

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

DONNA MCINTYRE, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 WALGREEN COMPANY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 ZURICH AMERICAN INSURANCE )  
 COMPANY, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2006-004336  
2007-007732**

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

Filed November 5, 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 Twin Falls on January 4, 2008. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. Eric S. Bailey of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. This matter came under advisement on June 12, 2008, and is now ready for decision.

**ISSUES**

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

1. Whether Claimant’s need for a July 16, 2007 left ankle surgery was caused by an industrial accident occurring either on March 30, 2006 or October 2, 2006 and, if so, whether Claimant is entitled to:

**RECOMMENDATION - 1**

2. Medical benefits, and
3. Total temporary disability (TTD) benefits.

All other issues were reserved pending Claimant's reaching maximum medical improvement.<sup>1</sup>

### **CONTENTIONS OF THE PARTIES**

Claimant contends that she first industrially injured her left ankle on March 30, 2006, requiring surgical repair. Surety accepted that claim and paid the appropriate benefits. Then, Claimant contends, she suffered another left ankle injury on October 2, 2007, requiring yet another left ankle surgery, and Surety should be responsible for that surgery and related benefits as well.

Defendants contend that Claimant's alleged October 2<sup>nd</sup> accident did not occur except as an afterthought, and if it did, the mechanism of such could not have created the condition that required the surgical repair. In spite of many opportunities to do so, Claimant failed to timely report to Employer and mention to her treating physician the October accident until after she had been given an impairment rating for her March injury, thus casting doubt on the latter accident's occurrence.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant presented at hearing.
2. Claimant's Exhibits 1-17 admitted at hearing.

---

<sup>1</sup> Claimant, in her Reply Brief, discusses an apportionment issue regarding a PPI rating for her March 30, 2006 injury. Defendants have paid the full PPI rating and have indicated they are not seeking reimbursement, therefore, to the extent that the apportionment may conceivably involve the March 30 injury and PPI rating, that issue will not be addressed. *See*, Hearing Transcript, p. 18, and Defendants' Post-Hearing Brief, p. 2.

3. Defendant's Exhibits 7-21 admitted at hearing.

4. The post-hearing deposition of Randall Wraalstad, D.P.M., taken by Claimant on January 30, 2008 and concluding on February 13, 2008, and that of Richard T. Knoebel, M.D., taken by Defendants on March 14, 2008.

Claimant's objection at page 109 of Dr. Wraalstad's deposition is overruled.

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 55 years of age and resided in Twin Falls at the time of the hearing. She has an associate degree as a certified medical assistant. Claimant worked for Employer as a pharmacy technician at the time of the industrial injuries at issue here.

2. Claimant had no problems with her left foot/ankle before being hired by Employer in November of 2002. In August of 2004, Claimant was treated surgically by Randall Wraalstad, D.P.M., for a bunion on her left foot. Then, in May of 2005, she was treated with injections for pain between her 4<sup>th</sup> and 5<sup>th</sup> metatarsal heads on her left foot. In October of 2005, Claimant's left mid-foot on the top was swollen and tender. On February 9, 2006, Dr. Wraalstad diagnosed Claimant with plantar fasciitis of her left heel.

3. On March 30, 2006, Claimant was working at Employer's drive-thru pharmacy when she caught her right foot on a rubber mat and rolled her left ankle as she kept herself from falling. She felt a "little bit" of pain at the time, but then ". . . it just started to sting really bad." Hearing Transcript, p. 48. Claimant finished her shift and after she went home, she began having pain on the outside of her foot near her ankle bone. She continued to work thinking she had only slightly sprained her ankle until she finally sought medical treatment.

### **RECOMMENDATION - 3**

4. Claimant presented to Dr. Wraalstad on April 6, 2006 complaining of left ankle pain. He noted, "It began approximately three weeks ago. She stated it was initially sore like something had popped. She cannot recall any traumatic incident. It has gotten progressively worse. This is a separate area from what she was seen [sic] prior." Dr. Wraalstad Deposition, p. 31. When questioned at hearing why she did not tell Dr. Wraalstad of her March 30, 2006 accident, Claimant vaguely responded that she was "embarrassed" and that she thought she had "... sprained my ankle a little bit or something." Hearing Transcript, p. 54.

