

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PATRICIA O'NEILL,)	
)	
Claimant,)	IC 2002-504617
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
ANTIQUE WORLD MALL,)	AND RECOMMENDATION
)	
Employer,)	
)	
and)	
)	
STATE INSURANCE FUND,)	Filed October 21, 2008
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on April 22 and 25, 2008. Claimant, Patricia O'Neill, was represented by Richard Owen of Nampa and participated telephonically. Defendant Employer, Antique World Mall, and Defendant Surety, State Insurance Fund, were represented by Gardner Skinner of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, and the submission of briefs, and came under advisement on July 15, 2008.

ISSUES

The issues to be resolved are:

1. Whether Claimant is entitled to additional medical benefits; and
2. Whether Claimant is entitled to attorney fees for Defendants' denial of additional medical benefits.

ARGUMENTS OF THE PARTIES

Claimant asserts her entitlement to additional medical benefits for refills of an intrathecal morphine pump and additional prescription medications for pain and depression after November 30, 2005, as reasonable and necessary treatment for her industrial back injury. She also asserts her entitlement to attorney fees for Defendants' unreasonable denial of payment of these medical benefits.

Defendants assert that the additional medical benefits Claimant seeks are not required or reasonable treatment related to her industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Robert Ritchie taken at hearing;
2. Claimant's Exhibits 1 through 7 admitted at hearing;
3. Defendants Employer and Surety's Exhibits 1 through 10 admitted at hearing;
4. Deposition of James Morland, M.D., taken by Claimant on May 6, 2008;
5. Deposition of Robert Friedman, M.D., taken by Defendants on May 27, 2008; and
6. The Modified Lump Sum Agreement entered into by the parties in this matter and approved by the Commission on November 30, 2005, of which the Referee takes judicial notice as requested by the parties.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

The objections posed during the depositions of Dr. Morland and Dr. Friedman are overruled. After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born in 1944 and was 64 years old at the time of the hearing.
2. On January 19, 2002, Claimant injured her low back while lifting a heavily loaded tray at work. She was treated initially by Timothy Johans, M.D., who referred her to Christian Zimmerman, M.D. Dr. Zimmerman diagnosed an L2-3 disc herniation with nerve root compression and L4-5 spondylolisthesis. On May 6, 2002, Dr. Zimmerman performed L2-3 laminectomy, L2-3 microdiscectomy, L4-5 laminectomy, L4-5 facetectomy, L4-5 foraminotomy and L4-5 fusion. Claimant's back condition improved for a time and then worsened. Dr. Zimmerman referred Claimant to William Binegar, M.D., and Robert Calhoun, Ph.D. Claimant was later treated by C. Timothy Floyd, M.D., who diagnosed recurrent L2-3 disc herniation.
3. On September 24, 2002, Dr. Floyd performed revision L2-3 laminotomy, revision L2-3 microdiscectomy, and revision L4-5 fusion. Claimant's back pain persisted and Dr. Floyd referred Claimant to James Bates, M.D. Claimant later returned to Dr. Johans. On May 13, 2003, Dr. Johans performed repeat L2-3 hemilaminotomy, L2-3 facetectomy, and L2-3 discectomy. Claimant's back pain improved and then worsened, and on September 10, 2003, Dr. Floyd performed repeat L2-3 laminectomy, repeat L2-3 discectomy, L2-3 fusion and L3-4 fusion. Claimant's back pain persisted
4. In March 2004, Claimant participated in the Idaho Elks Rehabilitation Hospital LifeFit Program where she was supervised by program director Robert Friedman, M.D. Upon completing the program, Dr. Friedman found Claimant was at maximum medical improvement and

rated her permanent impairment at 26% of the whole person due to her industrial accident. During her participation in the four week LifeFit program, Claimant was weaned off of prescription narcotics and her activity level increased approximately 50%. However, her back pain doubled, and her functionality following completion of the program decreased substantially due to her increased pain.

