

injury, is entitled to continuation of temporary total disability benefits during the time she is unable to continue with recommended and authorized medical treatment due to her pregnancy.

ARGUMENTS OF THE PARTIES

Claimant argues that her temporary disability benefits should continue through the time of her pregnancy even though recommended and authorized surgery is delayed during the term of pregnancy. She cites Penton v. Stepping Stones, Inc., 1999 IIC 1006 (August 25, 1999), and also maintains that Idaho Code § 72-408 contains no pregnancy exception to the Surety's obligation for temporary disability benefits during medical recovery.

Defendants counter that Claimant's pregnancy has delayed her course of authorized medical treatment and recovery, that Defendant Surety is an accident insurer not a health insurer, and that Defendants should not bear the additional burden of the pregnancy-induced delay in Claimant's treatment. Defendants urge consideration of Lawrence v. Herrett's Gun Stock, Inc., 85 IWCD 713 (1985).

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The written stipulation of facts presented by the parties on October 19, 2005.
2. The additional oral stipulation of counsel for the parties, during the course of the October 24, 2005 telephonic argument, that no doctor has released Claimant to return to work.

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

FINDINGS OF FACT

1. The Claimant is a 26 year-old woman who was employed as a district manager for the Lewiston Tribune. On January 20, 2005, the Claimant's average weekly wage was \$425.20 based upon a wage of \$10.63 per hour.
2. The Claimant was injured on January 20, 2005, when she was removing newspapers from the trunk of her car for recycling and suffered neck and back complaints.
3. The Defendants have accepted the claim and have paid time loss and medical benefits.
4. The Claimant was initially seen by Dr. William England at Valley Medical Center on January 21, 2005, with neck pain. Dr. England requested an MRI and it disclosed a herniated disc.
5. Dr. England referred the Claimant to Dr. Soloniuk, a neurosurgeon, for further evaluation. Dr. Soloniuk evaluated the Claimant and a determination was eventually made that the Claimant needed surgery for her herniated cervical disc. The Surety authorized the surgery, which was scheduled for June 21, 2005.
6. On or about June 20, 2005, the Claimant went in for a preoperative examination and it was determined that she was pregnant. Due to the pregnancy, the Claimant was unable to undergo radiographic studies or surgery, so the surgery was canceled to be rescheduled following delivery of the Claimant's baby.
7. When the surgery was canceled due to discovery of Claimant's pregnancy, the Surety terminated TTD benefits until such time as the Claimant was able to proceed with the recommended medical treatment. The Surety has not denied medical benefits.
8. Ms. Kresley has not been deemed medically stable by any physician with regard to the above-referenced industrial injury. Had she undergone the above-referenced surgery, it is not

known when medical stability would be reached.

9. No doctor has released Claimant to return to work.

DISCUSSION AND FURTHER FINDINGS

10. Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him which he or she is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219 (1986).

11. The Commission has previously dealt with several cases specifically regarding temporary disability benefits when medical recovery is prolonged by an injured worker’s pregnancy.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 4

12. In Penton v. Stepping Stones, Inc., 1999 IIC 1006 (August 25, 1999), the Commission considered virtually the identical issue presented here: whether claimant was entitled to temporary disability benefits while her medical treatment was delayed during pregnancy which ensued after her industrial injury. The Penton decision discussed three prior Commission decisions: Lawrence v. Herrett's Gun Stock, Inc., 85 IWCD 713 (1985), denying claimant time loss benefits during the time medical treatment was delayed because of her post-industrial injury pregnancy; Rochester v. J.R. Simplot, Co., 87 IWCD 1499 (1987), granting claimant temporary disability benefits during the delay in medical treatment due to her pre-industrial injury pregnancy; and Feurer v. Universal Frozen Foods, 91 IWCD 4367 (1991), granting claimant temporary disability benefits during the delay in medical treatment due to her post-industrial injury pregnancy. The Commission observed that:

The different results in Lawrence and Rochester may be explained by the fact that Rochester was pregnant at the time of her industrial accident, whereas Lawrence was not. If a claimant is pregnant at the time of the industrial injury, then the principle of taking the claimant as found at the time of accident, *see* Wynn v. J.R. Simplot, 105 Idaho 102, 666 P.2d 629 (1983), suggests that the employer should be responsible for disability benefits even if claimant's treatment or recovery is prolonged due to pregnancy.

Penton, 1999 IIC 1011-1012. The Commission also noted that the different results in Lawrence and Feurer were not reconcilable, however, the Feurer, decision relied upon Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219 (1986), a case decided after the Commission's Lawrence decision. The Commission relied upon Feurer as the most recent precedent and concluded that Penton was still within the period of medical recovery from her industrial injury, that her disability was due to her industrial injury not her pregnancy, and that she was

entitled to temporary disability benefits during her pregnancy until she could obtain the recommended additional treatment for her industrial injury.¹

13. In the present case there is no dispute that Claimant's work accident and resulting cervical disc herniation have disabled her from working, and there is no assertion that her disability arises from her pregnancy rather than her industrial accident. In reliance upon Penton, the Referee concludes Claimant is entitled to temporary total disability benefits during the time she is unable to continue with recommended medical treatment due to her pregnancy.

CONCLUSION OF LAW

1. Claimant is entitled to temporary total disability benefits during the time she is unable to continue with recommended medical treatment due to her pregnancy.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own, and issue an appropriate final order.

DATED this 31st day of October, 2005.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

¹ Although by no means controlling, at least two other jurisdictions have reached similar results finding claimant in each case entitled to temporary disability benefits during the pregnancy-induced delay of medical treatment because the work injury—not the pregnancy—rendered claimant unable to work. *See Wood v. Fletcher Allen Health Care*, 169 Vt. 419, 739 A.2d 1201 (1999); *Orr v. Elastomeric Products*, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996).

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2005, a true and correct copy of **Findings of Fact, Conclusion of Law, and Recommendation** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501-0607

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

kr

/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ADA NIKKI KRESLEY,)	
)	
Claimant,)	IC 05-001041
)	
v.)	
)	
TPC HOLDINGS, INC.,)	
)	
Employer,)	ORDER
)	
CONTINENTAL CASUALTY CO.,)	
)	
Surety,)	Filed
)	November 9, 2005
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is entitled to temporary total disability benefits during the time she is unable to continue with recommended medical treatment due to her pregnancy.

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

DATED this 9th day of November, 2005.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2005, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501-0607

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

kr /s/