

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANET LEE BRIGNETTI,)
)
 Claimant,)
)
 v.)
)
 VALLEY VISTA CARE)
 CORPORATION,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2005-524237

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

Filed October 10, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d’Alene on February 13, 2008. Claimant was present and represented by Starr Kelso of Coeur d’Alene. Monte R. Whittier of Boise represented Employer/Surety. Oral and documentary evidence was presented. The parties took one post-hearing deposition and submitted post-hearing briefs. This matter came under advisement on May 14, 2008, and is now ready for decision.

ISSUES

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

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1. Whether Claimant is entitled to reimbursement for and payment of a weight loss program, including a referral from her treating physician to a weight loss specialist, pending a total right knee arthroplasty;
2. Whether Claimant is entitled to total temporary disability (TTD) benefits (retroactive, current, and future) during the time she is attempting to lose weight pre-surgery; and
3. Whether Claimant is entitled to attorney fees for Defendants' unreasonable denial of benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that she is morbidly obese and that she would like to decrease the risk factors associated with that condition and a pending total right knee arthroplasty (TKA) by attending Weight Watchers and doing whatever it takes to lose some weight before that surgery. She also seeks TTD benefits until such time as she has lost enough weight to proceed to surgery. Finally, she seeks attorney fees for Surety's unreasonable termination of TTD benefits and their unreasonable denial of a weight loss program and referral to a weight loss specialist without contrary medical evidence.

Defendants contend that there is no medical necessity for Claimant to lose weight before her TKA. She has been morbidly obese all of her life and has tried to lose weight from time to time with no lasting results. The same can be said regarding her most recent attempts. Simply, there is no standard by which to judge how much weight she should lose or how long she should be given to lose it. Surety should not be held hostage in the payment of TTD benefits in the interim. Finally, Surety has acted reasonably in the handling of this claim and an award of attorney fees is not warranted.

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EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibits 1-2 admitted at the hearing.
3. Defendants' Exhibits A-G admitted at the hearing.
4. The post-hearing deposition of Douglas P. McInnis, M.D., taken by Defendants on February 28, 2008.

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

1. Claimant was 57 years of age and had been a Sagle resident for 27 years at the time of the hearing. She stood 5'5" tall and weighed 295.5 pounds.
2. Claimant was employed as a CNA for Employer in their lock-down unit caring for Alzheimer and traumatic brain injury patients. On October 19, 2005, she was transferring a patient weighing approximately 180 pounds with a co-worker who had a bad back. The patient decided that she did not want to be moved and attempted to sit down. Claimant got the patient back into her chair so she would not fall. "But right after that and I got her situated and went to walk out of the room, a few feet down the hallway all of a sudden my knee just - - I took a step and it was gone. I couldn't stand on it, it just like collapsed on me." Hearing transcript, p. 19. Claimant estimated her weight to be about 330 pounds at the time.
3. Surety initially denied Claimant's claim on the ground that she did not suffer an accident. After her treating physician "clarified" his understanding of events, he opined that Claimant permanently aggravated her severe pre-existing osteoarthritis, and Surety then accepted

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the claim and eventually authorized a TKA. For reasons not entirely clear from the record, Claimant's treating physician, Douglas Cipriano, M.D., refused to continue treating Claimant and referred her to orthopedic surgeon Douglas McInnis, M.D.

4. Claimant first saw Dr. McInnis on April 26, 2007. Upon examination and review of available medical records, Dr. McInnis diagnosed: (1) Severe medial compartment and moderate tricompartment arthritis, right knee. (2) Severe lateral compartment and moderate tricompartment arthritis, left knee. (3) Morbid obesity. (4) Multiple other medical problems partially related to her history of morbid obesity. He agreed that Claimant was in need of a TKA. He began a series of three Supartz injections. He noted:

At this point we spent a considerable amount of time discussing the fact that although knee arthroplasty is a technical feasibility in a morbidly obese patient that such an operative endeavor is associated with a significant increase in risk in a morbidly obese [*sic-patient*]. As such, I agreed with the opinion of Dr. Friedman¹ that the patient would certainly be well served to lose as much weight as possible prior to proceeding with knee replacement surgery. At this point, she reports that she understands this and agrees wholeheartedly. She has been involved with Weight Watchers program over the past month and has lost 10 pounds. She would like to delay her knee replacement surgery as long as possible until her weight loss has plateaued. Today, I agree with this decision making process.

Defendants' Exhibit E., p. 24.

