

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an injury to his right testicle when attacked by a coworker. He requires surgery to remove his right testicle. Defendants have unreasonably denied the surgery.

Defendants contend Claimant's injury has healed and they have paid for all reasonable medical care. Claimant's continued reports of symptoms and his enthusiasm for the surgery are not physically based. Defendants have no duty to pay for the surgery because no doctor has "required" the surgery be performed. Claimant is medically stable.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant;
2. Claimant's exhibits 1-7 and Defendants' exhibits 1-17; and
3. Depositions of Claimant and urologist Dirk S. Sypherd, M.D.

FINDINGS OF FACT

1. Claimant was attacked at work by a coworker on February 1, 2005. He injured his right testicle.
2. Immediate medical care revealed swelling and contusion. He was released from work for "a minimum of 3-4 days." Claimant had not returned to work as of the date of the hearing.
3. At the time of accident, Claimant was 36 years old. His prior medical history includes left knee surgery. It includes a vasectomy in January 1997 from which he had lingering pain and complications. On Christmas day 1997, he reported a sudden onset or exacerbation of left testicular pain which eventually required removal of his left epididymis in

January 1998. His medical history includes treatment for alcohol abuse and depression during a divorce in 1999.

4. On February 3, 2005, urgent care doctor, Lawrence Sladich, M.D., examined Claimant and “could not appreciate any swelling or ecchymosis involving that right scrotum” despite Claimant’s complaints of continued tenderness. Claimant’s release from work was extended.

5. On February 7, 2005, Claimant still complained of “pretty significant” right testicular pain. The immediate care facility referred him to a urologist.

6. Dr. Sypherd examined Claimant on February 14, 2005. His examination revealed the ecchymoses nearly resolved and a tender, inflammatory phlegmon. He diagnosed traumatic epididymitis. He anticipated it “should improve with time.” Dr. Sypherd further noted: “He doesn’t want to have anymore surgery and none is indicated at this time.”

7. Claimant filed a police report of the assault on March 8, 2005. On March 11, 2005, Jeff McDermott received a telephone message from Claimant’s assailant. The assailant stated in the message that “we were just horsing around.” Surety transcribed this message on March 18. No evidence suggests that Mr. McDermott or another Surety representative conducted any follow-up investigation before denying the claim.

8. Dr. Sypherd continued to treat Claimant. Claimant’s symptoms slowly improved, but Claimant reported episodes of pain with walking, with other movements, and with sexual function. Dr. Sypherd’s March 7 note mentions tenderness to palpation on the left as well. Dr. Sypherd mentioned surgery as an available option. Claimant initially declined, but after two more weeks, consented to surgery.

9. An epididymectomy would remove only the right epididymis. An orchiectomy

would remove the right epididymis and testicle.

10. On March 21, 2005, Surety denied Claimant's request for authorization for surgery. A confirming letter followed on March 22, 2005. The stated basis of the denial was, "Available evidence fails to substantiate that you suffered an accident which arose out of and in the course of your employment."

11. After additional visits, on May 17, 2005, Dr. Sypherd noted exquisite tenderness and induration with possible cystic formation at the head of the right epididymis. He further noted, "Epididymectomy or orchiectomy would certainly seem reasonable choices at this point." He also noted that no new therapy would help.

12. An internal document dated July 27, 2005 notes that Surety "just agreed to accept the claim." It contains a comment from M. Weiss, M.D., that a second opinion was encouraged before surgery.

13. On August 24, 2005, urologist Tullio Celano, M.D., evaluated Claimant at Surety's request. Dr. Celano "would not feel comfortable" performing surgery on Claimant and noted Claimant's prior genital surgeries and psychological records. He noted, "In the end, it may be necessary to allow him to undergo the procedure." He noted certain symptoms probably could not be causally related to the industrial accident. A September 14, 2005 scrotal ultrasound showed "no significant abnormality." On November 3, 2005, Dr. Celano considered Claimant not at MMI, but not a surgical candidate either. By December 7, 2005, Dr. Celano opined Claimant had reached MMI and required no further treatment. He noted another consultation might be "appropriate."

14. On September 26, 2005, Robert F. Calhoun, Ph.D., evaluated Claimant at Surety's request. He opined Claimant needed psychological counseling. On November 17, 2005,

Dr. Calhoun opined Claimant was unlikely to respond to psychological treatment and recommended no further treatment.

