

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GAYLAND GRIFFIN,)
)
 Claimant,)
)
 v.)
)
 EXTREME RV,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2005-514555

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

Filed December 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 Boise, Idaho, on May 14, 2008. Stephen K. Stark of Nampa represented Claimant. James A. Ford of Boise represented Defendants. The parties submitted oral and documentary evidence. Three post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on October 6, 2008, and is now ready for decision.

ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury or disease or cause not work related;

RECOMMENDATION - 1

2. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and

3. Whether Claimant is entitled to additional temporary partial and/or temporary total (TPD/TTD) benefits, and the extent thereof.

The parties expressly reserved all other issues.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his back on June 28, 2005. Surety paid for initial conservative medical care, lumbar surgery on May 8, 2006, and post-operative care through November 2006. TTD benefits were paid from the date of surgery until Timothy Doerr, M.D., Claimant's treating physician, certified that Claimant reached medical stability on November 16, 2006. The parties agree that Claimant's average weekly wage is \$536.13.

Claimant contends that his certification of maximum medical improvement was premature. His initial fusion has failed and he needs another fusion. His disk herniation at L4-L5 has not been addressed. Neurosurgeons Tyler Frizzell, M.D., and Michael V. Hajjar, M.D., agree that Claimant needs additional medical treatment and that Claimant is a potential surgical candidate. Claimant seeks additional TTD benefits from the date of his termination by Employer on September 9, 2005 through the date of his May 2006 surgery. Additionally, Claimant asserts that TPD benefits are owed from the date of injury through September 9, 2005, because he worked reduced hours as the result of his injury. Claimant argues that Employer's stated reason for his termination is a ruse and that his termination was not justified. Further, Claimant maintains that surveillance footage relied upon by Defendants was edited and/or altered through computer enhancement. The surveillance DVDs do not reflect his actual condition.

Defendants contend that Claimant's initial fusion was a success and that additional surgery is not warranted. Claimant's disk pathology at L4-L5 is not causally related to the 2005 industrial injury and is not likely the cause for Claimant's symptoms. Additionally, Claimant is a poor surgical candidate due to his continued smoking and methamphetamine use. Defendants rely on the medical opinions of the treating physician, Timothy Doerr, M.D., and radiologist William Taylor, M.D. Surveillance footage from October 2006 and June 2007 confirms that Claimant is exaggerating his symptoms to medical service providers and that Claimant's physical condition is significantly better than Claimant portrays. Claimant has received all medical and temporary disability benefits to which he is entitled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 16;¹
2. Defendant's Exhibits 1 through 27;²
3. Testimony taken at hearing from Claimant, Claimant's mother Joyce Griffin, private investigator Lance Anderson, and Employer's human resource manager Steve Archuletta; and
4. The post-hearing deposition of Michael V. Hajjar, M.D., taken by Claimant on May 21, 2008, with one exhibit; the post-hearing deposition of William Taylor, M.D., taken by Defendants on June 10, 2008, with one exhibit; and the post-hearing deposition of Timothy Doerr, M.D., taken by Defendants on June 12, 2008, with three exhibits.

Objections made during the depositions of Drs. Hajjar, Taylor and Doerr are overruled.

¹ Claimant's exhibit 6 includes an audio cassette tape.

² Defendants' exhibit 23 consists of two DVDs.

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

Background.

1. Claimant was 42 years of age at the time of hearing and resided in his own dwelling on his mother's ten-acre property in Caldwell, Idaho. Claimant grew up and graduated from high school in Middleton, Idaho. He spent eleven years as a mechanic in the Navy and received an honorable discharge.

2. Claimant began working for Kit Manufacturing (Kit) on March 1, 2000. Employer acquired Kit and became Claimant's employer in January 2003. Claimant sustained an injury to his lower back on February 20, 2002, while working in shipping and receiving for Kit. He treated with Timothy Doerr, M.D., and underwent lumbar surgery in the form of an L5-S1 microdiscectomy on August 27, 2002. Claimant had an uneventful recovery from the surgery and returned to work after six weeks of post-operative care. He was assigned an 8% whole person permanent partial impairment rating attributable to his 2002 injury.

Injury and Initial Treatment.

