

4. The extent of Claimant's permanent disability in excess of impairment, if any;
5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;
6. Claimant's entitlement to mileage benefits;
7. Claimant's entitlement to attorney's fees; and
8. Whether Claimant is entitled to any additional workers' compensation benefits.

ARGUMENTS OF THE PARTIES

Claimant asserts her industrial accident of August 3, 2005, has caused continuing back symptoms for which she needs further medical treatment. Defendants maintain that Claimant has received adequate treatment for her industrial injury, was released to work without restrictions on November 30, 2005, and is not entitled to any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Rodolfo Moreno, Herlind Garcia, Jade Martinez, JoAnn Bagby, and Claimant taken at hearing;
2. Claimant's Exhibits 1 through 11 admitted at hearing;
3. Defendants Employer and Surety's Exhibits 1 through 10 admitted at hearing;
4. Deposition of Michael O'Brien, M.D., taken by Claimant on May 11, 2006; and
5. Deposition of Michael O. Sant, M.D., taken by Defendants on May 25, 2006.

Defendants' objections during the deposition of Dr. O'Brien's at pages 23 and 25 thereof are overruled; Defendants' objections at pages 11, 16, 40, and 42 thereof are sustained, and page five of Exhibit 2 (containing Dr. O'Brien's March 14, 2006, letter) is denied admission.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

Defendants' objections during the deposition of Dr. Sant at pages 31, 35 and 36 thereof, and Claimant's objection at page 38 thereof, are all overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born in 1968 in Mexico. She was 38 years old at the time of the hearing. Claimant finished the seventh grade in Mexico and came to Los Angeles, California, at the age of 13. She later studied cosmetology and obtained her California cosmetologist license.

2. Commencing at the age of 17, Claimant worked in California as a sewing machine operator for several clothing stores where she earned \$7.00 to \$11.00 per hour. Claimant later worked at a computer assembly plant earning \$9.25 per hour. She next worked as a quality controller checking finished garments and earning \$8.00 per hour.

3. While working as a garment quality controller in California, Claimant suffered a work injury to her right arm and shoulder. She was treated with physical therapy and injections. Her injury eventually resolved. She was off work for approximately two years and then settled her claim for that injury through an attorney for \$11,000.00.

4. Claimant reported back pain to her physician in 1995 and also in 1996 during her annual physical examination. At hearing she has no independent recollection of any back pain in 1995 or 1996.

5. In November 2004, Claimant moved to Idaho.

6. In February 2005, Claimant commenced working for Employer BD Employment Solutions, Inc., a temporary personnel agency. Employer assigned her to work full-time at a Simplot packing plant.

7. On August 3, 2005, Claimant was at work for Employer at Simplot when she slipped and fell backwards while descending a short flight of stairs. In falling, Claimant struck her tailbone, buttocks and low back as she bounced down three stairs on her buttocks and low back. She also struck the back of her neck on the stairs with sufficient force to cause her hard hat to fly off. A coworker witnessed the fall, and Simplot supervisors helped carry Claimant from the stairwell. Claimant was transported to the emergency room of a nearby hospital where she was treated by Kevin Chicoine, M.D. X-rays revealed no fractures. Dr. Chicoine diagnosed lumbosacral strain and coccyx contusion, took Claimant off work, and prescribed medications and physical therapy.

8. On August 4, 2005, Claimant commenced physical therapy with Jack Morris. Claimant attended therapy approximately three times weekly from August 4 through November 30, 2005, and improved somewhat.

9. Approximately one week after her accident, Dr. Chicoine released Claimant to return to light-duty work with restrictions of no lifting over five pounds and frequent static posture changes. Claimant began light-duty work at Employer's office filing documents and performing light office cleaning. She testified that there were some days she was unable to come in to work because of pain. Claimant was paid only for the days she was able to work. She was not paid TTDs for the days she did not report for work due to pain because she had no doctor's release.

10. On August 24, 2005, Dr. Chicoine recorded that Claimant was about 50% better, however, she complained of ongoing back pain and also pain down to her knees. When Claimant's condition did not promptly improve, Dr. Chicoine referred Claimant to Michael O. Sant, M.D.

