements of the medical providers, and that they therefore should not be held against her. However, the medical records summarize what Claimant told the providers when she sought care, and Claimant has given us no reason to believe that these summaries are inaccurate, misleading, or false. It is clear from the records that Claimant did discuss her work with some of her medical providers, and those providers duly mentioned Claimant's work in their records. Presumably, if Claimant had mentioned a specific work accident that resulted in pain, that accident would have been mentioned in the records as well. Yet no such accident is described.

Related to the findings on Claimant's credibility, Claimant takes considerable issue with the Referee's implication that Claimant "did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009." *Clark*, 2012 IIC at 0023.9. Claimant argues at length that Employer was aware that Claimant had an accident and/or injury by December 15, 2008. Whether this is true or not, it is immaterial. Timely notice of an accident/injury is not at issue in this case, and the mere fact that Claimant *told* people that she suffered an accident/injury does not mean that the accident and injury actually happened. Defendants, if found liable, would not be liable because Claimant *told* them she suffered an industrial accident; they would be liable because Claimant *proved* she suffered an industrial accident. Here, Claimant has failed to prove that she did.

Claimant argues that the testimony of Aaron Swenson establishes the occurrence of the accident. We disagree. It is undisputed that Mr. Swenson did not see the alleged accident, and his testimony about the immediate aftermath conflicts with Claimant's. Mr. Swenson testified that

Claimant dropped a "dish bucket" full of "dishes." Tr. 26. He could not remember how, exactly, she said she hurt herself, but thought she said that she had "slipped or tripped." *Id.* Though Claimant testified that Mr. Swenson tried to call Michelle, their supervisor, Mr. Swenson could not remember trying to call Michelle. Tr. 27. He did testify, consistent with Claimant, that he helped her to a booth and had to perform her work for her, because she was too hurt to do it herself. Tr. 28. Yet despite finding Claimant on the floor, struggling to get up; despite having to do her work for her, because she was too injured to do it herself, and despite having to drive Claimant home, Mr. Swenson — and Claimant herself — apparently did not believe that Claimant should seek medical evaluation at the emergency room. In fact, the record indicates that Claimant did not seek medical treatment for her pain — which was supposedly excruciating enough for her to equate it to being stabbed with an ice pick — until December 11, seventeen days after the alleged accident. When Claimant did ultimately consult with medical personnel, she reported "moderate" pain, and she was inconsistent about when it began. D.E. D, p. 10. To her chiropractor, she said it began three weeks before; to the emergency room staff, she said it began several days before; to other providers, she said it began in early November. Again, no mention was made in the contemporaneous medical records of the pain beginning after a lifting incident at work.

Nor was mention of a workplace accident involving Claimant made in Employer's log book. As the Referee stated, this fact, standing alone, would not defeat Claimant's claim, but it cannot be said to support it, either.

In effect, the substantial and competent evidence in the record does not support a finding that Claimant suffered an industrial accident. Claimant's statement to Surety and her later testimony are not substantial and competent, as they are too contradictory to be reasonably relied upon. Having reviewed the entire record on reconsideration, we conclude that, while there are

some slight factual errors in the Referee's findings, her holding that Claimant failed to prove that a compensable accident occurred is supported by the record.

B.

Rehearing

In the alternative to reconsideration, Claimant requests that the case be reheard so that additional witnesses may testify. Under Idaho Code § 72-718, the Commission may grant requests for rehearing, but is not obligated to do so. *Curtis*, 142 Idaho at 388, 128 P.3d at 926. The Commission has discretion whether or not to grant such requests. *Id.*

Claimant contends, first, that the Referee improperly excluded some evidence that should have been considered; second, that material witnesses were not available to testify at the original hearing, but are available now; and third, that the Commission has recently allowed the record to be re-opened in some cases, at the defendants' request, and that Claimant should be "afforded" the "same consideration" given to the defendants in those cases. Claimant's Request, p. 16. We find each of these arguments unpersuasive for the reasons stated below.

At hearing, Defendants objected to the admission of two of Claimant's exhibits into evidence. These exhibits were affidavits by individuals who did not testify at hearing, and Defendants had no opportunity to cross-examine them. The Referee sustained the objection, finding that the exhibits were more prejudicial than probative, and that the evidence was not "sufficiently reliable to assist the Referee in resolving the issues in dispute." *Clark*, 2012 IIC at 0023.3.

