

CONTENTIONS OF THE PARTIES

Claimant contends she suffers permanent disability in addition to an 8% permanent impairment of the whole person from a compensable back injury which required surgery. She is entitled to attorney fees for Defendants' unreasonable denial of her claim from the date of accident until June 16, 2005, when the claim was finally accepted or until August 24, 2005, when the payment was actually made. Also, she is entitled to attorney fees from August 2005 until March 6, 2006, for Defendants' unreasonable denial of treatment or until April 10, 2006, when certain additional treatment was finally approved.

Defendants accept and agree Claimant suffered 8% PPI. They contend Claimant does not suffer significant disability in excess. She returned to her time-of-injury wage and job. They acted reasonably at all times. Immediately after the accident, Claimant sought chiropractic treatment from a physician not approved by Defendants, which treatment delayed Claimant from obtaining proper treatment from a medical doctor. Moreover, Claimant did not seek medical treatment between March 14, 2005 and November 30, 2005. She did not again visit any doctor until February 10, 2006.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and claims adjustor Dawn Sparks ("Adjustor");
2. Claimant's Exhibits 1 – 5; and
3. Defendants' Exhibits 1 – 8.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Working for Employer, Claimant suffered a back injury in a compensable accident on July 10, 2004. She immediately notified Employer. She could not finish her shift.

2. A notice concerning workers' compensation claims reported an incorrect telephone number for the third-party administrator. Claimant was unable to get beyond the voice-recorded phone tree after she obtained the correct telephone number by other means.

3. A notice identified six authorized medical facilities. The only one open at the time of Claimant's accident was a hospital emergency room. Claimant did not believe her condition required emergency hospital treatment.

4. The notice also stated: "For urgent care needs OR after clinic hours, you may seek treatment from the hospital Emergency Department listed OR the nearest qualified facility or provider." (Capitalization as in original.)

5. Claimant drove home. She telephoned her chiropractor, Scott Meissner, D.C. He first treated Claimant for the injury that afternoon. Claimant had visited him previously and had an established doctor-patient relationship with him. Dr. Meissner has an appropriate degree and license to perform chiropractic treatment. Claimant considered him to be "qualified."

6. Dr. Meissner treated Claimant daily for six days, then two to three times per week for the next several weeks. He released Claimant to light duty on July 19, 2004. Thereafter, he gradually removed her temporary restrictions.

7. On September 15, 2004, Dr. Meissner opined Claimant's condition was caused entirely by the work accident.

8. On September 28, 2004, Adjustor sent the following:

After a complete review of your claim and the statement that was taken, we are denying your physician's care. You went to see Dr. Meissner July 10, 2004 for

the injury and have continued care with him since that time. Walgreen's has established medical care with certain physicians for your worker's compensation injuries, which they have the right to do under the Idaho Statute. We have verified with your employer that a posting is out naming the physicians you should seek care with. Therefore, we are denying any of Dr. Meissner's care and his recommendations.

We are notifying Dr. Meissner's office of our denial of his services by copy of this and suggest you turn in the bills to the primary health insurance.

We are not denying your claim at this time and if you feel that further medical care is necessary, you should seek care with the certain physicians as outlined by Walgreen's.

9. Claimant obtained counsel before the end of 2004.

10. Largely because of nonpayment issues, the relationship between Dr. Meissner and Claimant deteriorated. She last received treatment from Dr. Meissner on March 14, 2005.

11. In June 2005, knowing Claimant was represented by counsel, Adjustor contacted Dr. Meissner directly to negotiate payment without contacting Claimant's counsel. Surety reversed its denial of payment of Dr. Meissner's bill. When asked why, Adjustor testified, "Well, in looking over it, it would be essentially cheaper to pay Dr. Meissner's bills than continue with litigation and to take the claim to hearing and eventually have to pay for it in the long run anyway."

