

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

JAYMIE FARRAR, )  
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 Claimant, )  
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 v. )  
 )  
 ADECCO, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 AMERICAN HOME ASSURANCE CO., )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2006-013181**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed: August 12, 2008

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just. Rick D. Kallas of Boise represented Claimant. Eric S. Bailey of Boise represented Defendants. An expedited hearing on the denied claim was set for August 29, 2007. On August 28, 2007, the parties advised the Commission that Defendants had accepted Claimant's claim, and the parties requested that the August hearing date be vacated. On September 18, 2007, Claimant renewed her request for an expedited hearing. Pursuant to a status conference held October 3, 2007, Claimant withdrew her request for an expedited hearing, and the matter was set for hearing on February 13, 2008. During the pre-hearing conference, held telephonically on January 22, 2008, the parties advised that the matter would be submitted for decision on stipulated facts and a stipulated record. The parties submitted their stipulation of facts and the record, and the matter came under advisement on April 21, 2008, and is now ready

**RECOMMENDATION - 1**

for decision.

## **ISSUES**

By agreement of the parties, the only issues to be decided are:

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

1. Permanent partial disability (PPD) in excess of her impairment; and
2. Attorney fees pursuant to Idaho Code § 72-804.

## **CONTENTIONS OF THE PARTIES**

Claimant asserts that the combined factors of her spinal surgery, her age, her education, and her work history constitute a permanent partial disability of 10% in excess of her undisputed 25% whole person impairment (PPI). Claimant also maintains that she is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 because Defendants acted unreasonably when they originally denied her claim without conducting a reasonable investigation, and then delayed payment of her claim for more than thirty days once it was accepted. Finally, Claimant asserts that a portion of the medical expenses related to her industrial injury (\$248.20) remained unpaid at the time that the parties filed their stipulated facts on March 6, 2008.

Defendants assert that Claimant has failed to carry her burden of proving that she sustained any disability in excess of her undisputed 25% PPI. Defendants defend their original denial as reasonable, and assert that their refusal to pay Claimant 10% disability in excess of her impairment was reasonable based on the stipulated facts.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Exhibits 1 through 11 and 14 through 20 as agreed to by the parties;<sup>1</sup> and

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<sup>1</sup> Exhibit nos. 12 and 13 were reserved for the vocational experts' evidence, but were not used.

2. Claimant's deposition taken July 25, 2007.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## **FINDINGS OF FACT<sup>2</sup>**

### ***CLAIMANT'S BIOGRAPHICAL INFORMATION***

1. Claimant's name is Jaymie Farrar (nka Jaymie Schoenwald), and her date of birth is August 6, 1988. On the date of her November 1, 2006 industrial accident / cervical spine injury, Claimant was 18 years of age, 5 feet, 2 inches tall and weighed 131 pounds. (Exhibit No. 2). Claimant is now 19 years of age.

2. Claimant graduated from Vallivue Senior High School in 2006. (Exhibit 16, Answer No. 4).

3. Claimant has not received any formal education in an academic setting since graduating from high school.

### ***CLAIMANT'S EMPLOYMENT HISTORY***

4. Claimant worked as a food service worker for Taco Ole' for approximately two months while in high school. She earned \$6.00 per hour in this job. (Claimant's Depo., p. 17).

5. After leaving Taco Olé, Claimant worked for Wendy's as a food service worker and earned \$6.00 per hour. (Claimant's Depo., p. 19; Exhibit 16, Answer No. 6).

6. After leaving Wendy's, Claimant worked at Dairy Queen from June 2005 to September of 2005 and earned between \$5.25 per hour and \$5.95 per hour. Claimant performed various job duties in this position including counter work, food preparation, and clean up.

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<sup>2</sup> Findings of fact 1 through 49 are the findings contained in the Stipulation jointly filed on February 13, 2008. Non-substantive changes were made by the Referee to bring the stipulation into conformity with Commission style and formatting requirements.

(Depo., p. 19; Exhibit 16, Answer No. 6).

