



## **CONTENTIONS OF THE PARTIES**

Claimant contends he required neck surgery as a result of a rollover of a semi-truck and trailer he was driving.

Defendants contend Claimant required neck surgery as a result of a congenital or otherwise preexisting condition.

## **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Hearing testimony of Claimant and treating chiropractor Patrick Mayo, D.C.;
2. Claimant's Exhibits 1 – 15;
3. Defendants' Exhibits 1 – 5, 8 – 15, 19, 21, 23, 24, 27 – 29, 31 – 33; and
4. Posthearing depositions of Grant Walker, M .D., and David Simon, M.D.

All objections raised in posthearing depositions are overruled, except for the objection of Claimant's counsel in Dr. Simon's deposition at page 19, line 23, which is sustained.

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. Claimant worked for Employer as a truck driver. On April 7, 2006, after just under one year of employment, he tipped his semi-truck and trailer on its side. An icy, slushy highway contributed to the accident. Claimant reported that his right shoulder was struck by some object flying around in the truck.

2. Claimant did not immediately seek medical attention. He spent the night in a motel. The following day he helped unload his trailer into a substitute trailer sent by Employer. He assisted the substitute driver by driving at least a part of the long route back to Idaho Falls.

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3. Claimant sought medical treatment on April 9, 2006. He reported pain and some loss of function in his right hand and arm. A neck X-ray showed no evidence of a recent injury. However, it did show an abnormality at C1-2.

4. Claimant was born without a fully developed odontoid (or “dens”). The odontoid is a bone that extends upward from C2 which stabilizes the C1-2 space.

5. An MRI confirmed the defect, but showed no acute soft tissue injury. Flexion/extension X-rays revealed a significant instability.

6. On April 10, 2006, Claimant described his injuries in his own handwriting. He mentioned his head, right side, right shoulder and arm to his hand, right hip and both legs. He did not mention any neck pain.

7. On April 11, 2006, Claimant visited his regular chiropractor, Patrick Mayo, D.C. Dr. Mayo’s note states Claimant’s chief complaint was odontoid fracture. He did not treat Claimant’s upper neck out of caution.

8. On April 11, 2006, Claimant was admitted for fusion surgery. His instability was considered “life threatening.” Dr. Stromberg’s note for that evening is set forth in full below:

Nurse call (about) 2315 – (Patient) requests a sleeping pill. I’m not comfortable (with) additional sedatives on top of narcotic & Clonazepam. (History) of sleep apnea. I ordered Benadryl 50 mg. (orally). Nurse call (about) 10 min(utes) later. (Patient) angry & hastily announced he was leaving despite nurses advise to contrary. Combative, would not sign AMA forms. Pulled IV & halo.

Nurse call @ 2345 as I entered parking lot. He re-appeared & announced he had his own pills. I asked (patient) why he was so hasty. He stated that he had asked for his pills & they brought him the wrong thing. He had been taking them for 6 years. I told him a) the nurse asked about a “sleeping pill” & not a specific drug and b) I wasn’t comfortable loading him up on that many sedatives. c) Earlier I had specifically instructed him to stay in bed and limit neck motion. He had demonstrated complete disregard for my instructions and his own safety and by acting so irrationally I do not wish to be responsible for his care. I will cancel surgery in A.M. Given his condition and that without a doctor he can’t be in the hospital I will remain as Dr. of record til arrangements can be made for him to

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solicit care from another physician, (with) my assistance if needed.  
Given that he left the hospital AMA I am unsure of his status (with) me as his physician and (with) his insurer. We will have to sort this out in the morning.

Nursing & security personel confiscated all meds (after) he indicated their location in cabinet. He told one nurse who took his meds that he would sue her. (Nicole)

As I initially entered the room & throughout our discussion the (patient) rolled about in bed, moving his head about (without) apparent pain (within) the limits of the brace. He still has no apparent regard for his condition.

