

2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and

3. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

and

c. Attorney fees.

All other issues, including impairment and disability, are reserved pending the decision on compensability.

CONTENTIONS OF THE PARTIES

Claimant asserts that he sustained a lumbosacral strain/sprain on November 26, 2004, while breaking down pallets containing product for delivery. As a result of the low back injury, an opportunistic streptococcus infection developed, leading to life-threatening sepsis, multiple surgeries, and a lengthy convalescence. Because Defendants denied his workers' compensation claim, Claimant incurred substantial medical expenses. Claimant's injury and its sequelae also resulted in considerable time off of work, entitling him to time loss benefits. Further, Claimant asserts that Defendants' denial of his claim was unreasonable, warranting an award of attorney fees.

Defendants contend that no work-related accident occurred, and that Claimant sustained no work-related injury. Absent an accident and injury, the medical condition for which Claimant seeks benefits is not compensable. Even if Claimant's medical condition is found to be compensable, Defendants' denial of benefits was not unreasonable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Nancy Miller, Ryan Anderson, Tisha Christensen, Bertie Mraz, and Lisa Kerns taken at hearing;
2. Claimant's Exhibits 1 through 15, as renumbered at hearing, with the exception of the journal article attached to Dr. Steven's report (Claimant's Exhibit 8);¹
3. Defendants' Exhibits 1 through 41;² and
4. Post-hearing depositions of John Townes, M.D., Dennis Stevens, M.D., Thomas Coffman, M.D., Lawrence Sladich, M.D., and Timothy Kennedy.

EVIDENTIARY ISSUES

During the deposition of Dr. Coffman (page 18), and Dr. Sladich (page 19), Defendants interposed continuing objections to testimony from Dr. Coffman that pertained to Dr. Sladich's deposition, and testimony in Dr. Sladich's deposition that pertained to Dr. Townes' report. In both cases, Defendants' objection was two-fold. The first objection concerned discovery--that Claimant had not disclosed that Dr. Coffman would be commenting on Sladich's opinions or that Dr. Sladich would be commenting on Dr. Townes' opinions. The second objection was that, in both cases, Claimant was attempting to elicit testimony developed post-hearing in contravention of J.R.P., Rule 10 E 4. Defendants did not argue either objection in their briefing. The Referee has carefully reviewed the record and the disputed deposition testimony. It does not appear that the questions were improper, and therefore both of these objections are overruled, along with all other deposition objections. After having considered all the above evidence and the briefs of the

¹ The Referee notes that the journal article in question subsequently came into the record without objection as Exhibit 4 of Dr. Stevens' deposition.

² Defendants' Exhibit 41, a carton of carpet stain remover, was admitted for illustrative purposes only and was not retained by the Commission.

parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

THE FOLLOWING FACTS ARE UNDISPUTED

1. Claimant began working for Employer as a route driver in Pocatello, Idaho, starting in August 2003. In the spring of 2004, Claimant's wife was transferred to Boise, and on April 12, Claimant began work as a route driver for Employer in Boise.

2. Employer is a supplier of paper and janitorial supplies with headquarters in Twin Falls. In addition to its headquarters, Employer operates facilities in Pocatello and Boise, Idaho and Elko, Nevada.

3. During the period in dispute, November 2004 and December 2005, Ryan Anderson was district manager for Employer's Boise operations and Claimant's direct supervisor.

4. Mr. Anderson spoke highly of Claimant's work ethic at hearing, stating that he had done a "very good job" for the company. Mr. Anderson noted that among Claimant's accomplishments was a complete revision of the route for which he was responsible, saving time and money for Employer. Tr., p. 130.

5. Claimant took time off work to go elk hunting in eastern Idaho the week before Thanksgiving week, returning to work on Tuesday, November 23. He did not get an elk, nor did anyone else in his party. Claimant sustained no injury during the unsuccessful hunt.

