

ISSUE

By agreement of the parties, the sole issue to be decided as the result of the hearing is whether Claimant's alleged need for a surgical procedure known as a nucleoplasty is reasonable and whether such alleged need is related to his December 23, 1997, industrial accident.

CONTENTIONS OF THE PARTIES

Claimant contends his back has never been symptom-free since his lifting accident in 1997 and he is entitled to a surgical procedure known as a nucleoplasty as recommended by his neurosurgeon.

Defendants contend that Claimant's back was declared medically stable in early 1998 and any back problems he may be currently experiencing are due to degeneration and the hard work he has been performing with his current employer, not his accident while working for Employer in 1997. Further, Claimant has not had continuous back problems since 1997 as is evidenced by the fact that he has sought no treatment and has missed no work due to his back. Finally, the nucleoplasty recommended by the neurosurgeon, or any other surgical procedure, would be of no benefit to Claimant based on his positive Waddell signs and other indicators of a bad outcome.

Claimant counters that the reason he has sought no medical treatment between 1998 and 2004 is because Surety terminated his medical benefits in 1998 and he could not afford treatment. Even though he has health insurance with his current employer, Claimant believes his continuing symptomatology stems directly from his 1997 accident and it would not be fair to use health insurance for a workers' compensation claim that should be re-opened. Finally, he missed no work due to his back because he needs to work to support his family.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

FINDINGS, CONCLUSION, AND RECOMMENDATION - 2

1. The testimony of Claimant, his spouse, the office manager and Claimant's supervisor at his current employer;
2. Claimant's Exhibits A-D admitted at the hearing;
3. Defendants' Exhibits A-H admitted at the hearing; and,
4. The post-hearing deposition of Larry D. Nelson, D.C., taken by Claimant on December 10, 2004, and that of Michael Weiss, M.D., taken by Defendants on January 6, 2005.

Claimant's objection at p. 44 of Dr. Nelson's deposition is overruled; Defendants' objection at p. 48 is sustained, their other objections are overruled; Defendants' objection at p. 60 of Dr. Weiss's deposition is sustained, all other objections are overruled.

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

FINDINGS OF FACT

1. Claimant was 36 years of age and resided in Idaho Falls at the time of the hearing. Since coming to the United States from Mexico in 1981, he has been a laborer and farm worker.
2. Claimant strained his back on June 30, 1995, while employed by Employer's pallet business. He received chiropractic care from Larry D. Nelson, D.C., and his injury resolved by October 10, 1995, when he reached MMI and was released with no restrictions or impairment. Claimant testified that his back did not cause him any problems thereafter until the subject accident.
3. On December 23, 1997, Claimant again strained his back while attempting to lift a pallet that had frozen to the ground at Employer's.
4. On December 24, 1997, Claimant presented to Dr. Nelson complaining of lumbosacral pain. Dr. Nelson performed a physical examination; however, no x-rays were taken. Claimant was taken off work.

FINDINGS, CONCLUSION, AND RECOMMENDATION - 3

5. Claimant returned to Dr. Nelson on December 29th. Dr. Nelson noted that Claimant had done better the past five days and his lumbar pain had greatly improved. Dr. Nelson returned Claimant to regular work and it was noted on December 31st that “. . . he did fairly well.” Defendants’ Exhibit D.

6. Claimant continued treating with Dr. Nelson and on February 5, 1998, after five more treatments, Dr. Nelson noted that Claimant was able to work without any problems.

7. On March 5, 1998, Dr. Nelson noted, “He has done very well this past month. He does state that when he is working if he bends over a lot he experiences aching in the lumbar spine. I suspect this is normal aching due to activities of daily living.” *Id.* Dr. Nelson also noted that all the previous orthopedic tests that had been positive were repeated and were now all negative. Dr. Nelson released Claimant from his care.