9. A nurse's note for 7:45 a.m. on April 12, 2006 states:

In to see Pt. Pt states, "If I don't get some breakfast right now, I'm leaving. Or I'll order out. Get me some food". Pt refused regular breakfast tray sent to him. Ate 50% of another regular tray. Informed Pt that if he leaves against medical advice that insurance may not pay for it. Pt verbalizes understanding and states, "Well, someone will have to pay for it. I'm not worried. One of my insurances or workmans comp will have to pay for it. That's why I called me Lawyer already. Someone will get sued for this. I can't understand why the doctor is mad at me." Pt informed about his rights and risks of not complying. Verbalizes understanding.

10. On April 12, 2006, orthopedic surgeon Lynn Stromberg, M.D., noted an old fracture of the odontoid, with no gross instability, no recent injury, and no neurological component to Claimant's condition. A psychological consultation was also performed by Dr. Brock.

11. On April 14, 2006, fusion surgery was performed at C1-2.

12. Except for an infection at the incision site for the donor bone, recovery was uneventful. He was discharged on April 15, 2006.

13. By April 25, 2006, Claimant reported symptoms suggesting a temporomandibular joint ("TMJ") syndrome.

14. Claimant was readmitted to the hospital on April 30, 2006, to treat an infection at the donor bone site. He was discharged May 4, 2006.

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15. On May 11, 2006, Claimant reported a nonindustrial fall and sought pain medications for his low back. A lumbar MRI revealed degeneration with no acute injury.

16. On June 20, 2006, Dr. Stromberg opined Claimant's C1-2 instability preceded the industrial accident. He opined that neither the accident nor Claimant's reported post-accident symptoms were related to the instability.

17. On September 7, 2006, Claimant sought an evaluation by Grant Walker, M.D. He opined that the odontoid defect preceded the accident. He diagnosed it as a congenital synchondrosis of C2. However, he also opined that the instability of C1 on C2 arose from the accident. He relied upon Claimant's descriptions of a history of the presence or absence of subjective symptoms as a major basis for his opinions.

18. On January 31, 2007, Dr. Stromberg reconfirmed his opinion that the instability preceded the industrial accident.

19. On April 19, 2007, Claimant was evaluated by David Simon, M.D., at Defendants' request. He found Claimant medically stable and rated Claimant's permanent impairment at 25-28% of the whole person. He opined this impairment was entirely preexisting due to the instability which he opined was also preexisting.

20. At hearing, Claimant demonstrated his ability to turn his head to the left and right. The Referee estimates Claimant showed a rotation of about 60 degrees from the midline in each direction. No further inquiry was made to determine whether this represented the full extent of Claimant's range of motion.

#### **Prior medical care**

21. Claimant underwent a DOT physical two days before the industrial accident. Claimant admitted he did not reveal to the examining physician any details which might have

required further inquiry or potential disqualification as a truck driver.

22. Claimant occasionally sought chiropractic treatment from Patrick Mayo, D.C. The first entry is November 14, 1997, "Neck is sore." Claimant made four visits in 1997. He visited Dr. Mayo three times in 2000 for low back pain. Visits started on October 20, 2005, and became more frequent. Dr. Mayo recorded Claimant's neck was tender on October 29, 2005. Claimant consistently reported some neck discomfort thereafter. Claimant visited Dr. Mayo two days before this industrial accident. He complained of neck "ache" then. Dr. Mayo's notes show he focused, in part, at C4-5 on the many visits between 2005 and this industrial accident. Dr. Mayo testified he did not detect C1-2 instability at any time.

23. A ClaimSearch report shows Claimant alleged neck strain/pain following the November 3, 2005 automobile accident. The medical records following that accident record low-back and mid-back pain, but not neck pain.

24. Patient underwent two psychiatric inpatient admissions. One occurred in 1996 and the other in 2002.

25. Claimant underwent bilateral carpal tunnel surgeries in 1997 with lingering complaints during an extended recovery. Gallstones were surgically removed in April 2005.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

26. **Credibility.** Claimant's testimony was not credible in places. His demeanor on direct examination was substantially different than on cross examination. On direct, leading questions and documents reviewed on the witness stand shaped his testimony. On cross, he appeared evasive. He failed to recall responsive facts to simple cross-examination questions. He responded to cross-examination questions with rhetorical, argumentative questions. He failed to recall simple facts without first examining the documents which referred to such facts.