7. Claimant began working for Adecco on August 14, 2006. (Exhibit No. 1). Adecco is a temporary employment / staffing agency. Adecco assigned the Claimant to report for work with a company named Plexus located at 906 E. Karcher Road, Nampa, Idaho 83687. (Exhibit No. 1).

8. On the date of her November 1, 2006 industrial accident, the Claimant was a full-time assembler for Plexus earning \$9.36 per hour. The Claimant's job duties as an assembler consisted of building circuit boards, putting the circuit boards in their chassis, screwing screws, putting the outside screw on, squeezing the chassis together, prepping the chassis, pulling the chassis apart, and lifting and carrying heavy boxes. (Exhibit No. 2).

***OCTOBER 15, 2006 NON-INDUSTRIAL INJURY***

9. On Sunday, October 15, 2006, Claimant was helping her mother move when she noticed neck and upper back pain. Claimant presented to Martin Donaldson, D.C., on Tuesday, October 17, complaining of neck and upper back pain. (Exhibit No. 4, p. 4004).

10. Based on the anatomical symptom diagram set forth in Dr. Donaldson's October 17 clinic note, Claimant's pain was located primarily in her right trapezius / right scapular area of her upper back (*Id.*).

11. Dr. Donaldson scheduled Claimant for a follow-up appointment on October 19, and released her to return to work with the following restrictions:

- Limit lifting to 20 pounds;
- Minimal bending and twisting; and
- No overhead reaching.

(*Id.*, at p. 4003).

12. On Thursday, October 19, Claimant returned to Dr. Donaldson's office. The anatomical symptom diagram from Claimant's October 19 visit showed that Claimant's symptoms were located primarily in her back at T-1 on the right. Dr. Donaldson took Claimant off work completely from October 19 until October 23 (*Id.*, at pp. 4004 - 4005).

#### ***CLAIMANT'S NOVEMBER 1, 2006 INDUSTRIAL ACCIDENT/ INJURY***

13. In compliance with Dr. Donaldson's October 19 release from work, Claimant missed work at Plexus on Thursday, October 19, and Friday, October 20.

14. On Monday, October 23, Claimant returned to full-time work at Plexus as an assembler with no restriction on her activities. (Exhibit No. 2).

15. After she returned to work at Plexus on October 23, Claimant "overall felt a lot better" and was able to work "without difficulty." (Exhibit 5, pp. 5001, 5004).

16. Claimant worked full duty without restrictions for Plexus from Monday, October 23, until she injured her neck at work for Plexus on Wednesday, November 1, 2006 while "prepping, bending over and lifting and then pushing and pulling." (*Id.*, at p. 5001).

#### ***POST-ACCIDENT MEDICAL CARE***

17. On Monday, November 6, Claimant reported to St. Alphonsus Medical Group, Occupational Medicine, and was examined by Physician Assistant S. Patash, who recorded the following history:

Patient is an 18-year-old female who just started her job at Plexus as an assembler of parts. The parts that she has to lift and put together weigh about 9 pounds each. She works a typical 8-hour shift. She reports that her pain started on November 1, 2006 when she was prepping, bending over and lifting and then pushing and pulling. It is primarily some pain of her neck and also her right shoulder, now she has some persistent tingling over her right shoulder with occasional radiation down her hand.

(*Id.*).

18. On November 10, Claimant returned to St. Al's occupational medicine clinic and told Physician Assistant Charlie Frost, that “. . . within about a week [from her October 15 non-industrial injury] all symptoms resolved in her right upper back and shoulder. . . . She does recall the cervical sprain just recently but claims she had complete resolution of symptoms prior to the 11/01/06 injury.” (*Id.*, at p. 5004).

19. On November 10, the Claimant also gave P.A. Frost the following history of her November 1 industrial accident / cervical spine injury:

She says on 11/01/06 she was working her normal job. She was bent over putting parts into a computer chassis when she felt acute onset of right upper back, mid-back and right arm pain. She did let her supervisor know.

(*Id.*).