12. On June 22, 2005, in response to a request form from Adjustor, Dr. Meissner reported Claimant MMI as of the date of her last visit, March 14, 2005, with no permanent impairment. He released her to work full duty without restrictions. Dr. Meissner's opinions are not supported by medical records he made on or immediately prior to March 14, 2005. The Commission will not speculate upon the timing of the issuance of these opinions in relation to Adjustor's exclusion of Claimant's attorney in negotiating Surety's reversal of its denial of payment. Dr. Meissner's opinions are inconsistent with his medical records made on or

immediately prior to March 14, 2005. These opinions cannot reasonably be considered to be held to a standard of reasonable medical probability.

13. On July 12, 2005, Dr. Meissner provided a written referral to an unspecified medical doctor for continuing back problems related to the work injury.

14. Despite Adjustor's assurance, in June 2005, to Dr. Meissner that payment would be forthcoming, no payment was made. In mid-August 2005, Dr. Meissner sued Claimant for recovery of his unpaid medical bills. Surety eventually paid Dr. Meissner directly without forwarding payment to Claimant's counsel. At hearing, Adjustor was unable to give a reason why the payment was delayed an additional two months after she had promised it.

15. On August 22, 2005, a nurse case manager hired by Surety asked Dr. Meissner to refer Claimant for a second opinion and suggested Timothy Floyd, M.D., or John Bishop, M.D. Neither doctor nor the clinic with which they are affiliated were on the approved list of providers posted at Claimant's workplace.

16. Despite having suggested Claimant be referred to Dr. Floyd, Defendants refused to authorize Dr. Floyd to treat Claimant until March 2006. In January 2006, they did authorize a diagnostic examination by Dr. Floyd and an MRI upon his recommendation.

17. Dr. Floyd first examined Claimant on February 10, 2006. An MRI showed a significant disk herniation at L4-5. Later, Defendants acknowledged Dr. Floyd to be Claimant's treating physician and began paying for care he provided. Dr. Floyd performed surgery on April 25, 2006. During surgery, he found a "large bulging disk with extruded material" and that the disk space was "closed down."

18. On July 20, 2006, Dr. Floyd imposed temporary restrictions including a 20-pound lifting limit.

19. Claimant completed physical therapy on August 11, 2006.

20. On October 23, 2006, Dr. Floyd found Claimant medically stable, opined she had permanent restrictions including a 35-pound lifting limit, and opined her permanent impairment at 8% of the whole person.

Nonmedical Factors

21. Claimant is a college graduate. She has worked in various supervisory, clerical, retail, and other positions. She has significant transferable skills. Claimant was 55 years of age on the date of medical stability determined by Dr. Floyd.

22. At the time of medical stability and at hearing, she continued to work in her pre-injury job, albeit with some accommodation regarding freight handling.

23. Vocational rehabilitation expert Nancy J. Collins, Ph.D., opined Claimant's overall disability at 24% inclusive of impairment. Using a national rather than a local market access analysis, she calculated a 33% loss of access. Considering statewide wage data, she calculated a 15% loss of earning capacity if Claimant should return to clerical work. Claimant's current wage with Employer is about the median wage for that type of work.

DISCUSSION AND FURTHER FINDINGS OF FACT

24. **Permanent impairment.** The parties agreed on the 8% PPI rating. No evidence of record supports a different rating.

25. **Permanent disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Wage earning capacity may be considered. Baldner v. Bennet's, 103 Idaho 458, 649 P.2d 1214 (1982). Wage earning capacity may not be the sole factor considered in determining permanent

disability. Loya v. J.R. Simplot Co., 120 Idaho 62, 813 P.2d 873 (1991). Evidence of disability must be more than speculation. *See*, McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 845 P.2d 1207 (1993)(lost potential wage increases were “unsupported by law and too speculative” to assign weight).

26. Permanent disability is a question of fact, and the Commission is the ultimate decision maker regarding questions of fact. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989); Thom v. Callahan, 97 Idaho 151, 540 P.2d 1330 (1975).

