

stipulated facts. As the time for hearing approached, it became apparent that neither party intended to produce witnesses. The Referee held a teleconference on April 13, 2006, and ordered that the matter be submitted on the record and the briefs of the parties. The April 25 hearing date was vacated, and a status conference was scheduled instead. The parties were ordered to exchange exhibits pursuant to J.R.P. Rule 10 as if the status conference was the hearing. At the April 25 status conference, Claimant's Exhibits 1 through 41, and Defendants' Exhibit A were admitted, and a briefing schedule was set. The matter came under advisement on June 28, 2006, and is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is:

1. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to an award of attorney fees because Defendants unreasonably denied medical benefits and wrongfully terminated TTD benefits. Further, Claimant claims entitlement to attorney fees for the disability benefits Claimant eventually received that were in excess of the 20% PPI rating awarded by J. Craig Stevens, M.D., for Claimant's cervical fusion.

Defendants assert that the matter of attorney fees for unreasonable denial of medical benefits is no longer at issue because Defendants have paid all outstanding invoices for medical services. Defendants further argue that they acted properly when they terminated Claimant's TTD benefits and began paying compensation for permanent partial impairment (PPI) based on the independent medical evaluation (IME) report of Craig Stevens, M.D. Finally, Defendants

contend that Claimant's counsel played no role in Surety's determination that Claimant was totally and permanently disabled, so no award of attorney fees is appropriate.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 41, admitted at the April 25, 2006 status conference; and
2. Defendants' Exhibit A, admitted at the April 25, 2006 status conference;

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

APRIL-OCTOBER 2003

1. On April 26, 2003, Claimant was injured when he struck his head on a conveyor belt frame at his workplace. The blow rendered him unconscious for an undetermined period of time. He was hospitalized and diagnosed with central cord syndrome and cervical myelopathy. Claimant received medical care for his injuries, including an anterior cervical discectomy and fusion with plating at C3-4, C4-5, and C5-6 performed by Cynthia Hahn, M.D., on April 30.

2. Dr. Hahn provided post-surgical care and also referred Claimant to Karen Stanek, M.D., a physiatrist, for rehabilitative treatment and on-going management of spasticity that resulted from his cervical injury. Claimant made what Dr. Hahn described as a remarkable recovery from his multi-level fusion, and she released him to return to work on August 5. His restrictions precluded him from returning to his time-of-injury employment, and Claimant was working with the Industrial Commission Rehabilitation Division to find suitable work.

OCTOBER-DECEMBER 2003

3. Claimant continued treating with Dr. Stanek. By October 2, 2003, Dr. Stanek began to suspect that Claimant had also sustained a closed head injury (CHI) at the time of his initial industrial injury. Her chart note for October 2, 2003 states:

Closed head injury, while not previously documented as a working diagnosis, I feel strongly that he has suffered a closed head injury, which has significantly impacted his ability to process information, manage his emotions and has significantly increased his anxiety and I feel this is interfering with his ability to cope with daily stress and maintain a healthy relationship with his family. This new diagnosis needs to be addressed if return to work is to be successful.

Claimant's Ex. 5, p. 06. Dr. Stanek referred Claimant to Michelle White, Ph.D., clinical neuropsychologist, for a consultation.

4. Claimant began seeing Dr. White on October 7 and completed neuropsychological testing on November 18. Dr. White diagnosed cognitive disorder, pain disorder with psychological or medical condition, adjustment disorder with anxiety and depression, and posttraumatic stress disorder (PTSD). Claimant continued to see Dr. White weekly for treatment.

5. Defendants referred Claimant to J. Craig Stevens, M.D., a psychiatrist, for an IME. Dr. Stevens' report is dated November 26, 2003. Dr. Stevens concluded that Claimant was at maximum medical improvement (MMI) *with regard to his physical cervical injury*. Dr. Stevens also opined that Claimant was not stable from a psychological standpoint, but that he could not comment further without additional diagnostic information. Dr. Stevens opined that a brain MRI would be necessary to evaluate for post-concussive features, and that it was possible that many of Claimant's post-injury symptoms could be the result of brain pathology not related to the industrial accident. Dr. Stevens also believed that Claimant's sleep and psychological problems, whatever their cause, were not being adequately controlled by his current drug regimen and

expressed concern about Claimant's pain control and narcotic habituation.