8. Claimant returned to Dr. Nelson on August 28, 1998, complaining of lumbosacral pain with pain “radiating” into his gluteal region bilaterally. Since February 24, 1998, Claimant had been working for a different employer running an edge bander. Dr. Nelson noted that the pain came on gradually and, “. . . if he bends over for an extended period of time the lumbar spine feels like it is going to break off or snap.” *Id.* Dr. Nelson inquired whether Claimant had had another accident; Claimant responded that he had not and the pain had just gotten progressively worse since he discontinued treatment in March.

9. Claimant returned to Dr. Nelson on September 1st. At that time, Claimant informed Dr. Nelson that his new job required a lot of bending and lifting. “He states that he works on a line, bends over, twists, picks up a piece [of wood], puts it on the machinery, goes to the other side, takes it off-takes it off [*sic*] and bends over and puts it down. I do believe that this repetitive type motion is aggravating or even causing the pain that he is experiencing.” *Id.* Claimant wanted a referral to an

orthopedic surgeon. Dr. Nelson did not believe such a referral would result in anything but a referral to physical therapy, but had no objection to Claimant's request; however, it does not appear from the record that Dr. Nelson actually made a referral.

10. Claimant did not again seek medical treatment for his back until March 10, 2003, when he again returned to Dr. Nelson. He informed Dr. Nelson that his lumbar pain had been going on for some time and he had contacted an attorney¹ who wanted an MRI done. Dr. Nelson ordered the MRI and informed Claimant that he and his attorney would have to deal with the insurance company before it was done. Dr. Nelson did not treat Claimant at that time.

11. The MRI of Claimant's lumbar spine was accomplished on March 14, 2003. As interpreted by John Strobel, M.D., the MRI revealed: "1. "High Intensity Zone" posterior annulus of L4 with small central left paracentral protruding disc. 2. Moderate broad-based central protruding disc at L5-S1 with minimal effacement of the right S1 nerve root sheath and rootlet." Claimant's Exhibit C.

12. On April 16, 2003, Claimant saw Robert Cach, M.D., a neurosurgeon, as a referral from Dr. Nelson. Claimant was complaining of back and leg pain and numbness. Other than "severely reduced" range of motion and back pain as well as the absence of ankle reflexes bilaterally, Claimant's neurological examination was normal. Upon review of Dr. Nelson's records, the lumbar MRI, and his examination, Dr. Cach recommended a nucleoplasty at L4-5-S1. Claimant's Exhibit A.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment

¹ Not Claimant's present counsel.

is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No “magic” words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician’s oral testimony is not required in every case, but his or her medical records may be utilized to provide “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

13. On September 1, 2004, Claimant’s counsel sent a letter to Dr. Cach asking various questions and leaving lines upon which Dr. Cach could provide answers to those questions. On September 7, 2004, Dr. Cach returned the letter to Claimant’s counsel with his handwritten responses to the questions. In order to avoid the expense involved in taking Dr. Cach’s post-hearing deposition, the parties stipulated that the questions and answers would be admitted post-hearing into evidence. In response to a question regarding his opinion as to whether or not Claimant’s 1997 accident was more probably than not still a significant factor in Claimant’s ongoing pain problems, Dr. Cach answered “yes.” In response to a question regarding his opinion as to whether or not the intermittent back pain Claimant has experienced following his 1997 lifting accident are more probably than not “. . . related to, derivative of, or consistent with” that accident, Dr. Cach answered “yes” and that it would be necessary and reasonable to treat those symptoms with a nucleoplasty at L4-5-S1 based on six years of failed conservative treatment. Claimant’s Exhibit A. Dr. Cach described nucleoplasty as a minimally invasive procedure wherein 1 cc of disc material is removed through a needle to decompress the disc

space. *Id.* Dr. Cach indicated that there would be a 70% chance of successfully reducing Claimant's pain long-term with the procedure. *Id.*

14. Claimant was scheduled to be examined at Defendants' request on two occasions by Michael Weiss, M.D., but was unable to attend both times due to transportation problems. On October 14, 2003, Dr. Weiss authored a report to Surety based on his review of the records of Drs. Nelson and Cach as well as the March 14, 2003, lumbar MRI. Defendants' Exhibit E. Dr. Weiss opined that it was not possible to relate the MRI results to Claimant's 1997 injury as Dr. Nelson had found Claimant to be at MMI as of March 1998 with full pain-free range of motion and no impairment similar to Claimant's recovery from his 1995 back injury. Dr. Weiss was also concerned that there was no documented abnormality on Claimant's physical examination by Dr. Cach to diagnose radiculopathy corresponding to the level of the abnormality on the MRI.