5. Claimant returned to Dr. Bates who referred her to James Morland, M.D. Dr. Morland recommended a trial of a spinal cord stimulator. Defendants denied authorization for the stimulator trial. On August 24, 2004, Dr. Morland performed placement of a trial spinal cord stimulator. The stimulator was not effective. Dr. Morland then recommended trial of an intrathecal morphine pump. Dr. Friedman opined Claimant was not an appropriate candidate for a pump and Defendants denied authorization for the pump. On October 26, 2004, Dr. Morland performed placement of a trial morphine pump. The pump was helpful in controlling Claimant's pain. On December 15, 2004, Dr. Morland performed placement of a permanent intrathecal morphine pump. Defendants denied all benefits related to the morphine pump; however, Defendants paid over \$175,000 in other medical expenses.

6. On November 30, 2005, the parties entered into a Modified Lump Sum Agreement which was approved by the Commission. The agreement constituted a full and final settlement of any and all claims resulting from the industrial accident "except as to reasonable future medical benefits which are compensable pursuant to the provisions of Idaho Code Section 72-432, arising out of the accident" Modified Lump Sum Agreement, p. 5.

7. In December 2005, Claimant moved to Thailand where she continued to reside at the time of hearing.

8. Claimant's intrathecal morphine pump requires periodic maintenance including refilling. Claimant received medical treatment for her back from Therdpoing Dumrongkiate, M.D., at the Bangkok Hospital on January 1, 2006, May 1, 2006, August 22, 2006, January 1, 2007, March 28, 2007, April 18, 2007, and September 11, 2007. Claimant's morphine pump was refilled on November 3, 2006, and March 5, 2007, in the Bangkok Hospital under the care and direction of neurosurgeon Dittapong Boonampol, M.D.

9. In May 2007, Claimant began treating with Chomchai Vichitrananda-Kleosakul, M.D., at Bumrungrad International Hospital in Thailand. Dr. Chomchai refilled Claimant's morphine pump on January 7, 2007, June 1, 2007, and September 13, 2007. In addition to the morphine pump, Dr. Chomchai has prescribed several medications for break through pain control and other medications to control Claimant's reactive depression caused by her chronic pain. These medications include Pariet, Durogesic patches, Paracetamol with Codiene, Zoloft, Seroquel, Nortrilen, Revotril and Lioresal.

10. Claimant and Robert Ritchie testified that Claimant is taking more medication now than when she completed the LifeFit program, but that she is significantly more functional since the installation of the morphine pump. Prior to installation of the pump, Claimant was often confined to bed. Claimant is now able to walk 30 to 60 minutes at a time, shop, drive, and tend a small garden. She was unable to tolerate this level of activity prior to installation of the pump.

11. Having conversed with Claimant and carefully compared her testimony with all of the other evidence, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

12. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

13. **Medical care.** The first issue is Claimant's entitlement to additional medical care after November 30, 2005. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

14. Intrathecal pump. Claimant herein received medical treatment, including installation of an intrathecal pump by Dr. Morland. Defendants argue that because Dr. Morland testified that "treatment of pain is pretty much always an elective situation" Morland Deposition, p. 48, Ll. 14-15, the intrathecal pump was not required, pursuant to Sprague, and thus Defendants bear no responsibility for the costs of refilling or maintaining the pump.

15. A closer review of Dr. Morland's testimony clarifies his perspective. He testified as follows:

Q (by Defendants' counsel) Did you believe that implantation of the pump was required for her treatment, or was it an elective situation?

A Treatment of pain is pretty much always an elective situation. There is no

known—for example, if someone is in severe pain, that is not necessarily a life-threatening illness. It’s—so it’s different than, say, somebody having a heart attack where if you don’t perform a procedure they’re likely going to die. Pain procedures are performed to relieve pain and improve quality of life, so I can’t view that as a medical emergency.

Morland Deposition, p. 48, Ll. 11-22. From the above it is clear that Dr. Morland considered a required procedure as one medically essential to preserve life. He categorized pain control procedures as elective because they were not essential to preserve life.

16. While the Court in Sprague examined whether “the treatment was required by the claimant’s physician,” the specific treatment at issue in Sprague consisted of some 47 chiropractic treatments. Sprague, 116 Idaho 723, 779 P.2d 398. There was no assertion that these chiropractic treatments were essential to preserve life, however the Court accepted the characterization of them as “required.” Thus for purposes of Sprague and Idaho Code § 72-432, a medically elective procedure may be deemed required by the treating physician although not essential to preserve life. Dr. Morland’s recommendation of the intrathecal pump, as Claimant’s then treating physician, is sufficient, even though he recognized it as an elective procedure not essential to preserve life.

