

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BILLIE R. BRACAMONTE,)
)
 Claimant,)
)
 v.)
)
 WAL-MART,)
)
 Employer,)
)
 and)
)
 AMERICAN HOME ASSURANCE)
 COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 01-024751

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed July 15, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on January 6, 2005. Claimant was present and represented herself. Natalie Camacho Mendoza of Boise represented Defendants. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs¹ and this matter came under advisement on May 23, 2005.

ISSUES

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

1. Whether Claimant’s medical condition is due in whole or in part to a pre-existing or subsequent injury, disease, or cause not work related.

¹ Alan K. Hull and Justin Aylsworth prepared and submitted Defendants’ post-hearing brief.

2. Whether and to what extent Claimant is entitled to:
 - a. reasonable and necessary medical care;
 - b. total temporary or total partial disability (TTD/TPD) benefits;
 - c. permanent partial impairment (PPI) benefits;
 - d. permanent partial or permanent total (PPD/PTD) benefits; and,
3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to medical and associated benefits for an injury to her back sustained when a pallet jack got hung up on a carpet and she twisted and jerked her arm causing a back injury. She acknowledges that she has a pre-existing back condition involving at least two prior back surgeries, but her accident and injury at Employer's place of business either permanently aggravated that condition or constituted a new and distinct injury. Claimant believes Employer should be held liable for at least a portion of the cost of a subsequent back surgery and time-loss benefits.

Defendants contend that Claimant suffered nothing more than a strain/sprain injury to her back that was temporary and she returned to baseline shortly thereafter when her treating physician returned her to work without restrictions. Further, Claimant has presented no convincing medical evidence that the surgery that was performed over a year after her accident was causally related thereto. Therefore, Claimant is entitled to no benefits other than what has already been paid by Defendants to her treating physician.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing;
2. Exhibits 1-14 admitted at the hearing; and,
3. The post-hearing deposition of Robert H. Friedman, M.D., taken by Defendants on January 27, 2005.

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

FINDINGS OF FACT

1. Claimant was 55 years of age at the time of the hearing and resided in Boise. She began her employment with Employer in November 1999. At the time of her November 19, 2001, accident, Claimant worked part-time in the floral department taking care of the plants.

2. Claimant testified that on November 19, 2001, she was pulling a pallet of heavy Christmas plants when the jack's wheels hit a mat or rug on the floor and the jack stopped causing Claimant to "jerk." Claimant did not experience any immediate pain. Claimant continued to work, but about two to three weeks later, she began experiencing low back and hip pain with some radiculopathy into her left leg. Claimant did not report the accident until December 13, 2001.

3. Claimant first sought medical treatment after her accident on December 12, 2001, at which time she reported to Lowell Schuknecht, Jr., M.D., Employer's preferred provider. At that time, Claimant was complaining of pain in her lower back and hips and left leg weakness. She informed Dr. Schuknecht that she had two prior back surgeries and has had a low level of numbness and tingling in her lower legs since then, worse with lifting activities and gardening. A lumbosacral x-ray revealed osteopenia (a reduction in bone volume), scoliosis, disk

degeneration, and arthritis. Dr. Schuknecht diagnosed a left SI joint dysfunction, referred Claimant to a chiropractor, and returned her to work with restrictions.

4. On December 26, 2001, Claimant informed Dr. Schuknecht that on Christmas Eve, she was stepping down off a stool when her left leg gave out and she fell to the floor. On January 14, 2002, Dr. Schuknecht determined Claimant to be at MMI and released her to return to work without restrictions.

5. In late January or early February, Claimant terminated her employment for personal reasons.

6. Claimant continued to experience low back, leg, and hip pain and eventually came under the care of John E. Bishop, M.D., an orthopedic surgeon. Claimant was previously acquainted with Dr. Bishop as he had performed a surgery on her mother as well as a back and shoulder surgery on Claimant. On January 20, 2003, Dr. Bishop performed a decompression and laminectomy at L2-3 and L3-4.

DISCUSSION AND FURTHER FINDINGS

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “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). Magic words are not necessary to show a doctor’s opinion is held to a reasonable degree of medical probability, only their plain and unequivocal testimony conveying a conviction that events are causally related. See, *Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217-218 (2000). An employee may be compensated for the aggravation or acceleration of a pre-existing condition, but only if the aggravation results from an industrial accident as defined

by Idaho Code § 72-102(17). See, *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994). A physician's testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." See, *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

7. The only physician to provide "medical testimony" even remotely favorable to Claimant on the causation issue is Dr. Bishop in his May 13, 2003, chart note:

She (Claimant) questions whether her worsening is related to an injury at Wal-Mart. When Billie first presented with recurrence of low back and leg pain in November of 2002, she did state that she had strained her hip and back while attempting to push a heavy cart at Wal-Mart, and she feels she had a definite change in symptoms with onset of the left sciatica **at that time**. She does have a history of prior back disease.

. . . .

I told Billie that with her extensive prior problems with her back that it would certainly be **impractical** to assess **all** of her current difficulties to a straining injury at work in 2002 [*sic*]. That episode likely was an aggravating injury and contributed to her need for further surgical care especially since her new problem appears to be a large disc extrusion at L2-3 which is above her prior surgical involved levels. It seems evident that Billie has connective tissue disease that has resulted in multiple disc disruptions as well as chronic fibromyalgia and Sjogren's syndrome and arthritis complaints, but her acute episode that led to surgery in January of 2003 does appear to be a **fresh** disc extrusion at L2-3 which likely did occur acutely and was associated with her straining injury at work superimposed on underlying degenerative disc disease.

Exhibit 3, p. 507-508. (Emphases added).

