

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ELIZABETH OVERALL,	)	
	)	
Claimant,	)	<b>IC 04-008260</b>
	)	
v.	)	<b>ORDER ON</b>
	)	<b>RECONSIDERATION</b>
WALGREEN COMPANY,	)	
	)	
Employer,	)	Filed June 1, 2007
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
	)	
Surety,	)	
Defendants.	)	
_____	)	

On April 27, 2007, Defendants filed a Motion for Reconsideration requesting a review of the Industrial Commission’s decision of April 24, 2007, in the above referenced case. Claimant filed a Response on May 11, 2007.

Defendants’ motion for reconsideration brings attention to factual errors in the decision which, when corrected, Defendants argue will change the award of attorney fees. Defendants also suggest that the Commission could reweigh the evidence regarding disability and assess a lower disability award. Claimant argues that the disability determination is correct because she has lost significant access to jobs due to her restrictions. Claimant further argues that she is entitled to attorney fees because Defendants did not immediately provide medical care.

Upon review, the Commission stands corrected about two factual matters: (1) The nurse case

manager was retained by Claimant, not Defendants; and (2) Dr. Meissner's bill was properly paid through Claimant's counsel. These corrections are important. Therefore, the following paragraphs should be substituted for similarly numbered paragraphs in the original decision:

15. On August 22, 2005, a nurse case manager hired by Claimant 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. 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.

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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, between the date of accident and January 2006 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. Moreover, Defendants have a continuing duty to investigate a workers' compensation claim. Instead of fulfilling that obligation, the Adjustor did not send Claimant to a medical doctor who could order an MRI and diagnose the herniated disk. They did not authorize treatment until March 2006. Whether Defendants' actions were unreasonable for purposes of Idaho Code § 72-804 must be considered.

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36. 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. They could have made the appointment for her to visit whichever treater they chose. 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.

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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 continued to fail to fulfill their obligation under Idaho Code § 72-432. The Adjustor did not assist Claimant in obtaining the proper medical, as opposed to chiropractic, care she needed. 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.

39. **(d.) Adjustor's blame-shifting to Claimant's counsel.** Defendants' actions in negotiating with Dr. Meissner without properly involving Claimant's counsel were unreasonable. *See, St. Alphonsus Regional Medical Center v. Edmondson*, 130 Idaho 108, 937 P.2d 420, (1997). On August 3, 2005, Dr. Meissner wrote Claimant's counsel as follows: "On this date my office contacted Dawn Sparks at Sedgwick. She stated that they are prepared to pay our bill directly to me in full, but that you had sent them a letter requesting that payment for our billing be sent to you directly." Thus, however the Adjustor ultimately paid this bill, she left Dr. Meissner with a mistaken impression that it was Claimant's counsel, not the Adjustor, who had been obstructing payment of

Dr. Meissner's bill. It was the activity of Claimant's counsel that caused Defendants to pay this bill which they had previously denied. Adjustor should have communicated to Dr. Meissner accurately instead of leaving him with a false impression.

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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. 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.

As stated in the substitutions above, and after considering the evidence with the appropriate corrections, the Commission adheres to its prior determination that Defendants acted unreasonably in adjusting this claim. Accordingly, Claimant is entitled to attorney fees under Idaho Code § 72-804.

Defendants also aver that the Commission could reassess the disability award because the high disability determination may be due to the Referee's misplaced anger at the Defendants. Yet, Defendants state that there is factual support in the record for the disability awarded in the decision. The Commission agrees that there is factual support for the award of disability and declines

Defendants' request to reweigh the evidence.

Based upon foregoing reasons, Defendants' Motion for Reconsideration is GRANTED in part, and the above noted paragraph substitutions are made to the Decision filed April 24, 2007; and DENIED in part, as the factual corrections do not alter the original conclusions regarding disability and attorney fees.

IT IS SO ORDERED.

DATED this 1st day of June, 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   1st   day of   June  , 2007, a true and correct copy of the foregoing ORDER ON RECONSIDERATION was served by regular United States Mail upon each of the following:

M SEAN BREEN  
PO Box 937  
Boise, ID 83701

W SCOTT WIGLE  
PO Box 1007  
Boise, ID 83701

\_\_\_\_\_/s/\_\_\_\_\_