15. During a January 20, 2006 examination, Dr. Sypherd noted Claimant's right epididymis, but not his testicle, was indurated and very tender. He noted,

Certainly the patient has many psychological issues but his epididymis is tender, it is indurated and he was doing well until the trauma. No guarantee is given him that an epididymectomy or orchiectomy would cure his pain but that it seems to me to be a reasonable thing to do in light of acute onset of this problem at time of trauma and how debilitating it is for him.

16. On May 31, 2006, Dr. Sypherd was deposed telephonically. Dr. Sypherd discussed the options he had presented to Claimant in March of 2005 and further discussed additional options which might be considered. Dr. Sypherd, when asked specifically, opined an orchiectomy was not "required." He was not asked whether an epididymectomy was required. He had no opinion about whether Claimant had reached MMI because he had not seen Claimant recently.

17. At hearing, Claimant appeared emotionally labile. He exhibited some anger, frustration, and despair about his condition and the process Surety required him to undergo in pursuit of medical care. Claimant was a credible witness.

Discussion and Further Findings

18. **Medical Stability.** Claimant's treating physician has never opined Claimant to have reached MMI. Drs. Celano and Calhoun did not treat Claimant. Dr. Sypherd examined Claimant several times over many months. Drs. Celano and Calhoun each saw Claimant only twice. Claimant has not been shown to have become medically stable yet.

19. **Medical Care.** Idaho Code § 72-432 requires Defendants to pay benefits for medical care "reasonably required by the employee's physician." The epididymectomy

was reasonably required by Dr. Sypherd. Further, the more complete orchiectomy may become required depending upon what Dr. Sypherd observes during surgery. Claimant is entitled to continuing medical care including surgery.

20. The phrase “reasonably required” does not equate with life or death necessity. Here Dr. Sypherd attempted conservative treatment before suggesting surgical options. Claimant declined surgery until conservative treatment failed. The fact that Dr. Sypherd offered treatment options does not mean that any one option was not reasonably required. Further, a claimant should be expected to participate in his recovery. The fact that Claimant prefers one option over another does not negate the fact that each option may be considered to have been reasonably required.

21. **Attorney Fees.** There is no evidence that Surety had any basis for denying this claim in March 2005 except for the unverified telephone message of the alleged assailant. That denial came the same day that a request for authorization for surgery was made. The stated reason for denial was unreasonable if based upon that telephone message. It was more clearly unreasonable if it were simply a pretext for denying surgery. There appears no reasonable basis upon which Surety initially denied this claim.

22. Surety later authorized the claim apparently for the sole purpose of obtaining an IME to attempt to bolster some basis for continuing to deny surgery. Surety’s failure to authorize the surgery reasonably required by Claimant’s treating physician has cost Claimant over a year of what may well have been a productive work life.

23. Claimant’s historical psychological reaction to the stress of divorce seems to have manifested again under the stress of Surety’s refusal to allow him treatment for a painful condition. While no finding is made nor issue raised relevant to Idaho Code § 72-451,

Surety should not be allowed to unreasonably create psychological stressors and then cite Claimant's psychological condition as an alternate, non-industrial cause of his pain.

24. Claimant should be awarded his attorney fees for Surety's initial and continuing denial of medical care benefits for surgery.

CONCLUSIONS OF LAW

1. Claimant has not reached MMI;
2. Claimant is entitled to medical care benefits including surgery as required by his treating physician; and
3. Claimant is entitled an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

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

DATED in Boise, Idaho, on this 6TH day of October, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20TH day of October, 2006, 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:

Richard K. Dredge
P.O. Box 9499
Boise, ID 83707-3499

W. Benjamin Slaughter III
P.O. Box 1539
Boise, ID 83701-1539

db

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DARREK MORKERT,)
)
 Claimant,) **IC 05-503295**
 v.)
)
 INTERSTATE BATTERIES,) **ORDER**
)
 Employer,)
 and) **FILED OCT 20 2006**
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the 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 not reached MMI.
 2. Claimant is entitled to medical care benefits including surgery as required by his treating physician.
 3. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-804.
- Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission

a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 20TH day of OCTOBER, 2006.

INDUSTRIAL COMMISSION

/S/ _____
Thomas E. Limbaugh, Chairman

/S/ _____
James F. Kile, Commissioner

R. D. Maynard, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

ORDER - 2

CERTIFICATE OF SERVICE

I hereby certify that on 20TH day of OCTOBER, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Richard K. Dredge
P.O. Box 9499
Boise, ID 83707-3499

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/S/_____