8. Robert H. Friedman, M.D., who is board certified in Physical Medicine and Rehabilitation as well as Electrodiagnostic Medicine saw Claimant at Defendants' request; he examined her and reviewed extensive medical records. He authored a report dated December 16, 2004, and was deposed on January 27, 2005. Upon examination and medical records review, Dr. Friedman diagnosed fibromyalgia and primary Sjogren's syndrome, a dryness disorder. Dr. Friedman opined that Claimant did not suffer any new injury in her November 19, 2001, accident and so testified:

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 5

A. The question is whether she had a new injury, not whether she had had injuries?

Q. (By Ms. Mendoza): Correct.

A. Based on the history, she was pulling a pallet jack, I think is what they call them, and got it caught, and had a pulling injury with a jerking sensation to her arm. She then says that she had **no pain at the time** that she had the injury. She put all of her, I think, they were Christmas cactuses that she was stacking for her employer [*sic*].

She thought she might have been sore and that it was a **few weeks later**, that the pain began to go down her leg.

And that would not be consistent with a new injury in the sense that the timeframe does not fit. It would be consistent with a mild strain, but she did not have a new radicular component. She didn't have anything that indicated that she had a new pinched nerve or what we call radiculopathy. Her symptoms were not significantly changed. She said she had some pain down her left leg, but that was **two to three weeks** after the injury.

And she, ultimately, after getting some chiropractic treatment went back to work without any restrictions – or went to work with restrictions, and she continued to work. That's my knowledge of what happened. That would not be consistent with a new injury.

Dr. Friedman Deposition, pp. 8-9. (Emphases added).

9. In response to a question asked by Claimant, Dr. Friedman testified:

A. Again, two questions. Let me see if I can answer the first one which is: So people have injuries and then not have symptoms for a period of time? And the answer – I'm going to specifically stick to herniated discs, because I think that's what we're talking about versus strains, and herniated discs push on nerves and within **24** to the maximum **48** hours those patients begin to complain of symptoms.

And they complain of symptoms in a very typical fashion for that nerve. It would be a little bit individualized by patient, but we know that certain nerves go to certain places. So, if you pinch off the S-1 nerve root, patients typically complain of pain going down the back of their legs, down to the bottom of their foot, and primarily to the heel and side of their foot. Whereas the next level up, which is the L-5 nerve root would track somewhat like that along the lateral aspect of the foot. It might get to the top or inside of their foot.

So, the nerve roots tend to go in certain distributions. But it should happen **within a day or two** after you ruptured the disc because the pressure is on it immediately. So, that's the answer to the first part of the question.

Now, the second part of the question you asked is: Could something contribute and later on happen? Of course, anything is possible. But, again, you have to start asking questions about how long does that have any meaning in terms of directly contributing to an injury. And that's the hard part of deciding whether something is directly contributing or partially contributing.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 6

But a timeframe where I would attribute something directly to an injury rather than the natural, normal history of the disease process would be related by time. So, I would expect injuries causing an exacerbation of something that was already there to fit medical model timelines. So, herniated disk, if you popped a disk out, it should start hurting somebody **within a couple of days, not weeks or months**. That, medically, does not fit. Does that answer your question?

Dr. Friedman Deposition, pp. 15-17. (Emphases added).

10. The Referee finds the causation opinion expressed by Dr. Friedman more persuasive than that expressed by Dr. Bishop for a number of reasons. First, it is not known what medical records were available for review by Dr. Bishop prior to his May 13, 2003, office note. Second, it is not known to what degree of medical probability Dr. Bishop holds his opinion. Third, he does not describe the mechanics of Claimant's injury that he categorizes as a hip and back strain. Fourth, he indicated that Claimant experienced the onset of left sciatica **at that time** which is contrary to Claimant's own testimony that the pain came on gradually in the two or three weeks following the accident. Fifth, it is apparent that Dr. Bishop was merely responding to an inquiry from his patient, not answering a question from an insurance company, an attorney, or another doctor. Finally, and most importantly, Dr. Bishop has the accident occurring sometime in 2002, rather than in November of 2001. Had he realized the accident was earlier than he thought, he may well have expressed a different opinion, one more in line with Dr. Friedman's regarding the time within which symptoms of a herniated disk would medically be expected to occur.

Dr. Friedman, on the other hand, was called upon to answer specific questions regarding causation, had reviewed Claimant's prior medical records, and had a thorough understanding of Claimant's accident and mechanism of injury and addressed the significance of the delay in the onset of her symptoms. His explanation regarding causation is reasonable and made with a better understanding of the all of the facts of record.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 7

11. The Referee finds that Claimant has failed to prove that the need for her January 20, 2003, surgery, or any treatment received after being declared medically stable by Dr. Schuknecht on January 14, 2002, is causally related to her November 19, 2001, accident and injury.

12. In light of the foregoing, all remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove the condition for which she seeks benefits is causally related to her industrial accident and injury.

2. All remaining issues are moot.

RECOMMENDATION

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

DATED this __28th__ day of __June__, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BILLIE R BRACAMONTE
2725 N FIVE MILE SP #107
BOISE ID 83713

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

_____/s/_____

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BILLIE R. BRACAMONTE,)
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 Claimant,) **IC 01-024751**
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 v.)
) **ORDER**
 WAL-MART,)
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 Employer,) Filed July 15, 2005
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 and)
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 AMERICAN HOME ASSURANCE)
 COMPANY,)
)
 Surety,)
)
 Defendants.)
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Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed 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 the condition for which she seeks benefits is causally related to her industrial accident and injury.
2. All remaining issues are moot.

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

DATED this __15th__ day of __July__, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

James F. Kile, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th__ day of __July__, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

BILLIE R BRACAMONTE
2725 N FIVE MILE SP #107
BOISE ID 83713

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

_____/s/_____

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