15. On November 11, 2004, Dr. Weiss supplemented his October 14, 2004, report after having had the opportunity to personally examine Claimant. He did not change his opinions previously expressed but added that due to Claimant's positive Waddell signs, no surgical intervention of any type would be of any benefit.

16. In his deposition, Dr. Weiss, who is board certified in physical medicine and rehabilitation, preventive and occupational medicine, and electrodiagnostic medicine, testified that nucleoplasty is an accepted procedure but needs more study to determine its relative efficacy. However, he does not believe Claimant's current condition is related to his 1997 accident and injury:

Q. (By Mr. Munson): Doctor, in your opinion, is it possible to state to a reasonable degree of medical probability, that Mr. Resendiz's current problems are a result of an injury he did [*sic*] in December of 1997?

A. No, it is not.

Q. Can you state to the Commission why that is?

FINDINGS, CONCLUSION, AND RECOMMENDATION - 7

A. Again, remember that things that affect degenerative disk disease, spinal arthritis, are multifactorial. To some degree it's the convention that if somebody has a specific event, has rapid onset of symptoms that develop after that, has findings that are all consistent, so if you're lifting something one day, you have sudden onset of back pain, you have pain going down your leg, you have numbness, tingling, weakness that corresponds to a nerve root, you do an MRI and it shows a herniated disk affecting that nerve root, we accept that as causal.

Although, disk herniations don't happen by themselves, it happens in individuals. You have the hereditary factors; there's very strong concordance of risk with whether you have family members who have similar back problems. There are activities that affect body physiology, diet, environmental factors, smoking, lots of things have an affect.

In this case, there isn't that, there isn't even that. He had an injury in 1997, which essentially got better. It was one of a number of injuries. He continued doing all kinds of activities both before and afterwards.

And to say that the injury on that day causes the abnormality that Dr. Cach wants to operate on now, is very speculative and does not in any way reach the criteria of more likely than not.

Dr. Weiss Deposition, pp. 22-23.

17. Dr. Weiss also expressed concern about the relatively "mild" findings on Claimant's lumbar MRI and the lack of concordance with those findings and his findings on examination:

So if we look at his examination, he has intact sensation; his reflexes are symmetrical, so they're not focal; his strength is actually normal throughout; and then he has something else that's really relative to this. He has findings of – they are called Widal [*sic*] signs. And Widal [*sic*] signs are nonphysiological findings that are predictions of poor outcome with surgery.

Dr. Weiss Deposition, p.16-17.

18. Based on Claimant's positive Waddell findings, Dr. Weiss is of the opinion that Claimant will have a bad result from surgical intervention, regardless of the type of procedure. However, Dr. Weiss would not be opposed to a percutaneous nucleoplasty if Claimant had true radicular symptoms, which Dr. Weiss found he does not.

19. Dr. Nelson testified that when he used the term "radiating" he did not mean to convey a pressure on nerve roots in the sense of true radiculopathy that would involve electric shocks down the

leg. Dr. Nelson did not perform any neurological testing and the orthopedic tests he performed merely demonstrated back pain, not radiculopathy.

20. On May 22, 2003, Defendants' former counsel wrote Dr. Nelson a letter wherein he asked Dr. Nelson to sign and return the letter if he agreed that Claimant demonstrated no radicular symptoms between December 1997 and August 1998 and if Claimant had fully and completely recovered from his 1997 injury by March 5, 1998, with no restrictions or impairment; Dr. Nelson signed and returned the letter.