6. Claimant had no prior medical history of spine complaints and no prior medical history of infectious disease.

7. Claimant worked on Friday, November 26, 2004, the day after Thanksgiving. Claimant made a delivery that day at the Owyhee Plaza Hotel. Ryan Anderson had that day off.

8. At the end of the day Monday, November 29, Claimant went to Ryan Anderson's office. Mr. Anderson observed that Claimant was in distress; Claimant told Mr. Anderson that his back hurt.

9. On December 2, Claimant asked to have someone accompany him on his route because his back hurt. Claimant was unable to complete his route, and called the office and asked Ryan Anderson to come pick him up at the Grove Hotel.

10. Claimant first sought medical care on December 3. Medical records from that date forward consistently relate the onset of Claimant's low back pain to Friday, November 26.

11. Employer became aware on December 3 that Claimant was asserting that his back pain was the result of a work-related accident.

12. Claimant sought medical care on December 3, December 4 (ER), December 8, December 10, and December 12, each time complaining of increasing pain.

13. Claimant returned to the ER on December 15 in severe pain; his white blood count was elevated and imaging of his lumbar spine, pelvis, and abdominal cavity were abnormal, indicating malignancy or infection. Claimant was admitted for pain control, stabilization and further diagnostic workup.

14. On December 16, Claimant remained in the hospital. Physicians suspected malignancy, as Claimant had no history of fever. Ultrasound-guided aspiration confirmed infected abscesses along right paraspinal muscles, gluteal and thigh muscles and in his abdominal cavity.

15. Claimant underwent three surgical procedures on December 16. Dr. McGee drained the abscess on Claimant's right flank and removed substantial necrotic tissue; Dr. Wolf drained the abscess in Claimant's abdominal cavity; and Dr. Cherny drained multiple abscesses along Claimant's spine, removed necrotic tissue, and performed a laminectomy at L4.

16. On December 18, Claimant underwent two additional surgical procedures—on his right flank by Dr. McGee and on his abdominal abscess by Dr. Wolf. Dr. McGee performed a third procedure on Claimant's right flank on December 21.

17. Claimant was discharged to Elks Rehabilitation Hospital on December 31 with wound vacs on his right hip and abdominal incisions, and a PICC line for IV antibiotics.

18. On April 4, 2005 Claimant underwent a split-thickness skin graft to close his hip wound.

19. Employer terminated Claimant's employment effective June 17, 2005.

20. On September 8, 2005, Dr. McGee released Claimant without restrictions.

21. On May 23, 2006, Claimant underwent surgery to remove heterotropic ossification in his right hip and permanently close up his hip wound.

22. During the long course of Claimant's treatment, his wife was present in the room at every medical appointment with two exceptions: an appointment with Dr. McGee on May 6, 2005 and another on June 30, 2006.

23. Claimant has no reliable recollection of events between December 13 and December 26, 2004.

ADDITIONAL FINDINGS

24. Claimant's typical workday began at 6:00 a.m. when he would arrive at the loading dock of the Boise office. The truck from Twin Falls with the day's deliveries would

already have arrived, and the products that Claimant would be delivering were on numbered pallets, covered in shrink-wrap, and waiting to be loaded onto his delivery truck. Claimant loaded the pallets into his delivery truck so that the first pallet in, containing the products he needed for his first few deliveries, was the most easily accessible. When pallet one was empty, he was able to access pallet two, which contained the product for the next series of deliveries. When Claimant's deliveries were properly palletized, he was easily able to access the products he needed for each customer, getting each pallet emptied and out of the way before he needed to access the next one.

25. It was not uncommon to find that a day's deliveries were not properly palletized, and Claimant would have to hunt through the pallets to find the product he needed for a particular delivery. When this happened, Claimant would have to squeeze between pallets and start tearing down the pallets that were further back in his delivery truck to locate the product that he needed. This often entailed standing sideways between two pallets, perpendicular to the pallet he was trying to open. If the product turned out to be on the bottom of a pallet that was behind the most accessible pallets, Claimant had to bend sideways to lift each item up and over the pallets to stack it in the bed of the truck until he could locate the product he needed.