27. Here, Claimant has returned to her old job and wage. Nevertheless, Claimant cannot perform certain duties as she was formerly required. Employer and co-workers have accommodated her disability. She has lost access to jobs in the local labor market because of her restrictions. This loss of access arises almost exclusively from her medical restrictions. Considering non-medical factors, only her age at the time of medical stability might impact her ability to compete for the types of jobs for which she would apply. Its impact may be minimal. Indeed, her maturity may be an asset for some managerial and supervisory positions. Any potential disability related to potential wage loss if she should try to change jobs is too speculative to be considered probable. She demonstrated no wage loss in her current job.

28. Claimant showed she is entitled to permanent disability rated at 20%, inclusive of permanent impairment.

29. **Attorney fees.** Ancillary to its obligations under Idaho Code § 72-432 an employer may designate among physicians from whom a claimant should seek treatment. Here, Defendants took no steps to fulfill their statutory obligations beyond instructing Claimant to go see an authorized provider. They did nothing to *provide* actual medical care to Claimant as required by Idaho Code § 72-432. Indeed, as set forth herein, after Defendants chose a provider

(outside their authorized list) they refused for a time to pay for his treatment. Whether Defendants' actions were unreasonable for purposes of Idaho Code § 72-804 must be considered.

30. Claimant argued two discrete time periods of unreasonableness on Defendants' part. A more expansive review of Defendants' behavior is in order.

31. **(a.) Notice.** Employer's notice about authorized providers was reasonable. Its statement on the notice about urgent or after-hours care was ambiguous in its use of the term "qualified facility or provider," but that is not, by itself, a basis for finding Defendants acted unreasonably.

32. Because only the hospital emergency room was available among the providers listed and because Claimant did not consider her injury to be of a nature to require emergency hospital care, she attempted to contact the third-party administrator. Again, the negligent posting of an incorrect telephone number is not unreasonable, nor is the use of a telephone messaging system outside of regular office hours. However, the ambiguous notice, incorrect telephone number, and a phone tree that did not allow Claimant to talk to an appropriate person all combined to initiate a cascade of errors that denied Claimant proper medical care for a year and one-half.

33. **(b.) Dr. Meissner's bill.** Dr. Meissner submitted a report and billing statement to the third-party administrator on August 6, 2004. Adjustor did not testify to any reasonable basis why she waited until September 28, 2004 to inform Claimant that Dr. Meissner's care was being denied. Adjustor did not testify to any reasonable basis why it took seven weeks to discover Dr. Meissner was not on Defendants' own list. Adjustor did not testify to any reasonable basis why she did not arrange for Claimant to visit a physician of Defendants' choice or take some other reasonable action to satisfy Defendants' obligations under Idaho Code § 72-432.

The record does not indicate that Adjustor acted further on this claim until after Claimant obtained counsel in December 2004.

34. Interestingly, Claimant requested production of the claim file during discovery. It was never produced. Except for requiring notices of service, the Commission's adjudication division does not specifically involve itself in the parties' discovery in a case unless invited to do so by motion. Thus, no assumption is made about its nonproduction. Still, that claim file would have shown what actions Adjustor may have taken. It might have assisted the Referee in determining whether Defendants acted reasonably or unreasonably.

35. After Claimant obtained counsel, Adjustor continued to unreasonably delay paying Dr. Meissner's bill. Adjustor offered no reasonable basis why, despite her assurance of payment directly to Dr. Meissner, he was forced to begin collection proceedings against Claimant before Defendants actually paid.

36. Despite Defendants' "official" refusal to recognize Dr. Meissner as a treating physician, on August 22, 2005 Defendants' nurse case manager requested Dr. Meissner provide a referral. If Defendants did not recognize Dr. Meissner as being Claimant's treating physician, they could have insisted she visit Defendants' chosen treater any time after August 6, 2004. If they did recognize Dr. Meissner as being Claimant's treating physician they should have paid him promptly. Instead, they delayed for more than one year. Then, Defendants requested a referral to two physicians who were not listed on the original notice. It was the absence of Dr. Meissner's name on that notice which had been, they asserted, the basis for denying payment of Dr. Meissner's care in the first place. Finally, for reasons unrelated to a listing or notice, as late as March 2006 Defendants balked for a time at paying for Dr. Floyd's treatment of Claimant. He was the very doctor to whom they asked Dr. Meissner to refer Claimant. Irony abounds.