Claimant argues that the Referee erred in excluding the exhibits. Claimant contends that the applicable standard for admitting affidavits is the one set forth in I.R.C.P. 56(e). This rule concerns affidavits offered in opposition to motions for summary judgment. Claimant avers that "an administrative proceeding is even less formal than that in a summary judgment motion" before a court, and therefore Commission procedure should be even more lenient than this rule.

However, we do not find this rule instructive on the issue before us. The purpose of affidavits in a motion for summary judgment is to demonstrate that there are facts in dispute; the affidavits are not offered as evidence to *prove* the facts. Here, Claimant is attempting to prove facts through the admission of these affidavits. As such, the affidavits are hearsay: out-of-hearing statements offered to prove the truth of the matter asserted.

As discussed above, the Commission is not bound by the same evidentiary rules that bind trial courts. Thus, the standard for admission of hearsay evidence before the Commission is whether the evidence appears to be "reliable" and whether it has "probative value." *Stolle*, 144 Idaho at 50, 156 P.3d at 551 (*citing Hite*, 96 Idaho at 72, 524 P.2d at 533).

Here, the Referee found that Claimant's proffered exhibits were more prejudicial than probative, and were not sufficiently reliable. We agree. Defendants had no opportunity to challenge the averments of these witnesses under cross-examination, and affidavits made to support a certain party in litigation do not come with the same circumstantial guarantee of trustworthiness as Claimant's medical records. Therefore, the exhibits were properly excluded.

Claimant also pleads the unavailability of certain witnesses at hearing and asks that the case be reheard so that these witnesses may testify. Claimant makes an offer of proof that these witnesses would testify to the fact that Employer was aware of Claimant's accident and injury "long before" April 2009. Claimant's Request, p. 7. As this is not a notice case, it is irrelevant when Employer became aware that Claimant was alleging an accident and injury. This case was decided on the basis that Claimant failed to prove she suffered an industrial accident. It is undisputed that no one saw Claimant's alleged accident; as such, none of the proposed witnesses would cure the principal defect in Claimant's case.

Finally, Claimant argues that the Commission has re-opened cases or continued hearings in the past, and that she deserves the "same consideration"; however, neither example cited by Claimant is similar to her situation. In one case, the record was re-opened after the matter had

been heard and briefed so that additional evidence could be admitted and considered. However, this happened before, not after, the decision was issued. In the second case, a hearing was continued so that a doctor could perform additional tests. Again, this happened before, not after, the decision was issued.

The procedure to object to a decision after it has been issued is to file a motion for reconsideration or rehearing, as Claimant has done here. She has had the opportunity to be heard, but our review of the record confirms that the decision was correct. Claimant failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment, because Claimant failed to prove that an industrial accident occurred. Accordingly, Claimant's motion for reconsideration or rehearing is DENIED.

IT IS SO ORDERED.

DATED this 28th day of August, 2012.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2012, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION AND REHEARING** was served by regular United States mail upon each of the following:

PAUL T CURTIS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

ROGER BROWN
PO BOX 6358
BOISE ID 83707-6358

eb

Marie Arnold

6/11

Paul T. Curtis ISB#: 6042
CURTIS & PORTER, P.A.
598 N. Capital Ave.
Idaho Falls, Idaho 83402

Telephone: (208) 542-6995
Facsimile: (208) 542-6993

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	No. 2009-011431 NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, SHARIS MANAGEMENT CORPORATION and LIBERTY NORTHWEST INSURANCE CORPORATION, BY AND THROUGH THEIR ATTORNEY OF RECORD, ROGER L. BROWN, AND THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, DALLAS L. CLARK, appeals against the above named Respondents to the Idaho Supreme Court from that ORDER of the INDUSTRIAL

115

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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, vs. SHARIS MANAGEMENT CORPORATION, Employer, and, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	No. 2009-011431 NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, SHARIS MANAGEMENT CORPORATION and LIBERTY NORTHWEST INSURANCE CORPORATION, BY AND THROUGH THEIR ATTORNEY OF RECORD, ROGER L. BROWN, AND THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, DALLAS L. CLARK, appeals against the above named Respondents to the Idaho Supreme Court from that ORDER of the INDUSTRIAL

(116)

COMMISSION OF THE STATE OF IDAHO, entered in the above entitled action on the 28 day of August, 2012, by the Commissioners of the Idaho Industrial Commission.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is appealable pursuant to I.A.P. Rule 11(d).

3. Appellant contends that the Industrial Commission's Order is erroneous as a matter of law because it is not supported by substantial and competent evidence. More specifically, Claimant contends it was error for the Commission to find that the Claimant was a credible witness, and then ignore her first-person testimony for less reliable hearsay.