26. On Friday, November 26, Claimant made a delivery at the Owyhee Plaza, one of his regular stops. He typically used the loading zone at the Owyhee Plaza to stage several deliveries. On that day, some of the items Claimant needed were not on the proper pallet, and he had to access pallets further back in the delivery vehicle as described above. While doing this, he felt what he described as "a tightening." Tr., p. 83. "It didn't tell me at the time that I was hurt bad, it was just – just a twinge, like, well, I pulled a muscle, I will work it off." *Id.*, at p. 84.

Claimant finished his route, and does not recall whether he even mentioned the incident to anyone at work at the end of his day.

27. When he got home from work on November 26, he told his wife, Nancy, that he had “. . . kind of pulled his back at work and, you know, he said but I don’t think it’s anything to worry about.” *Id.*, at p. 32. On Saturday, November 27, Claimant and his wife went shopping for a small artificial Christmas tree. Nancy observed Claimant rubbing his low back and asked if his back was bothering him. He said it was, and Nancy offered to abandon the shopping trip, but Claimant declined. When they found a tree they wanted, Claimant was unable to pick up the box off the shelf without causing discomfort, and Nancy began to suspect that Claimant “had hurt his back a little more than we thought.” *Id.*, at p. 33.

28. When they returned home, Claimant took some OTC anti-inflammatory medication and applied a heating pad to his low back. Later in the evening, Claimant and his wife cut short a card game because it was uncomfortable for Claimant to sit at the dining room table. On Sunday, Nancy described Claimant’s condition:

When he would get up out of the chair and start walking he would be a little stiff, but he didn’t show any – you know, he could still move around okay, it’s just a little stiff.

Id., at p. 34.

29. On Monday morning, Claimant’s back felt “pretty good” and he went to work. He worked his full shift, and by the end of the day, his pain had increased. Claimant made a point of seeing Ryan Anderson in his office because, “I wanted to let him know that I had pulled a muscle on his truck.” *Id.*, at p. 87.

Q. [By Mr. Bailey] Okay. Is there any doubt that as your left that office that day on the 29th, after talking to Mr. Anderson, is there any doubt in your mind that what you provided him with sufficient information for him to ascertain you’re talking about having an on-the-job accident?

A. [Claimant] That was my thoughts, yeah. I certainly thought I gave him enough information. Yes, I left with that assumption.

Id., at pp. 89-90.

30. On each succeeding day, November 30 and December 1, Claimant's back would feel better in the morning, he would work all day, and his back would be more painful at the end of the day, with each day's pain being worse than the day before. Finally, on December 2, Claimant asked to have David Kennedy, a service technician and back-up driver, help him with his route because of his back pain. By early afternoon, Claimant called Ryan Anderson and asked to be picked up so he could go home, leaving Kennedy to finish the route.

31. On December 3, Claimant sought medical care at JobCare, an occupational health clinic that is part of St. Alphonsus Occupational Health Network. He was seen by a physician's assistant. The chart note for that date states:

[Claimant] sustained a muscle strain to his lower back six days ago at work. He doesn't remember a specific injury prior to onset of the pain. However, he does state that at the end of the day he was having quite a bit of pain in his low back . . .

Defendants' Ex. 6, p. 1002. Claimant was diagnosed with a lumbar strain and given prescriptions for anti-inflammatories and muscle relaxants. Work restrictions were imposed, and he was to follow-up at the clinic in one week.

32. The next day, December 4, Claimant was in so much pain that he went to St. Luke's Meridian Emergency Department. The intake form for that visit notes: "Injured back while working day [before] Thanksgiving—thought was 'slight muscle pull.'" Claimant's description of his pain was such that there was concern about a kidney stone, and Claimant underwent a CT urogram, which was negative. The CT included scans of Claimant's abdomen and pelvis and showed no masses or free fluid.