6. Dr. Stevens' report was provided to Dr. Stanek for her review. She took issue with Dr. Stevens' apparent assumption that a diagnosis of CHI could be confirmed only with anatomic findings visible on an MRI or CT scan. She observed that the best way to diagnose CHI was with neuropsychological testing as had been done by Dr. White, who had agreed that Claimant had suffered a CHI as a result of his industrial accident. Claimant had a brain MRI on December 19.

JANUARY-FEBRUARY 2004

7. On January 28, 2004, Dr. Stevens wrote to Surety regarding his review of the MRI results. He noted that the images showed no abnormalities, and in particular, none of the abnormalities that needed to be ruled out. Dr. Stevens reiterated his opinion that while Claimant certainly sustained a cord injury, there was no objective medical evidence to support that he also sustained a CHI, especially in light of the relatively minor nature of his original injury. Dr. Stevens opined that Claimant was medically stable without need for further treatment except maintenance medication for his spasticity. He did not believe that any other treatment Claimant was receiving at that time could be attributed to his industrial injury with any degree of certainty. By letter dated February 6, 2004, Dr. Stevens found Claimant had a ratable impairment as a result of his spinal cord injury and multi-level fusion and calculated a whole person impairment of 20%.

8. Based on Dr. Stevens' letters of January 28, and February 6, 2004, Surety terminated Claimant's TTD benefits, and began paying PPI benefits.

9. Dr. White's neuropsychological evaluation of Claimant is dated January 30, 2004. The report included a review of Claimant's post-injury medical records, numerous

neuropsychometric test results, and clinical observations. She diagnosed PTSD, cognitive disorder, and pain disorder with medical and psychological factors. Dr. White recommended in pertinent part:

- One to two years of intensive outpatient cognitive behavioral therapy;
- Coordination with other treating physicians, and a psychiatrist if necessary, concerning psychotropic intervention; and
- On-going evaluation by Dr. Stanek for visual, hearing and upper extremity functional concerns.

10. By letter dated February 23, Dr. Stanek advised Surety that both she and Dr. White believed that Claimant had a number of psychological and cognitive issues resulting from his accident that required further treatment and that he could not be considered to be at MMI until that treatment stabilized his condition. Dr. Stanek declined to provide an impairment rating for Claimant, but did not dispute the impairment rating that Dr. Stevens gave Claimant for his cervical and spinal injuries.

11. By letter dated February 24, Surety reiterated that based on Dr. Stevens' opinion, it was not paying for any additional psychological treatment for Claimant. Claimant's Ex. 16, p. 01.

APRIL 2004

12. Surety referred Claimant to Craig W. Beaver, Ph.D., for a neuropsych examination. Dr. Beaver conducted the exam on April 7 and 8. Dr. Beaver's report is dated April 19. Dr. Beaver reviewed Claimant's pre- and post-accident medical records, conducted a battery of neuropsychometric tests, interviewed Claimant's wife, and conducted a clinical interview. Dr. Beaver stated his conclusions as answers to a number of questions posed by

Surety, including in relevant part:

- Diagnoses included cognitive dysfunction, PTSD, and pain disorder associated with psychological factors and a general medical condition and a learning disorder that was documented as pre-existing his industrial injury;
- Claimant's PTSD and his pain disorder were attributable to the accident, as was his cognitive disorder, although his pre-existing learning disability was a contributing factor;
- Further treatment for Claimant's psychological and cognitive difficulties was recommended, including review and reduction of his pain medications and changing the focus of his treatment with Dr. White from neurocognitive issues to a short series of sessions focused on his PTSD symptoms;
- All of the additional treatment recommended by Dr. Beaver was attributable to the industrial accident; and
- Claimant was not medically stable from a psychological standpoint, but with the recommended treatment, should be at MMI within ninety to one hundred twenty days, and once stable, his condition may warrant additional impairment.