20. On November 24, 2006, P.A. Frost diagnosed Claimant's injury as “cervical sprain with right radicular component” and ordered a C-Spine MRI. (*Id.*, at p. 5009).

21. On November 26, Claimant underwent a cervical spine MRI at Intermountain Medical Imaging which showed the following:

Huge disk herniation arising from the C7-T1 disk in the right paracentral and foraminal positions, with severe right neural foraminal compromise and expected mass effect upon the exiting right C8 nerve root. Additionally, the large disk extrusion fills the lateral recess and probably exerts mass effect upon the descending right T1 nerve root.

(*Id.*, at pp. 5012-5013).

22. After receiving the results of Claimant's MRI, P.A. Frost noted on November 28 that “. . . [t]he patient does have some neurological deficits. I feel it warrants a neurosurgeon consultation.” P.A. Frost then “touched base with Intermountain Claims to discuss these findings and [discovered that] apparently this case is under investigation.” (*Id.*, at p. 5014).

### ***INTERMOUNTAIN CLAIMS LETTER TO P.A. FROST***

23. On November 29, 2006, Intermountain Claims' claims examiner, Colleen Eason, wrote P.A. Frost a "RUSH" letter and requested his causation opinion. According to Intermountain Claims' date stamp, the letter, returned with an "X" in the "No" box at the bottom, was received by Intermountain Claims on December 7. (*Id.*, at p. 5016).

### ***P.A. FROST'S LETTER TO INTERMOUNTAIN CLAIMS***

24. P.A. Frost wrote Ms. Eason a letter dated November 30, 2006. In the letter, P.A. Frost stated:

It is my medical opinion that on a medically more probably [sic] [probable] than not basis Mrs. [sic] [Ms.] Farrar's injury, a cervical herniated disk, is not related to employment with Adecco.

The date stamp on P.A. Frost's November 30 letter to Ms. Eason indicates that it was received by Intermountain Claims on December 6. (*Id.*, at p. 5017).

### ***INTERMOUNTAIN CLAIMS' DENIAL NOTICE***

25. On December 4, Ms. Eason sent Claimant a Notice of Claim Status form indicating that her November 1, 2006 cervical spine injury claim had been denied "[b]ased on Charlie Frost PA's medical opinion your need for medical care is not, on a more probable than not basis, related to your incident of 11-01-06." (Exhibit 3, p.3001).

### ***PAUL J. MONTALBANO, M.D.***

26. Based on P.A. Frost's November 28, 2006 referral, neurological surgeon, Paul J. Montalbano, M.D., examined Claimant in clinic on December 4, 2006. In his December 5, 2006 letter to P.A. Frost, Dr. Montalbano recorded the following history:

Ms. Farrar states that her [sic] she initially injured her upper spine and neck on approximately October 15, 2006 while moving from one house to another. She states that at that time she experienced pain between her shoulder blades and a stiff neck. She denies ever experiencing upper extremity pain, numbness,

tingling, or weakness. At that time, she did seek out chiropractic care with Dr. Donaldson in Nampa. She states that after a few visits, her symptomatology had significantly improved if not completely resolve [sic]. She returned to work specifically on November 1, 2006 and was working with her head in a flexed position for an eight-hour shift pulling computer parts from “chassis’s”[sic]. She states she experienced an acute onset of right upper extremity symptomatology involving pain, numbness, tingling and weakness. She states that she did report this to her supervisor and was told to “keep working”.

(Exhibit 7, pp. 7001 –7003).

27. Based on Ms. Farrar’s MRI and her right upper extremity symptomatology, Dr. Montalbano recommended that she undergo a C7-T1 anterior cervical discectomy with fusion (ACDF) with instrumentation as soon as possible. (*Id.*, at p. 7002).

28. On December 7, 2006, Dr. Montalbano performed the following cervical spine fusion surgery on Claimant:

1) Microscopic C7-T1 anterior cervical and posterior radical discectomy for decompression. 2) C7-T1 anterior cervical arthrodesis. 3) Placement of 19-mm Atlantis plate and variable angle screws measuring 4.0 x 14 mm (4). 4) Structural allograft.