11. On September 23, 2005, Claimant presented to Dr. Sant who diagnosed neck and back strain. He provided trigger point injections to Claimant's hips, which she testified worsened her pain. Dr. Sant saw Claimant several times over the ensuing two months. He increased her restrictions to lifting 20-25 pounds, and continued her physical therapy and prescription medications. On October 10, 2005, Claimant reported back and thigh pain to Dr. Sant. He ordered an MRI.

12. On October 18, 2005, Claimant underwent an MRI which Anthony Giaugue, M.D., read as showing a mild diffuse disk bulge at L4-5 and a small posterior disk bulge at L5-S1, neither of which caused any significant central canal or neural foraminal narrowing. Dr. Sant opined, and advised Claimant, that her MRI results revealed no significant abnormality which should cause her long term problems. Claimant continued her participation in physical therapy.

13. On November 30, 2005, Dr. Sant found Claimant at maximum medical improvement from her August 3rd injury and released her from further medical care. He also released her to full work without restrictions. On that same day, Employer called Claimant and advised her that she was released for regular work but that Employer did not have any work for her. Claimant called Employer periodically thereafter for several weeks but no work was available for her.

14. After her release by Dr. Sant, Claimant continued to experience significant neck and back pain. She applied for and received unemployment benefits for approximately 10 weeks. During her receipt of unemployment benefits, Claimant searched for light work but without success. Sometime after her unemployment benefits ceased, Claimant ceased searching for work because, given her continuing back pain, she did not believe she could work.

15. On March 9, 2006, Claimant presented to Michael O'Brien, M.D., at her attorney's recommendation, for an impairment rating. Dr. O'Brien examined Claimant, and found she was not medically stable and had not reached maximum medical improvement. He opined Claimant suffered a sprain/strain injury from her industrial accident and recommended additional physical therapy. Dr. O'Brien declined to give an impairment rating until after Claimant received further medical treatment.

16. Claimant has been unable to afford any further medical treatment and continues to experience significant back pain. Her lumbar pain disturbs her sleep and limits her ability to clean, sweep, and vacuum her home. Claimant's children and common-law husband have provided increased assistance with household chores since Claimant's accident. She has significantly reduced her driving since the accident due to her need for frequent posture changes. She continues to perform the exercises recommended by the physical therapist, but testified that they aggravate her back pain. She takes over-the-counter ibuprofen or Tylenol for pain. Walking is painful and Claimant is unable to walk, sit, or stand for extended periods. She is generally able to tolerate from 15 to 25 minutes of continuous sitting or standing.

17. Claimant's first language is Spanish. She understands English well, however, she displays some difficulty expressing herself clearly in English. She testified at hearing through an interpreter.

18. Having closely examined the record and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

19. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187

(1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

20. **Additional Medical Treatment.** Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

21. Claimant herein seeks additional medical treatment for her back as recommended by Dr. O'Brien.

22. Dr. Sant opined that Claimant needed no further medical care. He considered Claimant's MRI normal. Dr. O'Brien acknowledged that the majority of similarly-aged individuals have similar MRIs. While all physicians agree that the MRI does not indicate any surgical condition for neurologic deficits, this does not negate Claimant's injury.

23. Dr. Sant released Claimant from further medical care on November 30, 2006. He acknowledged that Claimant continued to report limiting back pain, but testified that given the length of time since Claimant's August 3, 2005, accident, the type of injury, and the treatment she had already received, there was no longer a reasonable causal connection between her continuing complaints and her industrial accident. Dr. Sant also opined that Claimant has no present physical restrictions and does not warrant any permanent impairment rating.

24. Dr. O'Brien testified that Claimant's August 3, 2005, accident caused the symptoms of which she continued to complain in the spring of 2006.

25. Claimant had no significant symptoms prior to August 3, 2005. The symptoms resulting from her industrial accident are well documented. Claimant has continued with significant back symptoms from the time of her industrial accident to the time of hearing. There is no suggestion of any intervening cause.

26. The Referee finds Claimant's testimony of her continuing back pain and limitations credible, and finds Dr. O'Brien's testimony persuasive. Claimant is entitled to additional medical care.