13. Surety authorized six sessions of therapy with Dr. White to focus on his PTSD.

JULY 2004 – FEBRUARY 2005

14. In late July, Dr. White sent Claimant for a consultation with T. Jeffrey Stevens, M.D.,¹ a psychiatrist. Because Dr. White was not a medical doctor, she could not prescribe medications for Claimant, and both she and Dr. Stanek wanted Dr. J. Stevens' expertise in prescribing psychotropic medications to assist their comprehensive treatment of Claimant.

¹ To avoid confusion between J. Craig Stevens, M.D., and T. Jeffrey Stevens, M.D., the latter will be denominated as Dr. J. Stevens.

15. Dr. J. Stevens performed a psychiatric evaluation of Claimant on August 18. He diagnosed PTSD, cognitive disorder, and personality change due to traumatic head injury. Dr. J. Stevens declined to make any changes to Claimant's treatment regimen in light of Claimant's demonstrated improvement and the fact that he did not have all of the pertinent medical records. The doctor expressed agreement with Dr. White's suggested treatment plan. He also opined that he thought Dr. Stevens' 20% PPI was low.

16. Claimant continued to see Dr. J. Stevens for management of his psychotropic medications.

MARCH-JULY 2005

17. In March 2005, Dr. Stanek contacted the Surety seeking authorization for a sleep study, believing that Claimant's sleep disorders might be related to sleep apnea. A sleep study confirmed that Claimant had sleep apnea, and an auto C-PAP was prescribed.

18. Starting in April 2005, Claimant's counsel, Surety, Dr. Stanek, Dr. White, and Dr. Beaver exchanged correspondence regarding Claimant's on-going medical care needs. Dr. Stanek was managing Claimant's general medical care with Dr. J. Stevens managing Claimant's psychotropic medications and Dr. White providing neuropsychological and cognitive behavioral therapy.

19. On June 30, Dr. Beaver wrote Surety expressing his belief that Claimant had still not reached MMI with regard to his psychological diagnoses.

20. Dr. J. Stevens, Dr. White, and Dr. Stanek expressed disagreement with Dr. Beaver in a July 7, 2005 letter to Claimant's counsel.

AUGUST-NOVEMBER 2005

21. Surety referred Claimant back to Dr. Beaver for a re-evaluation in August 2005.

Dr. Beaver saw Claimant on August 18 and his report is dated September 2. The thread that is woven throughout the report is that despite fifteen months of treatment since Dr. Beaver's last evaluation, only minimal changes in Claimant's function were documented.

22. With regard to the need for further treatment, Dr. Beaver acknowledged that Claimant would require Lexapro and Seroquel for the foreseeable future. Dr. Beaver opined that Claimant had had a substantial amount of individual psychotherapy to address his PTSD and that there was no evidence that Claimant was making any additional gains. He recommended six more psychotherapy sessions to transition Claimant out of psychotherapy.

23. Dr. Beaver set out the ongoing treatment needs of Claimant that were attributable to his industrial injury:

- Six psychotherapy sessions to transition out of psychotherapy; and
- Long term use and monitoring of psychotropic medications.

Dr. Beaver deferred Claimant's need for other medications (for pain and spasticity) to his treating physicians.

24. Dr. Beaver opined that Claimant was more than two years post injury, and was relatively stable, without significant improvement or deterioration in his neurocognitive and psychological functioning. Dr. Beaver found Claimant at MMI with regard to all aspects of his industrial injury. Dr. Beaver determined that in addition to his 20% PPI for his cervical injury, he was entitled to 8% whole person PPI for his postconcussive syndrome and the subsequent cognitive and behavioral changes. In addition, Dr. Beaver rated Claimant for residual effects of his PTSD at 10% whole person. Combining the three ratings results in a combined whole person permanent impairment of 33%.