33. On December 8, Claimant saw Vicki Wooll, M.D. Dr. Wooll's chart note, under "Interim history," states in pertinent part: "Went to work at Gem State Paper on 11/26/04 and felt a twinge in back and kept working." Defendants' Ex. 9, p. 6001.

34. Claimant returned to JobCare on December 10 and 12 as ordered where he continued to receive treatment for a low back strain or sprain.

35. By December 15, Claimant was in critical condition at St. Luke's Regional Medical Center.

36. Surety, via its employee Lisa Kerns, testified at hearing that the sole reason that Surety denied the instant claim was because of the lack of notice and because of the alleged injury's temporal relationship to Claimant's hunting trip.

CREDIBILITY

37. Both Claimant and his wife Nancy were credible witnesses. Nancy demonstrated a firm grasp of specific dates as well as the general chronology of Claimant's injury, treatment, and recovery. She was present at every appointment and exam, save two. During the time that Claimant was so ill that he has no memory, she is a most reliable historian, and her testimony was borne out in the medical records.

38. Despite having "lost" nearly two weeks during the most critical period of his illness, Claimant's testimony as to the when, where, and how of his original back injury remained remarkably consistent. Claimant was interviewed by an agent of Surety via telephone on January 6, 2005. He was still quite ill, in rehabilitation, and under the influence of pain medication. While his interview transcript reveals his complete lack of recollection about his time in the hospital, and shows that he remained easily confused, he was unswerving about the events of November 26 and what he did and said in the days immediately following.

39. None of Claimant's co-workers or supervisors who provided testimony in this proceeding ever questioned Claimant's honesty or integrity, even though their recollection of events and conversations may have differed from his. David Kennedy, who worked with Claimant in the Boise office and helped Claimant on his route the last day he worked, was blunt in his assessment of Claimant. While being interviewed by Surety on December 30, 2004, he stated, "I don't know anything, you know. I don't know when he did it. All I know is he was—he's not—he's not a bullshitter so—." Defendant's Ex. 17a, p. 31. In his deposition, Mr. Kennedy reiterated, "[Claimant] is not dishonest. He may be an ornery old bastard, but he's not dishonest." David Kennedy Depo., p. 16.

DISCUSSION AND FURTHER FINDINGS

40. The most fundamental issue in dispute in this proceeding is whether Claimant sustained a low back injury while at work. Defendants contend that Claimant did not have a work accident on November 26, 2004. In support of this position, Defendants cite to Claimant's failure to report the accident and injury to Employer, and medical records that indicate the absence of a specific incident resulting in injury. Initially, Employer also posed the possibility that Claimant had been injured in the course of his elk-hunting trip the week before the alleged incident. A secondary issue is whether Claimant's overwhelming strep infection could have been caused by a low back sprain or strain. Defendants rely upon the opinion of Dr. Townes, who doubts that Claimant sustained a low back strain or even that such an injury could result in the strep infection that overwhelmed Claimant.

Claimant asserts that he did report the work injury to Ryan Anderson on Monday, November 29, and that the medical records are consistent with his explanation of when and how the accident occurred. As to the issue of medical causation—whether an overwhelming strep

infection could result from a relatively minor low back injury—Claimant relies on the medical opinions expressed by Drs. Sladich, Stevens, McGee, and Coffman.

INJURY/ACCIDENT

41. In an industrial accident case, the burden is upon the claimant to prove that he sustained an *injury* as a result of an *accident* that occurred within the course of his employment. “Injury” is defined by Idaho Code § 72-102(17)(c) as an injury caused by an accident, resulting in violence to the physical structure of the body. “Accident” is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b).

42. For the reasons set out in the following findings, the Referee finds that Claimant has met his burden of proving that he sustained an injury as the result of an accident in the course of his employment on November 26, 2004.