(*Id.*, at pp. 7006-7008).

#### ***DR. DONALDSON’S MEDICAL CAUSATION LETTER***

29. In a December 19, 2006 letter to Claimant, Dr. Donaldson stated:

After examining and treating Jaymie on 10/17/06 and on 10/19/06 I did not suspect a cervical disc herniation. Her positive response to the initial treatment further confirmed by belief that her condition was not serious.

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Had Jaymie presented to my office with significant right upper extremity radicular symptoms I do feel that I would have indicated this in my chart notes or diagrams.

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I do not believe that Jaymie had a ruptured disc prior to her initial presentation at my office on 10/17/06. She did not display symptoms that would be consistent with the MRI report which stated that there was “severe right neural foraminal compromise and expected mass effect upon the exiting right C8 nerve root”. Also, her response to the first treatment was positive with marked improvement in cervical rotation. This is not typical with severe cervical disc herniations.

(Exhibit 4, p. 4009).

***DR. MONTALBANO'S MEDICAL CAUSATION OPINION***

30. On December 28, 2006, Dr. Montalbano gave the following medical causation opinion: "I do believe that her [11/1/06] work-related injury is the etiology of her upper extremity symptomatology and the subsequent need for surgery." (Exhibit 7, p. 7019).

***CLAIMANT'S DEMAND FOR REVERSAL OF CLAIM DENIAL***

31. On January 30, 2007, Claimant made demand on Intermountain Claims for: (a) reversal of the Defendants' claim denial; (b) direct payment of unpaid medical benefits and (c) direct payment of retroactive total temporary disability benefits. With her demand letter, Claimant provided Intermountain Claims with the following exhibits: (A) December 4, 2006 denial letter from Intermountain Claims; (B) Medical records from Martin Donaldson, D.C.; (C) Medical records from St. Alphonsus Occupational Medicine; (D) Medical records from Dr. Montalbano, and (E) medical expense summary and itemized billing statements confirming that Claimant had incurred \$29,080.60 in medical expenses in connection with her November 1, 2006 industrial accident / cervical spine injury. (Exhibit 8, pp. 18001-18017).

***THE MARCH 19, 2007 COMPLAINT***

32. Defendants did not respond to Claimant's January 30, 2007 demand for reversal of claim denial. Therefore, Claimant filed her Complaint with the Industrial Commission on March 19, 2007.

***RICHARD RADNOVICH, D.O.***

33. On May 16, 2007, the IME physician hired by Claimant, Richard Radnovich, D.O., issued Claimant a 25% whole person PPI rating for her C7-T1 cervical spine fusion. Dr. Radnovich described Claimant's permanent physical restrictions as follows:

The Claimant should avoid occupations that require prolonged cervical flexion or extension (as would be required with persistent looking up or looking down), cervical rotation (as in repeated looking over her shoulder as in backing up a vehicle), low frequency vibration (as would be found with operating heavy machinery).

(Exhibit 15, pp. 15061-15065).

***BETH ROGERS, M.D.***

34. On August 15, 2007, the IME physician hired by the Defendants, Beth Rogers, M.D., agreed with Dr. Radnovich and issued Claimant a 25% whole person PPI rating for her one-level cervical fusion surgery. (Exhibit 16, p. 16001).

***DEFENDANTS' ACCEPTANCE OF CLAIM***

35. On August 28, 2007, the day before the scheduled hearing, Claimant received notice that Defendants "had agreed to pick up and accept this claim." (Exhibit 18, p. 18008).

36. Also on August 28, Intermountain Claims issued two Notice of Claim Status forms indicating that Defendants had accepted Claimant's November 1, 2006 "claim for a neck strain when working for Adecco," and would be paying Claimant PPI benefits based on Dr. Radnovich's 25% whole person PPI rating. (*Id.*, at pp. 18009 – 18010).

37. On September 5, Defendants sent Claimant a PPI check for \$4,972.00. Since that date, Defendants have been making regular monthly PPI payment of \$1,243.00.