5. On May 23, 2006, Dr. Wraalstad performed a surgical posterior tendon repair on Claimant's left foot. Claimant was given an ankle brace and prescribed physical therapy post-surgery. Surety accepted the claim and has paid appropriate medical and TTD benefits.

6. Claimant testified that on October 2, 2006, while wearing a knee-high cast/boot, she stepped forward while standing in her boot on a mat and the boot stuck to the mat. She thought she had pulled a muscle in her calf and perhaps re-injured the area for which she had recently had the surgery. She told the head pharmacist that she had hurt herself and the pharmacist told her she had better report it. Claimant testified, "I said, I don't want to. Because I knew they'd make fun of me. So I kind of held back on it." Hearing Transcript, p. 63. Claimant further testified that she called someone at Surety, "I called her probably the next day. Because that was a really busy - - it was the first of the month, which is the busiest time. I probably didn't call her until later that week, maybe the next week." *Id.*

7. Claimant saw Dr. Wraalstad on October 10, 2006 complaining that she felt like something had torn loose on the inside of her ankle. He ordered an MRI at her request. Claimant did not mention the October 2<sup>nd</sup> incident.

#### **RECOMMENDATION - 4**

8. Claimant next saw Dr. Wraalstad on October 24<sup>th</sup>. She complained of a new problem; an ingrown toenail on the medial border of her left great toe. No mention was made of the October 2<sup>nd</sup> incident. On October 25<sup>th</sup>, Dr. Wraalstad released Claimant to return to work without restrictions.

9. Claimant next saw Dr. Wraalstad on November 11<sup>th</sup>. Again, she made no mention of the October 2<sup>nd</sup> incident. On December 5, 2006, Claimant returned to Dr. Wraalstad for an impairment rating regarding the March 30, 2006 accident/injury. She once again failed to mention the October 2<sup>nd</sup> event. Dr. Wraalstad assigned a 7% whole person PPI rating.

10. Claimant next saw Dr. Wraalstad on January 2, 2007, at which time he noted, “She states there was an additional injury at work approximately 2-3 weeks ago where she was walking and tripped over a mat.” Claimant’s Exhibit 7, p. 42. Dr. Wraalstad performed a peroneal tendon debridement with repair on the lateral side of Claimant’s left foot on July 17, 2007. At issue here is Surety’s liability for this procedure and corresponding time loss benefits.

### **DISCUSSION AND FURTHER FINDINGS**

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, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor’s opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, *Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217-218 (2001).

### **RECOMMENDATION - 5**

**Dr. Wraalstad:**

11. Dr. Wraalstad is a board-certified doctor of podiatric medicine and has been Claimant's treating physician for her left ankle/foot problems at all times relevant hereto. When asked at his deposition to assume Claimant's version of her March 30, 2006 accident was correct, Dr. Wraalstad testified that her resultant injury to her ankle was consistent with that accident. Regarding the October 2, 2006 accident, Dr. Wraalstad was not able to unequivocally supply the required causal connection. One problem with causation was that Claimant was wearing a cast/boot that would prevent inversion/eversion of her foot. Even though the boot was "worn out" and had to be replaced on October 24, 2006, it was apparently tight-fitting on October 2<sup>nd</sup> as Claimant testified: "And I would have walked out of it if it was loose. It just stuck to that new mat." Hearing Transcript, p. 61. Dr. Wraalstad testified as follows regarding the significance of the boot and an inversion/eversion type of injury:

Q (By Mr. Bailey): What I am trying to figure out is how we get from that type of actual physical maneuver or mechanism to the type of injuries that you are repairing as a part of this second injury. We obviously don't have any eversion or inversion action, and I guess I have a hard time with this foot being strapped in tightly, how she could end up with that type of damage that you see in this operative report. Can you tell me that?

A. Well, I wish that I had specifically been able to see the injury. I don't know exactly what occurred with that. When you have some type of mechanism like what you are describing in one of those boots, you are limited as to what amount you can either evert or invert your foot. You are not specifically limited to how much your tendons can pull, because they usually try to guard and they can pull relatively hard.