37. After all came the hearing of this matter. Adjustor could offer no reasonable basis for why Defendants belatedly reversed their position about Dr. Meissner's bill other than to testify "it would be essentially cheaper to pay" than to be forced to pay later.

38. **(c.) Delay in authorizing additional treatment.** Claimant requested additional treatment in August 2005. Claimant had been unable to return to Dr. Meissner after March 14, 2005, because of a deteriorating relationship resulting from Defendants' continuing refusal to pay his bill. She still hurt. She still needed care. Defendants knew it. Otherwise, the nurse case manager would not have asked for a second opinion. Defendants continued to fail to fulfill their obligation under Idaho Code § 72-432. Only after additional prodding in November 2005 from Claimant's counsel did Defendants begin to move in a direction that allowed Dr. Floyd to examine Claimant in February 2006 and perform surgery on April 25, 2006. Defendants' unreasonableness preceding its belated decision to allow Dr. Floyd to treat her has been set forth above.

39. **(d.) End run around Claimant's counsel.** Defendants' actions in negotiating with and paying Dr. Meissner without properly involving Claimant's counsel was unreasonable. *See, St. Alphonsus Regional Medical Center v. Edmondson*, 130 Idaho 108, 937 P.2d 420, (1997).

40. **(e.) Contesting disability.** Defendants' decision was reasonable to contest whether Claimant suffered permanent disability. She returned to work for Employer without reduction of her wage rate. Although Claimant's argument for additional permanent disability is found more persuasive, the Referee finds Defendants showed reasonableness in their denial of permanent disability.

41. **(f.) Amount of Attorney Fee Awardable.** In sum, Defendants should not be allowed to “starve” Claimant of appropriate medical care and later claim it was Claimant’s fault for picking the wrong doctor in the first place. Defendants had an obligation and ample opportunity to provide reasonable medical care. Instead, they posted a notice, then sent one letter seven weeks later, and thereafter ignored or obstructed Claimant’s opportunity to obtain the care she needed for another year and one-half.

42. An award of attorney fees in this matter is appropriate under Idaho Code § 72-804. Moreover, where Defendants’ unreasonableness in adjusting this claim was so pervasive, Claimant should be awarded attorney fees fully, without reduction for the brief flashes of reasonableness by Defendants. Claimant was forced to take this matter to hearing by Defendants’ unreasonableness. Eleventh hour reversals of position by Defendants do not eliminate, ameliorate, or mitigate prior unreasonableness. The issue of attorney fees for Adjustor’s decision to cut Claimant’s attorney out of any conversation about payment of Dr. Meissner’s bill, by itself, would have required the hearing. Merely allowing attorney fees based upon a percentage of the disputed medical bills would punish Claimant for Defendants’ sustained unreasonableness. Thus, Claimant should be awarded attorney fees for his time and efforts in preparing and trying this matter to the fullest extent allowed by Idaho Workers’ Compensation Law.

CONCLUSIONS OF LAW

1. Claimant is entitled to PPI of 8% of the whole person and permanent disability of 20%, inclusive;
2. Claimant is entitled to full attorney fees under Idaho Code § 72-804.

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 17TH day of April, 2007.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24TH day of APRIL , 2007, 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:

M. Sean Breen
P.O. Box 937
Boise, ID 83701

W. Scott Wigle
P.O. Box 1007
Boise, ID 83701

db

/S/ _____

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; and

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

DATED this 24TH day of APRIL , 2007.

INDUSTRIAL COMMISSION

/S/ _____
James F. Kile, Chairman

/S/ _____
R. D. Maynard, Commissioner

/S/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 24TH day of APRIL , 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

M. Sean Breen
P.O. Box 937
Boise, ID 83701

W. Scott Wagle
P.O. Box 1007
Boise, ID 83701

db

/S/ _____