38. Also on September 5, Claimant responded to Defendants' Notice of Claim Status forms, clarified the scope of Defendants' acceptance, and demanded the direct payment of medical benefits, TTD benefits and PPI benefits. (*Id.*, at pp. 18011-18013).

39. On September 14, Claimant served Defendants with Claimant's Second Set of Interrogatories regarding Defendants' non-payment of 100% of the Claimant's medical bills. (Exhibit 19, pp. 19001-19006).

40. On September 18, Claimant requested expedited calendaring on the issues of Defendants' non-payment of medical bills, disability in excess of physical impairment and attorney's fees.

41. On August 29, Defendants sent Claimant a TTD check for \$2,006.80.

42. On October 1, Intermountain Claims sent Claimant a Notice of Claim Status form confirming that Defendants would be sending a "medical expense check in the amount of \$29,226.60." (Exhibit 18, p. 18014).

43. On October 1, Defendants sent the Claimant a medical expense payment for \$29,226.60.

44. Also on October 1, Defendants sent Claimant a second TTD check for \$65.05.

45. By notices dated October 5, 2007, the Industrial Commission set a pre-hearing telephone conference date of January 22, 2008 and a final hearing date of February 13, 2008.

46. During the January 22, 2008 pre-hearing telephone conference with the Referee, the parties agreed to submit the two remaining disputed issues in this case to the Industrial Commission for decision based on Stipulated Facts. The Commission entered its Order Vacating Hearing on January 28, 2008, which required the parties to submit stipulated facts and record by February 13, 2008.

47. On January 22, 2008, Claimant sent Defendants, *via* facsimile, correspondence requesting that \$248.20 in outstanding medical bills be paid. (*Id.*, at pp 18015-18020). Since that date, Defendants have represented to Claimant that Defendants are in the process of paying the medical bills set forth in Claimant's January 22 letter.

#### ***CLAIMANT'S LETTERS TO MEDICAL CREDITORS***

48. Claimant sent letters to her medical providers and bill collectors requesting the

suspension of all collection activity on Claimant's accounts for medical expenses incurred by Claimant as the result of the Defendants' denial of her November 1, 2006 cervical spine injury claim (Exhibit 20, pp. 20001 –20004).

### ***CLAIMANT'S POST-INJURY EMPLOYMENT***

49. Since her November 2006 industrial accident / cervical spine injury, Claimant has worked for Mercy Medical Center as a housekeeper and earned \$8.00 per hour. Claimant has also worked as a telemarketer for Alert Drug and Alcohol Prevention. (Exhibit 17, pp. 17021-17022).

## **DISCUSSION AND FURTHER FINDINGS**

### ***DISABILITY IN EXCESS OF IMPAIRMENT***

50. The definition of "disability" under the Idaho workers' compensation law is:

. . . [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 in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425.

Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances

of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

51. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

52. The parties agree that a wage comparison of her before-injury and after-injury wages does not support a determination that Claimant sustained disability in excess of her 25% impairment.

### ***Education and Work History***

53. Claimant asserts that the restrictions imposed by Dr. Radnovich, together with her lack of education and her history of performing only unskilled manual labor, have caused her to lose access to “vital segments of the labor market” to which she previously had access (Claimant’s Opening Brief, p. 4). Claimant’s assertion may be correct, but it is not substantiated by the record. There is no evidence that Dr. Radnovich’s restrictions would have precluded Claimant from any of the food service or janitorial jobs that she held before her injury. There is no evidence that Claimant had any physical difficulty performing either of the positions that she briefly held after her injury. Claimant identified no examples of particular jobs that she could perform before her injury but not after. Claimant is not required to provide *expert evidence* to support her claim for disability, but she must still provide *some evidence*. Claimant’s bald assertion remains just a bald assertion in the absence of any evidence in the record that would substantiate it.

### ***Claimant’s Age***

54. Claimant also argues that because she was only eighteen years old when she had her cervical fusion, it is likely that she will suffer from additional cervical problems as a result of

adjacent segment disease in the future. A fusion may place additional bio-mechanical stress on the motion segments above and below the fused area—leading to the need for additional medical intervention down the road. Claimant argues that an award of disability in excess of her impairment will compensate her for such an eventuality.