25. As a result of Dr. Beaver's report, Surety increased Claimant's PPI to 33% of the

whole person effective September 16.

26. Dr. White had an opportunity to review Dr. Beaver's September report, and disagreed with significant portions of Dr. Beaver's re-evaluation. Dr. White did agree that Claimant was at MMI. She calculated Claimant's impairment to be 33% whole person for his postconcussive syndrome, and 42% for his PTSD, for a combined whole person impairment of 61%.²

27. Dr. Stanek also reviewed Dr. Beaver's report and prepared her own impairment analysis. Dr. Stanek believed that Dr. White underestimated Claimant's PPI for postconcussive syndrome because she did not include Claimant's sleep apnea, believed to be related to the head injury. Dr. Stanek added 10% PPI for sleep apnea, resulting in a whole person PPI of 40% for the postconcussive syndrome. Dr. Stanek also rated Claimant at 10% whole person impairment for his central cord syndrome that resulted in sexual dysfunction and loss of strength in his fingers. Dr. Stanek also awarded a 5% PPI for lumbar muscle spasms, and 42% PPI for Claimant's PTSD. Combining these four ratings results in a whole person impairment of 71%.

FEBRUARY 2006

28. On February 9, 2006, Surety determined that Claimant was totally and permanently disabled and changed his benefits accordingly.

DISCUSSION AND FURTHER FINDINGS

29. The sole issue before the Commission in this proceeding is whether Claimant is entitled to attorney fees. Attorney fees are not granted to a claimant as a matter of right under

² This rating is exclusive of the previously determined 20% whole person impairment for Claimant's multi-level cervical fusion. Combining the three ratings results in a whole person impairment of 69%.

the Idaho workers' compensation scheme, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

A finding that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

30. Claimant asserts entitlement to attorney fees for the reasons that Surety acted unreasonably when it terminated Claimant's TTD benefits in February 2004, that Surety acted unreasonably when it refused to authorize continuing treatment by Dr. White, and that Surety unreasonably withheld or delayed payment of total disability benefits.

In hindsight, Surety's handling of this claim was not without flaws. Surety admitted that its refusal to authorize additional psychological treatment of Claimant by Dr. White may have been in error. But mistakes or errors or misjudgments do not necessarily constitute unreasonable conduct on the part of Surety. Claimant's case is medically complex, and involved diagnoses that can be hard to make, difficult to document objectively, and are inherently disputatious. After a careful review of the chronology of events and the medical information available to Surety at the time that it made the decisions that give rise to this claim, the Referee cannot find

that Surety's actions were unreasonable so as to justify an award of attorney fees.

Termination of TTDs

31. Surety terminated Claimant's TTD benefits on February 6, 2004, and began paying PPI benefits instead. At the time that Surety stopped paying TTDs and began paying impairment benefits, they relied upon the opinion of Dr. Craig Stevens. Dr. Stevens' letter of January 28, 2004, opined that Claimant was at MMI with regard to his cervical injury, a finding that has never been disputed. Additionally, Dr. Stevens opined that based on the medical evidence and imaging, he could not relate Claimant's other complaints, including his neuropsychological and cognitive difficulties, to the industrial accident with any degree of medical certainty. He noted that Claimant's neuropsychological and cognitive problems could have arisen as a result of a variety of scenarios, all of which were equally problematic to prove with any degree of certainty.

From the vantage point we all now enjoy, it appears that Dr. Stevens may have been in error when he opined as to the cause of Claimant's neuropsychological and cognitive problems. At the time he issued his opinion, however, Surety was entitled to rely upon it. That the two physicians disagreed is not unusual—treating physicians and IME providers have differing roles, which often leads to disagreements. Neither is it appropriate to debate the relative credibility of the two physicians at this time, from this perspective, or on this issue. The Commission does not have to decide which physician was “more right” given the posture of this proceeding. Surety retained an IME doctor who practiced in the same specialty and the same geographic area as Claimant's treating physician, and it was entitled to rely upon his opinion.