17. Defendants also assert, based upon Dr. Friedman’s opinion in 2004 which he reaffirmed in 2008, that the intrathecal pump is not a reasonable treatment for Claimant. As noted, Claimant’s physician, Dr. Morland recommended, encouraged and instituted this treatment. He explained that the intrathecal pump delivers medication predominantly to the spinal cord where the receptors most involved in pain transmission are thought to be. The intrathecal pump has fewer side effects such as mental confusion and constipation as compared to the use of oral medications. Dr. Morland noted that Claimant’s condition was improved by the intrathecal pump. He also testified that the refills and level of medication delivered through the intrathecal pump as calibrated

by Dr. Chomchai would be considered standard care in the United States.

18. The clear weight of the evidence establishes that the intrathecal pump has significantly improved Claimant's functionality and quality of life. The Referee finds this treatment reasonable.

19. Other pain medications. Defendants assert Claimant's use of other medications for break through pain control is unreasonable. Dr. Chomchai has prescribed, and Claimant has utilized, oral and other pain medications for break through pain control. Dr. Morland testified that in a minority of cases he prescribes oral medications for control of break through pain for his patients having an intrathecal morphine pump. Dr. Morland further testified that the prescription medications Claimant was taking at the time of the hearing when considered collectively were fairly similar to the amount of medication Claimant took in November 2005. The record establishes that these additional pain medications have aided Claimant's functionality and the Referee finds that these are reasonable.

20. Anti-depressant medications. Defendants argue that Claimant's depression and continued use of prescription anti-depressants are related to pre-existing factors and not her industrial accident.

21. The record reveals that Claimant has an extensive history of depression which pre-existed her industrial accident and for which she received a great deal of counseling and medication. Although Dr. Friedman's opinion regarding the ongoing cause of Claimant's depression has not always been clear, it appears that since Claimant's completion of the LifeFit program, Dr. Friedman believes her ongoing depression is due to pre-existing factors rather than her industrial accident. Dr. McClay's opinion is similar. However, neither has examined Claimant since prior to 2005. In

contrast, Dr. Chomchai, who currently treats Claimant regularly, indicated in her letter of February 12, 2008, that Claimant's need for anti-depressants is due to her reactive depression "caused by chronic pain from failed back surgery." Claimant's Exhibit 3, p. 2.

22. The Referee finds that Claimant's ongoing depression is related to her industrial injury.

23. Defendants are responsible for payment of medical benefits after November 30, 2005, relating to and including refills and maintenance of Claimant's intrathecal pump and other prescription pain control and anti-depressant medications.

24. **Attorney fees.** 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.

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

26. Claimant herein asserts entitlement to attorney fees for Defendants' denial of medical benefits including intrathecal pump refills and related hospitalization, and prescription medications.

27. There is conflicting expert opinion regarding the medical benefits sought by Claimant. Drs. Morland and Chomchai opined these medical treatments are reasonable and necessary while Dr. Friedman testified they are not. Although Dr. Friedman's opinion is not persuasive, Defendants reasonably relied thereon and their denial of additional medical benefits was not unreasonable.

CONCLUSIONS OF LAW

1. Claimant has proven she is entitled to additional medical benefits after November 30, 2005, including treatment relating to refills and maintenance of her intrathecal pump and medications prescribed for break-through pain and depression.

2. Claimant has not proven her entitlement to attorney fees for Defendants' denial of medical care.

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 15th day of October, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

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ORDER

Filed October 21, 2008

Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 recommendations of the Referee. The Commission concurs with these recommendations. 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 proven she is entitled to additional medical benefits after November 30, 2005, including treatment relating to refills and maintenance of her intrathecal pump and medications prescribed for break-through pain and depression.
2. Claimant has not proven her entitlement to attorney fees for Defendants' denial of medical care.

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

DATED this 21st 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 21st day of October, 2008 a true and correct copy of **Findings, Conclusions, and Order** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

GARDNER W SKINNER JR
PO BOX 359
BOISE ID 83701

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