27. **Temporary disability benefits.** 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 expert medical opinion 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). Furthermore,

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he 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 light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

28. Claimant herein asserts entitlement to total temporary disability benefits from November 30, 2005, to the time of hearing and until she reaches medical stability.

29. Dr. O'Brien testified that Claimant needs further medical care due to her August 3, 2005, industrial accident, and that although "she was dismissed from [Dr. Sant's medical] care in November and she wasn't stabilized or better ... she really was not completely better and ready to resume full work." Dr. O'Brien Deposition, p. 14, Ll. 15-19. There is no indication that after November 30, 2005, Employer offered Claimant full work much less modified work.

30. Pursuant to Malueg, Claimant is entitled to temporary total disability benefits from November 30, 2005, through the date of hearing and continuing until she is medically stable or the Employer makes a reasonable offer of suitable work.

31. **Mileage reimbursement.** Claimant asserts her entitlement to mileage expense reimbursement. IDAPA 17.02.04.321.01 limits reimbursement for travel for medical treatment in that no reimbursement is owed for the first 15 miles of any round trip, nor for traveling any round trip distance of 15 miles or less.

32. Claimant's Exhibit 11, p. 88, records Claimant's travel for medical treatment totaling 152 miles. However, only four trips of 17 miles each, exceed the 15 mile criteria. Claimant is entitled to reimbursement for two miles for each of these four trips, for a total of eight (8) miles of travel for medical treatment.

33. **Attorney's fees.** Attorney's fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, 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.

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

35. Claimant herein asserts entitlement to attorney's fees for Defendants' denial of further medical treatment and other benefits, specifically, Claimant alleges that Defendants' denial of medical benefits, and temporary disability benefits after November 30, 2005, was unreasonable. However, given Dr. Sant's opinion and testimony regarding Claimant's condition, Defendants' conduct was not unreasonable. Claimant has not proven her entitlement to attorney's fees.

36. **Other issues.** The other issues identified, including the extent of Claimant's permanent partial impairment, permanent disability, apportionment pursuant to Idaho Code § 72-406, and Claimant's entitlement to any other workers' compensation benefits are not presently ripe for resolution.

CONCLUSIONS OF LAW

1. Claimant has proven she is entitled to additional medical care for her back.
2. Claimant has proven she is entitled to temporary total disability benefits from

November 30, 2005, through the date of hearing and continuing until she is medically stable or the Employer makes a reasonable offer of suitable work.

3. Claimant has proven she is entitled to mileage reimbursement benefits for a total of eight (8) miles of travel to receive medical treatment.

4. Claimant has not proven she is entitled to attorney's fees.

5. The issues of permanent partial impairment, permanent disability, apportionment pursuant to Idaho Code § 72-406, and Claimant's entitlement to any other workers' compensation benefits are not presently ripe for resolution.

RECOMMENDATION

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

DATED this 4th day of October, 2006.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, 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 **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

Bruce D. Skaug
Mark V. Withers
1226 East Karcher Road
Nampa, ID 83687-3075

Neil D. McFeeley
P.O. Box 1368
Boise, ID 83701

db

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA RODRIGUEZ,)
)
 Claimant,) **IC 05-517606**
 v.)
)
 BD EMPLOYMENT SOLUTIONS, INC.,) **ORDER**
)
 Employer,)
 and)
) **Filed October 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 proven she is entitled to additional medical care for her back.
2. Claimant has proven she is entitled to temporary total disability benefits from November 30, 2005, through the date of hearing and continuing until she is medically stable or the Employer makes a reasonable offer of suitable work.
3. Claimant has proven she is entitled to mileage reimbursement benefits for a total of eight (8) miles of travel to receive medical treatment.
4. Claimant has not proven she is entitled to attorney's fees.

5. The issues of permanent partial impairment, permanent disability, apportionment pursuant to Idaho Code § 72-406, and Claimant's entitlement to any other workers' compensation benefits are not presently ripe for resolution.

6. 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

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

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:

Bruce D. Skaug
Mark V. Withers
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/s/