While it is possible that Claimant could develop adjacent segment disease in the future, such an outcome is not a certainty, and her treating physician does not believe it is even a probability. No physician has opined that Claimant will eventually need additional treatment for her cervical spine as a result of her fusion.

Evidence of disability must be more than speculation. See, *McClurg v. Yanke Machine Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993). In the case at bar we have much speculation, but no evidence.

55. The Commission recognizes that a cervical fusion surgery in an eighteen-year-old is a serious event. The Commission recognizes that the cervical fusion surgery permanently altered the structure of the Claimant's cervical spine and that some restrictions may be appropriate to minimize the risk of re-injury. The Commission recognizes that Claimant has been awarded a *substantial* permanent impairment rating in recognition of these factors. The Commission cannot recognize what has not been proven—that Claimant has lost access to the labor market, and that such loss actually exceeds her impairment rating.

#### ***ATTORNEY FEES***

56. Attorney 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. (Emphasis added.)

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

57. The gravamen of Claimant's request for attorney fees in this matter is that Surety did not make a reasonable investigation into the claim before issuing a denial. In particular, Claimant notes that Surety issued its denial based solely on a bare bones causation letter prepared by a physician's assistant when Surety knew that Claimant had been referred to Dr. Montalbano for a neurological surgical consult.

Defendants contend that Surety's reliance on the causation opinion of P.A. Frost as a basis for denying the claim was not unreasonable. In particular, Defendants argue that P.A. Frost was Claimant's initial treater, and causation opinions of treating medical professions are frequently relied upon in making claim determinations.

58. The Commission is well aware that causation opinions may come from a variety of sources, and it was not improper for Surety to seek a causation opinion from P.A. Frost. However, as noted in *Troutner*, whether a Surety acted unreasonably in a particular case is a fact-specific determination that is solely within the purview of the Commission. In this case, the Referee finds that Surety's actions in handling the instant claim were unreasonable in several respects, and justify an award of attorney fees in this proceeding.

## ***Investigation***

59. Surety's investigation of Claimant's injury was both hasty and superficial. It was appropriate for Surety to start its investigation with P.A. Frost's causation opinion, but it was unreasonable to end its investigation there. P.A. Frost's first opinion on causation consisted of a check mark in a "No" box. He reconfirmed his opinion in a three-sentence letter that offered neither an explanation of nor a basis for his opinion.

The record is devoid of any evidence that Surety even attempted to contact Dr. Donaldson, the chiropractor who treated Claimant just two weeks before the industrial injury, despite the fact that Surety was taking the position that Claimant's herniation was the result of that earlier event.

Surety knew, or should have known, from P.A. Frost's chart notes that he was scheduling Claimant with Dr. Montalbano for a neurological surgical consult. In fact, Claimant saw Dr. Montalbano the same day that Surety issued its denial. Dr. Montalbano recommended immediate surgery during that December 4, 2006 visit, and Claimant's surgery was scheduled for December 7, a mere three days later. Dr. Montalbano's operative report clearly states that Claimant's cervical herniation is the result of a November 1, 2006, work injury. Despite this new information, Surety did nothing and continued to rely on P.A. Frost's causation opinion.

In *Gabe 2004*, 2004 IIC 0077, defendants had accepted claimant's claim and paid benefits. Defendants stopped paying benefits when an IME physician opined that claimant was at maximum medical improvement. Claimant returned to his treating physician where he continued to receive treatment, including a second surgical procedure, which a third surgeon agreed was necessary. In that case, the Commission awarded attorney fees to the claimant, noting that while surety's initial reliance on the IME physician was reasonable, their continued

reliance on the opinion in light of additional medical evidence that claimant was not stable, was unreasonable (2004 IIC at 0096). Although the issue in this case is causation, not stability, the analysis remains on point: Not only was Surety's investigation lacking at the outset, but it soon became evident that the physician's assistant and the treating neurosurgeon were at odds over causation. Such a situation should have been a red flag, yet, nothing in the evidentiary record suggests that Surety made any effort to review its decision or to conduct additional investigation of the matter. Such conduct was unreasonable on these facts.