Q. So even though this was described by me to you and represented how this thing happened, do you think she could still suffer that tendon damage that was there for this operation?

A. Well, I believe it is possible.

Q. Do you believe it is probable?

A. Well. There's that question again. I still do not like it. It is - - is it probable?

Q. More probable than not. No eversion or inversion, twisting sideways, just a straight-forward movement of catching the tip of the boot in sort of a stumbling action. Do you believe that is more probable than not to cause the injury that you had to take her to the second surgery?

A. I am going to kind of preface that answer a little bit. The clinical fact that she did not, prior to the injury when I assessed her on other occasions, she did not have that snapping or clicking type of problem on the outside of her ankle, leads me to believe something happened to allow that to become a problem. Now, is that more probably than not because of that specific injury, barring any other injuries? I cannot think of what else would do it unless there is information I do not know.

\* \* \*

Q. Then the next thing with you, you treat her conservatively; ultimately take her to surgery on July 16, 2007, and we have already talked briefly about that. With all this information we have talked about here for this past ten minutes, lack of history given to you in four or five visits, lack of history given to Dr. Surbaugh, the January history of something happening in the middle of December in early October, and then combine that with surgical findings, do you have an opinion on a more probable than not basis as to whether the need for surgery was as a result of an incident occurring October 2, 2006 at Walgreen's?

A. My best guess right here would be the need for this surgery on the tendons on the lateral side of the foot, the peroneal tendon, would have been caused by something that happened here to Ms. McIntyre, I'm guessing in December of 2006, in an injury where she states she was walking and tripped on the mat and states it was witnessed by two pharmacists. Because to me the two surgeries, in my mind, if I recall right, what I remember of the notes here, were of separate injuries.

Q. Correct. We have got the first injury of March 30, 2006, with your first surgery being in May sometime of '06. And then we have the second surgery of July of '07 being the result of something, and so that is my question I pose to you, can you state on a more probable than not basis - - let me back up.

What I have been sued for and what the issues are for is a second injury, an October 2, 2006 industrial accident. I gather from listening to you that as of January 2, 2007, you not only were unaware of the allegations of the October 2<sup>nd</sup> incident, you had been given a history of an event on November 7<sup>th</sup>. Correct?

A. Correct.

Q. So what I'm trying to get to is can you tell us, are you willing to state on a more probable than not basis, and forget whatever other reason it might be due to, can you tell me or are you of an opinion that the need for the second surgery was due to this October 2, 2006 event?

A. I cannot say that.

Dr. Wraalstad Deposition, pp. 107-109, 111-113.

**Dr. Knoebel:**

12. Richard T. Knoebel, M.D., is a board-certified orthopedic surgeon who currently has a small orthopedic practice but primarily conducts independent medical evaluations. He is also a member of the American Academy of Disability Evaluating Physicians. He examined Claimant on January 25, 2007, reviewed medical records, and reviewed the deposition transcripts of Claimant and Dr. Wraalstad. Dr. Knoebel offered the following comments regarding causation of the alleged October 2, 2006 accident/injury:

Q. (By Mr. Bailey): And Dr. Wraalstad's deposition, he indicated that he thinks there may have been an event, as he says, I'm guessing, in December of 2006, an injury where she states she was walking and tripped on the mat, and he believes that's the root of her problems that ultimately led to the second surgery. Would you agree with that position or disagree?

A. Disagree.

Q. And why?

A. Because it's pure speculation. There's no documentation of that in the medical records. There's no increased likelihood of that causing it versus walking down the street or walking in your house to cause her to have increased pain over that area.

Regarding the cast/boot:

MR. PETERSEN: Meaning the outside?

THE WITNESS: Outside. He [Dr. Wraalstad in his July 16, 2007 Operative Report] describes tears and adhesions in that area. Adhesions means scarring, tear is obviously what it is, a tear. If she's in a cast boot, first of all, to get the tears, you would have to have an inversion injury to the foot, putting stress on the lateral part of the ankle. The cast boot prevents that from happening. It's just like having a cast on. That's why it's called a cast boot. So the chance of having any damage to the perineal [sic] tendon while in that cast boot is very unlikely.