Notice

43. Throughout this proceeding, Defendants placed a great deal of emphasis on the issue of notice. So much so, in fact, that it took some effort to recall that, in fact, compliance with statutory notice requirements was not even an issue in the proceeding. Rather, Defendants contend that Claimant’s failure to notify Employer of a work-related accident on November 26 is probative on the question of whether there *was* a work-related accident. Even if it was undisputed that Claimant never reported a work-related injury to any representative of Employer, such failure is not dispositive on the issue of whether an accident occurred. And in this proceeding, Claimant is just as certain that he informed Anderson that he hurt his back at work as Anderson is certain that he didn’t.

In the memorable words of the prison warden in Cool Hand Luke, “what we’ve got here is failure to communicate.” And at the end of the day, that failure of communication sheds little light on the fundamental question of whether there was an accident.

Medical Records

44. In disputing the occurrence of an accident, Defendants point to certain of the medical records that indicate there was no specific event connected with the onset of Claimant’s back pain, just that it was hurting by the end of the day. Indeed, the chart note from Claimant’s first visit to JobCare about his back states:

[Claimant] doesn’t remember a specific injury prior to onset of the pain. However, he does state that at the end of the day he was having quite a bit of pain in his low back . . .

Defendants’ Ex. 6, p. 1002. Yet, on the following day, December 4, the emergency room intake note specifically describes a “slight muscle pull” that occurred the day after Thanksgiving. Claimant himself described the initial injury as merely a “twinge” or a “tightening” with no immediate onset of severe pain—an event of the type that is easily overlooked.

The medical records closest in time to the injury are typically the most probative of events leading to the need for medical care. As humans are neither perfect storytellers, interrogators, nor scribes, it is not unusual to find some variation in the patient history portion of the records. What is most significant to this Referee is that on his second medical visit, just one day after he initially sought care, Claimant described a specific event that he could reasonably locate as to time when and place where it occurred.

Accident/Injury Summary

45. When Claimant arrived home on Friday, November 26, he told his wife that he had hurt his back at work that day.

Claimant had no reason to be in Anderson's office complaining about his back at the end of the day on Monday, November 29, except to inform Anderson that his back pain was work-related. Claimant left Anderson's office confident that he had made it clear that the discomfort that Anderson had himself observed was work-related.

All of the medical records relate Claimant's injury to November 26, the Friday following Thanksgiving. Emergency room records from December 4 identify a specific event that marked the onset of Claimant's complaints.

Claimant's explanation of the events of Friday, November 26, remained consistent from his initial interview with Surety, through his deposition, to his testimony at hearing. He was careful to correct mischaracterizations of his testimony and did not waver in the face of confusing questions or questions intended to lead him astray.

Both Claimant and his wife were credible witnesses. Neither Claimant's supervisor, nor his co-workers, ever impugned Claimant's honesty or integrity, and one co-worker was blunt in his assessment of Claimant's good character.

Defendants ultimately admitted that they had no evidence that Claimant had hurt himself on an elk hunt the week before Thanksgiving, or that he had any history of pre-existing back problems. The only evidence they could offer concerning reporting of the claim was the testimony of Ryan Anderson. Both Claimant and Mr. Anderson may be wrong regarding their recollections of their interaction on November 29; or, both may be right. Whichever the case may be, it signifies nothing, and is not dispositive of the accident/injury question.

46. Taken as a whole, there is substantial evidence in the record to support a finding that Claimant did have an accident, and did sustain an injury, however minor it seemed at the time, on November 26, 2004.

MEDICAL CAUSATION

47. Not only must a claimant prove that there was an accident that resulted in an injury, but also that there is medical causation:

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

48. There is substantial evidence in the record to support a finding that Claimant sustained a low back strain or sprain, which injury, though seemingly minor, caused the life-threatening strep infection, necessitating extensive medical intervention.