Whether Surety should have resumed payment of TTDs once its own expert opined that Claimant was not medically stable is beyond the scope of this proceeding. That question goes to

whether TTDs were *underpaid*, not to the issue of *wrongful termination*.³

Psychological Treatment

32. Pursuant to a referral from Dr. Stanek, Claimant saw Dr. White on a weekly basis beginning in early October 2003. Following receipt of Dr. Stevens' January 28, 2004, opinion that Claimant's neuropsychological and cognitive problems could not be attributed to the industrial accident, Surety advised Claimant by letter dated February 5, 2004 that it would authorize no further psychological treatment. Surety reiterated its position in a subsequent letter dated February 24.

For the same reasons as discussed previously, Surety was entitled to rely on the opinion of Dr. Stevens regarding the need for psychological treatment until it had a reason to reconsider that position. Dr. White's neuropsychological evaluation did challenge Dr. Stevens' causation opinion. Surety promptly sought an IME from its own neuropsychologist, Dr. Beaver. Dr. Beaver *did* attribute Claimant's neurological, psychological, and cognitive problems to the industrial accident, but he disagreed with Dr. White that Claimant needed to treat with her indefinitely. Instead, he recommended six to eight sessions to be focused on Claimant's PTSD. Surety approved those visits.

Defendants argue in their brief that their denial of further treatment from Dr. White was justified because once Claimant was under the care of Dr. J. Stevens, a psychiatrist, Dr. White's involvement was duplicative. This particular argument is rather disingenuous, since Claimant did not start seeing Dr. J. Stevens until August 2004, six months after Surety terminated authorization for Dr. White's treatment. Further, Surety should have been aware that Dr. J.

³ While not legally significant, it should be noted that Claimant was never without income benefits during the pendency of this proceeding. At bottom, the dispute was about the *rate* at which those benefits should have been paid.

Stevens' involvement in Claimant's case was limited to prescribing Claimant's psychotropic medications. Nevertheless, Surety did not act unreasonably when it declined to authorize additional treatment by Dr. White—initially because of a lack of causation (Dr. Stevens), and subsequently because its own neuropsychologist recommended limiting Claimant's further psychological treatment.⁴

Again, the posture of this proceeding is such that it is not necessary for the Commission to make a determination as to which of the two neuropsychologists involved in Claimant's care is the most persuasive. This case is not about what constitutes reasonably necessary medical care; it is about what constitutes an unreasonable denial of benefits.

Payment of Disability Benefits

33. Finally, Claimant argues that he is entitled to attorney fees on the difference between the value of the 20% PPI rating from Dr. Stevens and the value of total and permanent disability benefits. At the outset, it appeared that Claimant's injury was limited to his cervical fusion and the spinal cord injury—certainly not trivial, but certainly not totally debilitating. Once he was diagnosed with PTSD and cognitive disorders, his impairment increased, and Surety increased Claimant's PPI benefits. Even after Claimant's cognitive and psychological problems were accepted, there remained reasons to think that Claimant's condition would improve and he would be able to return to some type of gainful employment. When Claimant had not improved more than two years after the accident, it became apparent, even to Surety, that Claimant was totally and permanently disabled and Surety changed Claimant's status to that of totally and permanently disabled by its own volition.

It is not unreasonable for Surety to contest matters that are patently in dispute. As

⁴ Ultimately, Defendants paid for all of the treatment provided by Dr. White.

matters became more clear, Surety acted to adjust its position in response to the new information. Such actions on the part of Surety do not give rise to an award of attorney fees.

CONCLUSION OF LAW

1. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 10 day of August, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of September, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DOUGLAS B ECTON
900 N MAPLE STE 202
SPOKANE WA 99201

MONTE WHITTIER
PO BOX 6358
BOISE ID 83707-6358

djb

/s/ _____

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

DATED this 11 day of September, 2006.

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 11 day of September, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DOUGLAS B ECTON
900 N MAPLE STE 202
SPOKANE WA 99201

MONTE WHITTIER
PO BOX 6358
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djb

/s/ _____