Other issues may be presented on appeal.

4. Appellant is not aware of any portion of the record having been ordered sealed.

5. (a) Reporter's transcript is requested.

(b) Appellant requests the entire reporter's transcript.

6. Appellant requests the documents to be included in the agency's record to include those automatically included per I.A.R. 28(b)(3).

7. Appellant also requests the following additional documents:

- copies of all depositions taken in this matter;
- copies of all briefs;
- copies of all exhibits admitted into evidence;
- a copy of the hearing transcript regarding the hearing dated June 1, 2011.

8. I certify that:

(a) The clerk of the Industrial Commission is being paid the fee of $50.00 for preparation of the Clerk's record;

(b) The appellate filing fee in the amount of $86.00 is being paid herewith;

(c) Service of this Notice of Appeal has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

Dated: October 4, 2012

PAUL T. CURTIS
Attorney for Appellant, DALLAS CLARK

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2012, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served upon the following by the method indicated:

Mr. Roger L. Brown HARMON & DAY P.O. Box 6358 Boise, ID 83707-6358	[X] First class mail [ ] Facsimile [ ] Hand-Delivery [ ] Express Mail
IDAHO INDUSTRIAL COMMISSION 700 S. Clearwater Lane Boise, ID 83712	[X] First class mail [ ] Express Mail [X] Facsimile [ ] Hand-Delivery
M&M Court Reporting Service, Inc. 700 S. Clearwater Lane Boise, ID 83712	[X] First class mail [ ] Express Mail [ ] Facsimile [ ] Hand-Delivery
T & T Reporting P.O. Box 1020 Idaho Falls, ID 83405	[X] First class mail [ ] Express Mail [ ] Facsimile [ ] Hand-Delivery

Paul T. Curtis

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant/Appellant, v. SHARIS MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants/Respondents.	**SUPREME COURT NO. 40343** **CERTIFICATE OF APPEAL**

Appeal From:	Industrial Commission, Chairman, Thomas E. Limbaugh, presiding.
Case Number:	IC 2009-011431
Order Appealed from:	Findings of Fact, Conclusions of Law, and Recommendation, filed March 13, 2012; and Order, filed March 13, 2013 and Order Denying Reconsideration, filed August 28, 2012.
Attorney for Appellant:	Paul T. Curtis Curtis & Porter, P.A. 598 North Capital Avenue Idaho Falls, ID 83402
Attorney for Respondents:	Roger L. Brown Law Offices Of Harmon & Day P.O. Box 6358 Boise, ID 83707-6358
Appealed By:	Dallas L. Clark, Claimant

Appealed Against:	Sharis Management Corporation, Employer/Surety, Defendants
Notice of Appeal Filed:	October 4, 2012
Appellate Fee Paid:	$86.00
Name of Reporter:	Daniel E. Williams, CSR, RPR M & M Court Reporting Services, Inc. 421 West Franklin Street P.O. Box 2636 Boise, ID 83701-2636
Transcript Requested:	Standard transcript has been requested. Transcript has been prepared and filed with the Commission.
Dated:	October 10, 2012

Sara Winter
Assistant Commission Secretary

CERTIFICATION

I, SARA WINTER, the undersigned Assistant Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the **Notice of Appeal filed October 4, 2012; Findings of Fact, Conclusions of Law, and Recommendation; and Order entered March 13, 2012, and Order Denying Reconsideration, filed August 28, 2012**, and the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 10th day of October, 2012.

Sara Winter
Assistant Commission Secretary

CERTIFICATION OF RECORD

I, SARA WINTER, the undersigned Assistant Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Clerk's Record on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court after the Record is settled.

DATED at Boise, Idaho, this 2nd day of November, 2012.

Sara Winter
Assistant Commission Secretary

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant/Appellant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants/Respondents.	**SUPREME COURT NO. 40393-2012** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, Clerk of the Courts; and
PAUL T CURTIS for the Appellants; and
ROGER L BROWN for the Respondent.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant:	PAUL T CURTIS CURTIS & PORTER PA 598 NORTH CAPITAL AVE IDAHO FALLS ID 83402
Attorney for Respondent(s):	ROGER L BROWN LAW OFFICES OF HARMON & DAY PO BOX 6358 BOISE ID 83707-6358

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

123

DATED at Boise, Idaho, this 2nd day of November, 2012.

Sara Winter
Assistant Commission Secretary