49. Dr. Coffman was the infectious disease specialist who treated Claimant from the time that the infection was confirmed, throughout his stay in the hospital, his rehabilitation at Elks Rehabilitation Center, and during a lengthy course of post-hospitalization IV antibiotics. Dr. Coffman opined in his records and in his deposition that it was more likely than not that Claimant's low back injury provided fertile ground for a transient strep bacillus to set up housekeeping and eventually cause an overwhelming infection.

50. Dr. Stevens, an infectious disease specialist who reviewed Claimant's records, also opined that it was more likely than not that Claimant's back injury started the process that

led to Claimant's near-fatal infection. Dr. Stevens has done substantial research in the area of strep-caused bacteremia. He testified that everyone hosts a variety of strep bacteria in their mucous membranes. Although it remains unclear how these normally-benign bacteria find their way into deep tissue, it is well documented that no portal of injury (such as a laceration or wound) is necessary to have an ordinarily harmless bacteria become life-threatening. Any injury to tissue, such as occurred when Claimant strained or sprained his low back, can provide an environment that attracts and holds the bacteria, permitting the development of widespread infection.

51. Claimant's other treating physicians, including Drs. McGee, Cherney, Sladich, and Wooll either expressed agreement with the opinions provided by the infectious disease specialists or stated that they did not disagree with them.

52. The only medical evidence in the record that purports to dispute medical causation in Claimant's case is the report and subsequent deposition of Dr. Townes. Dr. Townes is an infectious disease specialist who practices at Oregon Health and Science University. Dr. Townes arrived late on the playing field of this proceeding. He reviewed relevant medical records, and issued a report dated June 1, 2006. Dr. Townes' report includes a great deal of speculation about Claimant's case. What it lacks is any legally sufficient opinion that actually disputes or contradicts the medical causation opinions expressed by Claimant's treating physicians and Dr. Stevens.

53. Most fundamentally, Dr. Townes questions whether Claimant sustained *any* low back injury. That is a bold position to take in view of the medical records documenting Claimant's early treatment. Five medical providers who saw and treated Claimant before his infection was discovered diagnosed a strain or sprain in his low back. While sheer numbers do

not make the treating physicians necessarily correct, the opinions of five providers who actually saw and treated Claimant carry far more weight than that of an IME physician who did not. Furthermore, although Dr. Townes questions the existence of a back injury, he does not posit an alternative cause of Claimant's strep infection that meets a legally defensible standard. Dr. Townes does *speculate* on a number of possible explanations for Claimant's condition, but he cannot state that any of these possibilities is more likely than not to have caused Claimant's illness.

54. Dr. Townes was quite certain, however, that the use of prednisone either pre-disposed Claimant to infection, or worsened the infection if it was already present. This assertion is of no legal significance. The Idaho Industrial Commission has adopted the "compensable consequence" doctrine discussed in Professor Larson's treatise on workers' compensation. This doctrine provides that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of and in the course of employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional conduct (not an issue in this proceeding). Thus, the consequence of any treatment Claimant received that was intended to be curative of his back injury was compensable, whether or not the treatment had the intended effect. See, *Castaneda v. Idaho Home Health, Inc.*, 1999 IIC 0538 (July 1999); *Martinez v. Minidoka Memorial Hospital*, 1999 IIC 0262 (February 1999); and, *Offer v. Clearwater Forest Industries*, 2000 IIC 0956 (October 2000).

Dr. Townes was also of the opinion, although he could not state it as a more-likely-than-not proposition, that if Claimant's infection had been spotted sooner, he might not have needed such extensive critical care. This is a valid, if tautological, assertion; but misdiagnosis, too, falls

under the aegis of compensable consequences.

MEDICAL CARE

55. 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 required by the employee's physician or needed immediately after an injury or disability from an occupational disease, 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). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

56. Having determined that Claimant's injury was compensable, Claimant is entitled to payment or reimbursement, as appropriate, of all medical expenses incurred as a result of his injury. Defendants shall pay all outstanding invoices, reimburse any third-party insurer amounts paid on Claimant's behalf, and shall remit to Claimant all out-of-pocket costs together with the amount of any contractual write-off taken by providers as a result of the third-party payor. Claimant shall ensure that medical providers are reimbursed the full invoiced amount for all services.