5. Dr. McInnis requested a referral to John Pennings, M.D., a bariatric surgeon, for an evaluation regarding a surgical or nonsurgical weight loss program. Surety denied the referral.

6. Claimant last visited Dr. McInnis' office on July 11, 2007, when she received the last of her Supartz injections from Travis Headley, PA-C, who noted: "She will try to continue to lose

¹ Robert Friedman, M.D., performed an IME at Surety's request on December 11, 2006. He recommended a bilateral TKA and weight loss. He did not relate the need for the TKA to Claimant's industrial accident, but rather to the natural progression of her underlying osteoarthritis.

weight, but understand and we agree that if her weight seems to plateau, we will entertain the idea of a total knee arthroplasty.” *Id.*, p. 29.

DISCUSSION AND FURTHER FINDINGS

While Defendants assert that the reasonableness of medical care proposed for Claimant under Idaho Code § 72-432 is not an issue as it was not addressed by the parties, the Referee is not persuaded. *See*, page five and six of the hearing transcript and pages one and two of Claimant’s Opening Brief.

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

Defendants do not contest that it would benefit Claimant to lose weight; however, they do contest that she should be awarded TTD benefits during the conceivably endless period of time within which the weight loss is to occur. Defendants argue that the outcome will be no different whether Claimant loses weight or not; only the surgery itself will be more difficult. In order to address Defendants’ concerns, the opinions of Drs. Cipriano and McInnis will be discussed.

Dr. Cipriano:

7. Dr. Cipriano is a board certified orthopedic surgeon practicing in Sandpoint. He inherited his father’s practice and both have treated Claimant in the past for knee problems. He testified as follows at his deposition regarding Claimant’s weight and the proposed TKA:

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Q. (By Mr. Whittier): Okay. Would you also agree with him [Dr. Friedman] that she would not be a candidate for knee replacement surgery at the present time due to her weight?

A. That is a difficult thing to answer. Historically in orthopedic surgery total joint replacement is not performed in the morbidly obese unless they can prove that they can lose some weight ahead of time. But ultimately somewhere you will find an orthopedic surgeon who will do the surgery. I think that there are studies that both support and negate that presumption that the patients who are morbidly obese do poorly after joint reconstruction. I can tell you that because of their weight they have a hard time rehabbing, surgery is more difficult and so the current gestalt is to have morbidly obese patients lose weight prior to their surgery. But some surgeons do them in morbidly obese patients and the patients do well. So that's a qualified prerequisite to total joint surgery is weight loss.

So I guess I can neither agree or disagree with that statement because some surgeons believe it and some do not.

Dr. Cipriano Deposition, pp. 81-82.

Dr. McInnis:

8. Dr. McInnis is a board certified orthopedic surgeon who specializes in knee and hip replacements and is now Claimant's treating physician. He testified in his deposition as follows regarding the relationship between obesity and surgery:

Q. (By Mr. Whittier): You mention obesity. How does obesity increase the complexity of a knee replacement?

A. Well, I think most obviously the amount of tissue to be gotten through on the way from the skin to the work on the bone, which is at the heart of a knee replacement, I think obviously the amount of tissue to be moved out of the way is the first thing. That the incision is longer. The amount of time getting from the skin to the bone takes longer.

Once you have the knee joint exposed, maintaining adequate and appropriate visibility is more difficult because there's simply more tissue in the way that has to be moved out of the way. There is more aggressive retraction of soft tissue in order to keep adequate exposure on what you need to see.

Once you've gotten the knee joint replaced, the closure obviously takes longer because there's more tissue to close. Once the operation is over and the patient is in the recovery room and out on the floor, the recovery is less predictable and more fraught with potential complications because of the obesity.

* * *

Q. (By Mr. Whittier): Okay. So you didn't tell her she had to lose a certain amount of weight before you would proceed to surgery?

A. I don't think that's what - - I don't think that's the way any reasonable person would - -

Q. I'm just trying to clarify to make sure that that's what happened on April 26th (the date of Claimant's first visit).

A. I think what I made clear on this document (his office note for that visit), and I think what I still believe to be true, is that - - and I think what probably is at the heart of this matter is that you can do a knee replacement in a [*sic*] ideal body weight patient. You can do a knee replacement in a morbidly obese patient. They both can have knee replacements. They both oftentimes turn out well. They are both associated with some degree of risk.