3. On June 28, 2005, Claimant was working for Employer as a shipping and receiving supervisor. He felt a pop and low back pain when he bent over to pick up a sheet of plywood. The injury was reported to Employer and Claimant sought treatment on the following day at Primary Health. Claimant was diagnosed with a lumbar strain, provided medication, and assigned a ten-pound lifting restriction. Employer was able to accommodate Claimant's restrictions. Claimant was reevaluated on July 12, 2005, and referred to physical therapy through the Elks. Light-duty restrictions continued on July 26, 2005, but it was noted that

RECOMMENDATION - 4

Claimant was able to perform almost all of his essential job functions, since he was a supervisor and could get help with heavy lifting. As of August 9, 2005, Claimant felt that the physical therapy improved his condition. Claimant was reported to be in good spirits with no pain behavior or limitation of motion. Claimant's lifting restriction was changed from 10 to 20 pounds on August 9, 2005, and he was released to regular duty on August 23, 2005.

Termination.

4. Claimant was terminated by Employer on September 9, 2005 for a violation of company policy regarding timekeeping. Employer's handbook states; *inter alia*, that no one other than the employee whose name appears on the time card is allowed to check the employee out. It is undisputed that Claimant received a copy of Employer's handbook on January 31, 2003.

5. On September 9, 2005, Claimant allowed his girlfriend³ to punch out his time card and her actions were witnessed by Claimant's supervisor, Randy Day. Employer asserts that this incident was Claimant's third violation of the timekeeping policy and that Claimant was previously reprimanded for leaving the plant to take care of personal matters without clocking out. Employer maintained that Claimant left work on September 3, 2005 to perform personal business without clocking out. (Defendants' Exhibit 22, p. 16). Employer documented that Claimant's pay was docked 1.5 hours in mid-July 2005 for leaving the plant without clocking out or letting anyone know. (Defendants' Exhibit 22, p. 19). Claimant admitted that he left work on one occasion in either June or July of 2005 because he received word that his girlfriend's sister had "called the cops on her" and Claimant went to his girlfriend's house to help sort things out

³ Claimant's girlfriend, Helen Bailey, was also employed by Employer. She was subsequently terminated for reasons unrelated to timekeeping. Ms. Bailey is erroneously referred to as Claimant's wife in some of the medical records.

after completing a work task of dropping off tires. (Claimant's Exhibit 6 - testimony from unemployment hearing on audio tape).

6. On December 13, 2005, a determination was made by the Industrial Commission that Employer discharged Claimant for misconduct in connection with employment. In doing so, the Industrial Commission affirmed the Department of Commerce and Labor Appeals decision denying unemployment benefits.

7. Claimant testified at his unemployment hearing that he was unfairly scrutinized and that several employees violated the timekeeping policy without repercussion. He testified that Employer's owner's son vowed to get him (Claimant) fired two weeks prior to Claimant's termination and pointed out that it was the owner's son who ended up being promoted to Claimant's supervisory role after the termination. Further, Claimant disputes that a violation of the company's timekeeping policy occurred on September 3, 2005, since that was the Saturday of Labor Day weekend when the company would have been closed.

8. Assertions made by Claimant's counsel in his post-hearing brief regarding the inherent unfairness of unemployment hearings is not supported by the evidence. Although the evidence establishes that Claimant's alleged violation of Employer's timekeeping policy of September 3, 2005, either did not occur or occurred on a different date, it is undisputed that Claimant violated Employer's written policy on at least two occasions.

Post-Termination Medical Treatment and Surgery.

9. Claimant did not receive medical treatment from August 23, 2005 until he returned to Primary Health on September 23, 2005, with complaints of significant pain. Claimant was described as hunched over and "quite uncomfortable, fairly exaggerating his symptoms." The evaluation took place on Friday evening and Claimant was encouraged to seek

treatment at the emergency room for further evaluation, imaging, and medication. (Claimant's Exhibit 7, p. 4036).

10. Claimant was referred to physiatrist, James H. Bates, M.D., by his previous attorney. Dr. Bates evaluated Claimant on September 27, 2005 and requested an MRI. Claimant reported to Dr. Bates that he experienced an exacerbation of his pain when he unloaded awnings on September 9, 2005, the day of his termination. Claimant's lumbar MRI of September 28, 2005, revealed a lateral disk herniation at L4-L5 and scar tissue around the left S1 nerve root. Claimant was referred to Dr. Doerr, but Dr. Bates continued to provide treatment to Claimant and conferred with Dr. Doerr about Claimant's care.

11. Dr. Doerr evaluated Claimant on October 18, 2005, and reviewed Claimant's MRI findings. By April 2006, both Dr. Doerr and Dr. Bates felt that Claimant had exhausted conservative treatment. Dr. Doerr proposed a lumbar fusion and counseled Claimant to stop smoking. Dr. Doerr performed an L5-S1 fusion on May 8, 2006. Initial post-operative care was uneventful and Claimant continued to receive treatment from both Dr. Doerr and Dr. Bates.