21. At his deposition, Dr. Nelson testified that he had changed his mind about Claimant's state of MMI on March 5, 1998, because Claimant had returned with back pain on September 10, 1998. However, Dr. Nelson's testimony in that regard is not credible. As of May 2003, Dr. Nelson knew Claimant returned on September 10th and could have easily noted that in his response to counsel. In fact, Dr. Nelson testified that he had counsel change something in the letter with which he did not agree. If that was the case, he could certainly have expressed his disagreement that Claimant was at MMI as of March 5, 1998, at the same time he had counsel make the other change.

22. The Referee finds that Claimant was at MMI from his December 23, 1997 injury as of March 5, 1998. The record does not support Claimant's testimony that he was never pain-free from that accident. He went from his time-of-injury job to a new job that required a lot of bending and lifting. He never missed a day of work due to his back pain. He had no medical treatment for his back after September 10, 1998. Claimant's present supervisor testified that in the six years Claimant has worked for his current employer, he has never observed any back problems or heard Claimant complain of any. Claimant's testimony that he did not seek any medical treatment after September 10, 1998, because he could not afford it even though he had health insurance is not persuasive. He testified that he quit going to Dr. Nelson because Surety had left a message on his

answering machine that they would no longer pay for that treatment. However, Claimant testified in his deposition that the reason he quit seeing Dr. Nelson was because he quit working for Employer. If Claimant's back was bothering him to the extent he claims, it is unlikely that he would not have sought treatment at some point after September 10, 1998. Further, in his deposition, Dr. Nelson had no opinion regarding whether Claimant suffered a continuing injury from December 23, 1997, to the present that would require the surgery recommended by Dr. Cach, but that it was "possible." *See*, Dr. Nelson Deposition, pp. 46 and 49.

23. Dr. Cach's conclusionary opinions that Claimant's current condition is related to his 1997 accident are without foundation and are entitled to little weight. The Referee takes notice that Dr. Cach was extremely uncooperative in the scheduling of his deposition by Claimant and would only allow 15-30 minutes for the taking of the same. Further, due to the "extensive costs associated with the disruption of Dr. Cach's neurosurgical practice, a Stipulation was obtained for the introduction of Dr. Cach's testimony via letter in lieu of his post-hearing deposition." Claimant's Opening Brief, p. 10. As pointed out by Defendants' counsel in his opening statement at hearing, "We are all at the mercy of the medical professionals here." Hearing Transcript, p. 10. The Referee notes that both counsel in this matter were cooperating with each other regarding attempting to schedule a meaningful deposition of Dr. Cach, not one limited by the doctor's arbitrary demands regarding the length of the deposition and his fee therefor. It is indeed unfortunate that a physician who accepts payment for treating injured workers cannot take the time away from his "busy schedule" at a reasonable fee to provide the Commission with valuable information regarding that treatment and its relationship to an industrial accident. Nonetheless, the burden of proof is on the Claimant to establish by medical evidence to a reasonable degree of medical probability that the benefits sought are causally connected to a compensable industrial accident. Here, the records and testimony of Dr. Weiss are afforded more

weight than the opinions of Drs. Nelson and Cach. While the Referee is empathetic with a claimant caught in the bind of Claimant herein regarding a practical inability to develop his or her case medically, this Referee and the Commission are still required to reach a decision based on the totality of the evidence.

24. The Referee finds that Claimant has failed to prove the need for any further medical treatment is causally related to his December 23, 1997, industrial accident.

CONCLUSION OF LAW

1. Claimant has failed to prove a causal connection between his need for further medical care and his industrial accident on December 23, 1997.

RECOMMENDATION

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

DATED this 4th day of April, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Michael E. Powers, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __19th__ day of __April__, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

PAUL S PENLAND
PO BOX 199
BOISE ID 83701-0199

_____/s/_____

ge

_____/s/_____
James F. Kile, Commissioner

_____/s/_____
R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __19th__ day of __April__, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404-6236

PAUL S PENLAND
PO BOX 199
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_____/s/_____

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