In addition, those tendons were noted to be partially torn and had degenerative changes in them at the original MRI scan, so that's a preexisting condition of the perineal [sic] tendons.

Dr. Knoebel Deposition, pp. 32-33, 35.

**RECOMMENDATION - 8**

13. The Referee is not persuaded that Claimant injured her ankle on October 2, 2006 resulting in the need for surgery on July 16, 2007, for two reasons. First, although not dispositive, it is troublesome that Claimant failed to mention the October 2<sup>nd</sup> incident until January of the following year. Even then, she did not get the date right. She told Dr. Wraalstad the incident occurred two to three weeks prior to January 2, 2007. That would place the “event” in December of 2006, not October. Of additional concern is that Claimant had been determined to be at MMI from her March 30<sup>th</sup> injury as of December 5, 2006, when Dr. Wraalstad assigned a PPI rating. Had she actually suffered the October 2<sup>nd</sup> accident, she may have not been at MMI and failed to so inform Dr. Wraalstad even though her TTD benefits would soon be terminated. It is likely that Claimant may have suffered some event after her rating in early December (and consistent with her “two to three weeks prior” comment to Dr. Wraalstad) that may have led to her July 2007 surgery; however, there is no evidence that such an event was industrial in nature.

14. Second, and most importantly, is the failure of Dr. Wraalstad to address the actual mechanics of injury that would have led to the lateral peroneal tendon repair. Defendants mention in their brief that this Referee may be disadvantaged because he did not have the opportunity to actually see Claimant’s cast/boot so he may not understand how they work. Defendants need not be concerned in that regard, as this Referee has had the dubious “opportunity” to have worn one of those abominable contraptions for nigh on half a year in the early 1990s due to a tri-malleolar left ankle fracture. It is virtually impossible to invert or evert one’s foot while wearing one; such is its purpose. Dr. Knoebel credibly testified that the injury to Claimant’s peroneal tendon would most likely have arisen from an inversion injury to her foot (or by nothing at all - - merely the natural progression of her preexisting degeneration).

**RECOMMENDATION - 9**

Claimant herself failed to describe any inversion-type injury in her description of the alleged October 2<sup>nd</sup> accident.

15. The Referee finds that based on the opinions of both Dr. Wraalstad and Dr. Knoebel, Claimant was medically stable from her March 30, 2006 injury by December 5, 2006, and there is no medical evidence supporting the proposition that the March 30 accident and injury led to the July 2007 surgery. Likewise, with regard to the alleged October 2<sup>nd</sup> accident, the medical evidence is overwhelmingly in favor of a finding that that event did not occur. Even Claimant's treating physician, when pressed, was unable to provide the requisite causation opinion to a reasonable degree of medical probability.<sup>2</sup> Proof of a possible causal connection between an accident and an injury is insufficient to satisfy Claimant's burden of proof. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

16. The Referee finds that Claimant has failed to prove to a reasonable degree of medical probability that her July 16, 2007 surgery was necessitated by either her March 30, 2006 or October 2, 2006 industrial accidents.

### CONCLUSIONS OF LAW

1. Claimant has failed to prove a compensable industrial accident occurring on October 2, 2006.

2. The issues of Claimant's entitlement to medical and TTD benefits are moot.

---

<sup>2</sup> It was clear from reading Dr. Wraalstad's deposition testimony that he was uncomfortable with the probability v. possibility standard.

**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 \_\_\_29<sup>th</sup>\_\_\_ day of October, 2008.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

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

DONNA MCINTYRE, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 WALGREEN COMPANY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 ZURICH AMERICAN INSURANCE )  
 COMPANY, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2006-004336  
2007-007732**

**ORDER**

Filed November 5, 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 prove a compensable industrial accident occurring on October 2, 2006.
2. The issues of Claimant’s entitlement to medical and TTD benefits are moot.

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

DATED this \_\_\_5<sup>th</sup>\_\_\_ day of \_\_\_November\_\_\_, 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 \_\_\_5<sup>th</sup>\_\_\_ day of \_\_\_November\_\_\_ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

DENNIS R PETERSEN  
PO BOX 1645  
IDAHO FALLS ID 83403-1645

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701

ge

Gina Espinosa