TTDs/TPDs

57. Idaho Code § 72-408 provides for income benefits (temporary total and temporary partial disability) for injured workers during the period of recovery. Having found that Claimant has a compensable claim, he is entitled to income benefits from the date he last worked until he

is released to light duty work and Employer has made a reasonable and legitimate offer of employment that Claimant can perform within the terms of the work release.

58. It is undisputed that Claimant last worked for Employer on December 2, 2004. Employer terminated him on June 17, 2005. Dr. McGee released Claimant to work on September 8, 2005. Dr. McGee imposed no specific restrictions in that release but stated that Claimant could pursue work as tolerated. Claimant asserts entitlement to TTDs for the period of December 3, 2004 through September 8, 2005.³

It is undisputed that Claimant underwent additional surgery to remove the heterotropic bone growth on his hip on May 23, 2006. Although a written medical release following this procedure was not in the record, both Claimant and his wife testified that he was released to return to work on June 30, 2006. This testimony was undisputed. Claimant asserts entitlement to TTDs for the period of May 23 through June 30, 2006.

Claimant is, therefore, entitled to TTD benefits for the period of forty (40) weeks from December 3, 2004 through September 8, 2005, and for an additional period of five (5) weeks and four (4) days for his subsequent hip surgery, for a total of forty-five (45) weeks and four (4) days (45.571428 weeks).

59. Claimant's average weekly wage (AWW) at the time of his injury was \$433.06 ($\$5,629.75 \div 13 = \433.06). TTD benefits are calculated at the rate of 67% of Claimant's

³ At the time that Dr. McGee released Claimant on September 8, 2005, Claimant's hip wound was covered only by a thin skin graft. It was undisputed that Claimant's femur was clearly visible beneath the thin layer of protection the graft provided. Additionally, there was a substantial growth of heterotropic bone in his right hip that was painful and interfered with Claimant's mobility. The Referee seriously doubts that Claimant was actually medically stable at this point in time, and could be entitled to TTDs for some additional period of time. However, no evidence was presented on this particular issue and Claimant only requested TTDs for the period of December 3, 2004 through September 8, 2005, and May 23 through June 30, 2006.

AWW, for a compensation rate of \$290.15 ($\$433.06 \times .67 = 290.15$). Claimant is entitled to past TTD benefits in the amount of \$13,222.55 ($290.15 \times 45.571428 = 13,222.55$).

ATTORNEY FEES

60. Claimant asserts entitlement to attorney fees in this proceeding. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered pursuant to Idaho Code § 72-804. That section provides that the Commission *shall* award attorney fees when an employer/surety contests a claim without reasonable grounds, neglects or refuses to pay compensation within a reasonable time after receiving a claim, or discontinues payment of compensation without reasonable grounds. Claimant argues that Defendants are liable for attorney fees on all three of the grounds stated.

Claim Contested Without Reasonable Grounds

61. For the reasons set out and discussed below, the Referee finds that Claimant is entitled to an award of attorney fees for the reason that Employer/Surety contested the claim without reasonable grounds.

62. When Employer notified Surety about Claimant's request for compensation, Employer brought three concerns to Surety's attention: 1) Whether there was an accident; 2) if Claimant was injured, did the injury occur on the elk-hunting trip; and 3) how could a minor strain or sprain result in a life-threatening infection? These were all reasonable questions or concerns at the outset. Surety determined that the claim needed further investigation before it was accepted or denied. Claimant, a co-worker, Claimant's supervisor, and the company's administrative secretary were interviewed. Medical records were obtained. It is important to note that by the time Surety began investigating this claim, Claimant was already in the hospital in critical condition.