He could not recall whether he claimed neck problems following a November 2005 automobile accident claim. He refused to admit to remembering a December 2006 automobile accident until irrefutable documentation was presented. Then he gave many specific details. His demeanor, both on direct and on cross, impaired his credibility. Finally, Claimant has been convicted for theft. Claimant is not a credible witness.

27. **Causation.** A claimant must prove he was injured as the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995).

28. Here, all experts agree that Claimant's disc defect preceded the industrial accident. The dispute is whether the accident caused the instability of C1 on C2 or whether it existed before the accident.

29. The evidence for instability caused by the accident is Dr. Walker's opinion and Dr. Mayo's testimony that he did not discover any instability during his chiropractic examinations. Essentially, Dr. Walker's theory is that the accident injured the soft tissue surrounding C1-2 in such a way that it destabilized the area. Dr. Walker's opinion is undercut by his reliance upon Claimant's reported history about his symptoms. Dr. Mayo's testimony lacks foundation. The record fails to show it likely a chiropractor would be able to discover C1-2 instability during the examinations and treatment Dr. Mayo provided. Dr. Mayo's records show treatment at C4-5, never at C1-2.

30. The evidence for preexisting instability includes the absence of muscle or ligament injury on CT and MRI scans, the inherent likelihood of instability associated with Claimant's dens defect, and Dr. Simon's opinions.

31. Claimant's testimony about the onset, severity, location and duration of symptoms is not entitled to any weight, particularly where that testimony is inconsistent with medical records. Chiropractic records show Claimant reported frequent neck pain in the years preceding the accident.

32. Dr. Simon's opinions carry more weight. Claimant failed to show it likely the accident caused the C1-2 instability.

33. **TTD.** Claimant worked unloading and reloading the day after the accident. He drove part way home. Claimant failed to show he lost any work as a result of this accident. He is not entitled to TTD benefits.

34. **Medical Care.** Claimant reported complaints of pain upon returning home. He is entitled to medical care to evaluate and treat his minor injuries. Dr. Mayo's treatments from the date of the accident until the subsequent fall on May 11, 2006 are compensable. Initial doctors' visits and diagnostic imaging conducted before he was admitted as an inpatient for surgery on April 11, 2006 are compensable. The hospitalization and post-hospitalization treatment is not compensable, except for the April 25, 2006, doctor's follow-up visit in which Claimant reported some pain which was interpreted at that time as suggestive of possible TMJ syndrome.

35. This compensable medical care was reasonably shown to be related to the accident. It was not preexisting. However, any chiropractic visits after the May 11, 2006 fall were not shown to be likely related to the accident. The noncompensable medical visits

were likely related to the C1-2 instability or to the May 11, 2006 fall.

36. **PPI/PPD.** Claimant failed to show it likely he suffered any compensable permanent impairment as a result of the accident. In the absence of compensable PPI, no permanent disability is awardable.

### **CONCLUSIONS OF LAW**

1. Claimant failed to show it likely that his C1-2 instability and neck surgery were related to the accident;
2. Claimant failed to show he is entitled to TTD benefits;
3. Claimant is entitled to medical care for accident-related pain and soft tissue injury as follows: chiropractic treatment from April 7 through May 10, 2006, and doctors' visits and diagnostic testing from April 7 up to but not including Claimant's inpatient admission on April 11, 2006; and
4. Claimant failed to show he is entitled to PPI or permanent disability benefits.

### **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 8TH day of July, 2008.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary



4. Claimant failed to show he is entitled to PPI or permanent disability benefits.

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

DATED this 21ST day of JULY, 2008.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_

James F. Kile, Chairman

Participated but did not sign.

\_\_\_\_\_  
R. D. Maynard, Commissioner

/S/ \_\_\_\_\_

Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ \_\_\_\_\_

Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of JULY, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

James D. Holman  
2635 Channing Way  
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Alan R. Gardner  
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db

/S/ \_\_\_\_\_

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