The risk is statistically higher of wound problems in a morbidly obese patient, but it is not always prohibitive. Making some effort to lose weight prior to proceeding with an endeavor of that magnitude, from which you can never go back, I think is a very reasonable thing to do.

If you have a morbidly obese patient who is interested in weight loss, has shown interest in weight loss by being involved in Weight Watchers and, in fact, has documented a weight loss in a very short period of time, from when she started to when I had this conversation with her, I think it is a very reasonable thing to do to allow those weight loss efforts to continue so long as they continue to be successful.

Allowing that weight loss, if the patient is 300 pounds, you know, the risk will be less if the patient is 290 pounds and 280 pounds and less and less and less and less until the patient gets down to an ideal body weight. And I think it's very reasonable to attempt to delay this kind of endeavor until that weight loss has plateaued or the patient's ability to continue to try to lose weight has failed or whatever.

I do not think that it is absolutely critical that you wait that period of time. [Some discussion omitted]

I believe that it was very, very reasonable to delay this operation allowing the patient to try to lose weight. I do not believe that it was necessary.

Dr. McInnis Deposition, pp. 13-15.

9. Dr. McInnis was unable to articulate whether Claimant's 13-pound weight loss in the three months he was treating her was appropriate, as he is not a weight loss expert, and that is why he made the referral to Dr. Pennington. Further, Dr. McInnis was unaware of any standard of care

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regarding obesity and knee replacement surgeries because there was no consensus of opinion among practitioners in that regard. Dr. McInnis' review of the medical literature reveals that obesity in knee and hip replacement may increase the risks of wound healing problems, and is something the patient should be made aware of in terms of informed consent, but is not "prohibitive." He also opined that the long-term outcomes in knee arthroplasties are nearly equivalent in the obese and the non-obese patients.

10. Awarding weight loss programs is not without precedent at the Commission level. In *Somora v. Kimberly Cold Storage*, 95 IWCD 8394 (1995), the Commission awarded nutritional and dietary counseling, either individually or through Weight Watchers, to determine if the claimant was entitled to attend a pain clinic for back pain, and jurisdiction was retained for seven months to monitor his progress. Of note, the claimant's treating physician recommended a 50-pound weight loss. In *Howard v. Department of Health and Welfare*, 2000 IIC 0610 (2000), a decision authored by this Referee, the Commission also retained jurisdiction for seven months while the claimant participated in a weight loss program in an attempt to avoid back surgery. Of note, the claimant's treating physician would not perform the surgery, if needed, unless the claimant lost weight.

11. While authority exists for awarding a claimant the costs associated with a weight loss program, the Referee is not convinced that this is a proper case to do so. No physician has expressed the opinion that Claimant cannot undergo the TKA without weight loss. Claimant has had a life-long battle with morbid obesity and has failed at attempts to lose weight in the past. She has not lost much weight in her most recent attempt. While Claimant's accident may have permanently aggravated her underlying osteoarthritis, it did not aggravate her underlying morbid obesity. As Dr. McInnis testified, and no one seriously doubts, it is reasonable for Claimant to lose weight pre-surgery; but not necessary.

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12. Claimant testified that Dr. McInnis did not set any target weight, but that if she reached a plateau with her weight loss, the situation would be re-evaluated. Dr. McInnis testified as follows in that regard:

Q. (By Mr. Whittier): At the time of the hearing in this matter, which was just a couple weeks ago, we had - - we went over to Kootenai County Medical Center and weighed Ms. Brignetti. The weight that was reflected at that time was 295.5 pounds, which would have been a five-pound loss over a six, seven-month period of time.

Would you have considered that weight as plateaued considering she was losing less than a pound per month over the preceding seven months?

A. Again, I'm not a weight loss expert. But I think I would have considered that plateaued, for all intents and purposes, yes.

Dr. McInnis Deposition, p. 17.

13. The Referee finds that a weight loss program, while reasonable, was not required by any physician, and, therefore, is not compensable.

14. In light of the above finding, the Referee further finds that Defendants did not act unreasonably in the handling of this claim and an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Claimant has failed to establish her entitlement to costs associated with a weight loss program.
2. Claimant has failed to prove her entitlement to an award of 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 __3rd__ day of October, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

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IC 2005-524237

ORDER

Filed October 10, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 establish her entitlement to costs associated with a weight loss program.
2. Claimant has failed to prove her entitlement to an award of attorney fees.

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

DATED this __10th__ day of __October____, 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 __10th__ day of __October____ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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Gina Espinosa

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