Surety denied the claim by letter dated January 25, 2005. The stated reason for the denial was that there was no accident. Surety's investigation had turned up no evidence that Claimant had injured himself while hunting. Despite Employer's early question about medical causation, that was not yet an issue so far as Surety was concerned. Both Karla Gossi, the claims adjuster assigned to the claim, and Lisa Kerns, Ms. Gossi's supervisor, testified that the sole basis for denial of the claim was that there was not an accident. Ms. Kerns stated that in reaching that conclusion Surety relied upon the inconsistencies in the witness statements and the initial medical record from Dr. Sladich that did not identify a specific incident as the cause of Claimant's complaints.

After receiving the denial, Claimant asked that the matter be reconsidered. Karla Gossi, Lisa Kerns, and their supervisor Paulette Boyle all reviewed the file. They asked legal counsel to review the file. Legal counsel noted that the claim might, in fact, be compensable, but it would likely require a hearing to make that determination. By letter dated March 24, 2005, Surety advised Claimant that it was standing on its original denial. The Referee notes that, although medical causation was a threshold issue in this adjudication, medical causation was never the basis for denial of the claim.

63. A determination on whether attorney fees are justified, then, turns on the reasonableness of Surety's reliance on the notice issue as a basis for determining there was no accident. No one witnessed Claimant's accident, and so no one other than Claimant could provide any testimony or information about what actually happened. None of Claimant's co-workers or supervisors could or did dispute the substance of Claimant's account. Not one of Claimant's co-workers or supervisors ever questioned Claimant's integrity or his reputation for veracity, and one was outspoken in defense of Claimant's honesty. Claimant provided a specific

and consistent explanation of when, where, and how the accident occurred, and this specific explanation is found among the first two medical records that were generated over the course of Claimant's treatment. Thus, the sole remaining basis for Surety's determination that there was no accident is a relatively minor dispute, which is not even probative of the issue, over whether Claimant gave Employer notice of the accident. Surety's denial of the claim on such a basis is unreasonable.

CONCLUSIONS OF LAW

1. Claimant sustained an injury as a result of an industrial accident on November 26, 2004.
2. The conditions for which Claimant sought medical care were caused by the industrial accident.
3. Claimant is entitled to reasonably required medical care for his immediate injury and its sequelae.
4. Claimant is entitled to TTDs in the amount of \$13,222.55 for the 45-week, 4-day period that he was unable to work because of his injury.
5. Claimant is entitled to an award of attorney fees for unreasonable denial of his claim.

RECOMMENDATION

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

DATED this 5 day of March, 2007.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of March, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

JAMES A FORD
PO BOX 1539
BOISE ID 83701-1539

djb

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEAN MILLER,)
)
 Claimant,)
)
 v.)
)
 GEM STATE PAPER AND SUPPLY, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2004-527494

ORDER

Filed: March 26, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her 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 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 conclusions of law as its own.

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

1. Claimant sustained an injury as a result of an industrial accident on November 26, 2004.
2. The conditions for which Claimant sought medical care were caused by the industrial accident.

3. Claimant is entitled to reasonably required medical care for his immediate injury and its sequelae.

4. Claimant is entitled to TTDs in the amount of \$13,222.55 for the 45-week, 4-day period that he was unable to work because of his injury.

5. Claimant is entitled to attorney fees from Defendants pursuant to 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 setting forth the amount and basis for attorney fees requested in this case on either a contingent fee or hourly basis. Counsel shall also provide a copy of the fee agreement executed by Claimant and his attorney, and an affidavit in support of the claim for fees. 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 such documentation, Defendants may file a response to Claimant's information. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. With seven (7) days after Defendants' counsel files the above-referenced response, Claimant's counsel may file a reply. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 26 day of March, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

Participated but did not sign
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of March, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

JAMES A FORD
PO BOX 1539
BOISE ID 83701-1539

djb

/s/ _____