60. A second aspect of Surety's handling of the instant claim that the Referee finds troubling is Surety's failure to respond in a timely manner to Claimant's demand for reversal of the initial denial, and its unnecessary delay in issuing payment for medical expenses once the claim was accepted.

Claimant undertook to do what Surety should have done at the outset—she obtained causation opinions from Dr. Montalbano and Dr. Donaldson. Claimant forwarded the opinions to Surety on January 30, 2007, along with other exhibits and her letter demanding that Surety accept the claim. There is nothing in the record that suggests that Surety responded to Claimant's letter or took any action as a result of the new information. The Referee is not suggesting that Surety was obligated to grant Claimant's request, but its failure to reply in any way necessitated the filing of the Complaint on March 19, 2007. Thereafter, another five months passed before Claimant was scheduled for a defense IME.

It was not until the day before the hearing that Surety advised Claimant that it would pick up her claim. Yet, having accepted the claim, and having a complete record of unpaid medical bills, it took over a month before Surety actually issued a medical reimbursement check to Claimant. Meanwhile, the matter was scheduled for hearing on issues of medical care, disability,

and attorney fees.

At the pre-hearing conference held January 22, 2008, Claimant advised that the bulk of Claimant's medical had been reimbursed, but notified Defendants that \$248.20 in medical expenses remained outstanding and had been referred for collection. The parties agreed to submit the remaining issues to the Referee for decision on stipulated facts, and the hearing date was vacated pursuant to that agreement. The Referee commends both parties for waiving a clearly unnecessary hearing and submitting the matter directly to the Referee for decision. The parties have stipulated that as of February 13, 2008, the date the stipulation was filed, Claimant had not been reimbursed for the \$248.20 in outstanding medical costs. The amount remained outstanding at the time that Claimant filed her opening brief on March 6.<sup>3</sup>

61. Based on the record and the facts as stipulated to by the parties, Claimant is entitled to attorney fees. Claimant's claim for disability in excess of impairment was legitimately disputed, and ultimately failed. No portion of the attorney fees related to the issue of disability in excess of impairment is compensable.

62. The Referee wishes to make one point particularly clear: Attorney fees are not being awarded in this proceeding because Surety initially denied the claim and then reversed its position. Sureties should not be penalized because they made a decision that they later reversed. As discussed herein, Sureties are encouraged to continually revisit their determinations in the light of new developments. Rather, attorney fees are awarded in this proceeding because Surety did not use due diligence in investigating the claim at the outset, nor did Surety ever take the opportunity to review its initial decision despite the receipt of new and mounting evidence

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<sup>3</sup> Claimant made such an assertion in her opening brief, and Defendants did not deny the assertion in their brief filed on April 4. Claimant asserted in her reply brief, filed April 18, that the amount remained unpaid.

contrary to the information on which it based its initial denial. Once it had accepted the claim, Surety unnecessarily delayed in proceeding to quantify aspects of the claim, and was slow to pay once disputed amounts were liquidated.

### **CONCLUSIONS OF LAW**

1. Claimant has failed to carry her burden of proving that she is entitled to permanent disability in excess of her 25% permanent impairment.
2. Claimant is entitled to attorney fees.

### **RECOMMENDATION**

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 1 day of August, 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

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

JAYMIE FARRAR, )  
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 Claimant, )  
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 v. )  
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 and )  
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**IC 2006-013181**

**ORDER**

Filed: August 12, 2008

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 has failed to carry her burden of proving that she is entitled to permanent disability in excess of her 25% permanent impairment.
2. Claimant is entitled to attorney fees.

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 of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 12 day of August, 2008.

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 the 12 day of August, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

RICK D KALLAS  
1031 E PARK BLVD  
BOISE ID 83712-7722

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701-1007

djb

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