12. By October 2006, Dr. Doerr suspected that Claimant was magnifying his symptoms and discussed the issue with Dr. Bates. Claimant's reported symptoms and forward flexed posture were inconsistent with his pathology and what Dr. Doerr would expect five months post-operatively. Dr. Doerr contacted Surety and recommended that they perform a surveillance activity check.

Surveillance.

13. Surety hired Lance Anderson, a private investigator with Rocky Mountain Investigations, to perform a surveillance activity check. Surveillance was performed on October 19, 20, and 23, 2006. Mr. Anderson videotaped Claimant performing work on his mother's

property. In October 2006, Claimant was driving vehicles, a backhoe, and a four-wheeler ATV. He frequently twisted and looked over his shoulder to back up in both his truck and on the backhoe. Claimant picked up trash along the highway using a tool to grab paper and debris without having to bend over. Claimant's posture in most of the video appeared normal. However, Claimant was noticeably hunched over on October 19, 2006 when he was filmed entering and exiting Dr. Bates' office.

14. Additional surveillance was performed in June 2007 by Mr. Anderson. Claimant was videotaped performing light yard maintenance around his mother's property and driving a vehicle to run errands. On June 13, 2007, Claimant drove an ATV for a short period of time and operated a tractor for more than an hour. The tractor work required Claimant to perform significant bending and twisting. During surveillance in both 2006 and 2007, Claimant was usually smoking.

15. Claimant testified that the surveillance footage was obviously edited and/or computer enhanced. He explained that the editing/enhancement was evident based on the position of shadows and because some segments paired his head and body with legs that were not his.

16. Mr. Anderson testified that two-and-a-half minutes were edited out of the overall footage to delete video taken when the camera had been inadvertently pointed at the ground and when the camera was panning but not depicting Claimant. No other edits were made to either video and there was no computer enhancement.

17. Both DVDs were viewed post-hearing in their entirety by the Referee. While the surveillance footage does not establish that Claimant was pain-free or without limitation, it clearly establishes that Claimant's presentation to medical service providers and during the

hearing was exaggerated and not representative of his actual capabilities. The testimony of Mr. Anderson about the surveillance footage was more credible than Claimant's critique of the DVDs. Although the DVDs may not have captured every movement made by Claimant, they were not computer enhanced or edited in a manner that would mislead the viewer.

Additional Lay Witness Testimony.

18. Claimant's mother, Joyce Griffin, testified about her property and Claimant's change in abilities after his 2005 injury. Ms. Griffin operates a small farm and owns a tractor, swather, a baler and a rake. Prior to the 2005 injury, Claimant fixed things around her house and worked the property in the evenings. After the injury, he did much less work on the property and worked at a slower pace. She had to hire someone to perform work on her property after Claimant's 2005 injury because Claimant was unable to pitch in as much as he had in the past.

19. Steve Archuletta works for Employer as the human resource manager and safety coordinator. He testified that Employer has a return-to-work program and that light-duty work is offered to employees who sustain on-the-job injuries. The program was in effect in June 2005 and has not significantly changed. Based on Claimant's supervisory position, he was able to perform his regular job duties and comply with initial medical restrictions. Claimant was released to regular duty on August 23, 2005.

20. Claimant has not worked for Employer since his September 2005 termination. If Claimant had not been terminated, he would have been eligible for light-duty work, and a ten-pound lifting restriction could have been accommodated.

Future Medical Care.

Smoking and Drug Use.

21. Claimant's continued smoking and drug use has been identified as a relevant factor in determining his future medical care by most of the physicians who have evaluated Claimant for his industrial injury. Claimant admits that he has not stopped smoking in spite of Dr. Doerr's recommendation prior to and following the 2006 fusion, but indicates that he is willing to do so. Claimant admits to occasional use of marijuana and methamphetamine.

22. Claimant underwent a urinalysis in January 2007 at the Boise Veterans Administration Medical Center (VA) that was positive for methamphetamine and marijuana. A treatment program was recommended, but Claimant declined to participate. Throughout treatment for his low back pain at the VA in 2007, Claimant was noted to have a history of drug abuse and continued to deny the need for rehabilitation.

23. On February 19, 2008, Claimant was accompanied by his girlfriend at his VA appointment. The issue of drug abuse was raised and Claimant's girlfriend began to yell at the medical service provider while asserting that Claimant could not be drug tested without advance notice. Claimant declined a drug test at that visit and it was noted that he declined to be drug tested at his previous visit. Claimant admitted using methamphetamine and marijuana, but stated that it was not a problem.

Dr. Bates

24. Dr. Bates treated Claimant throughout October 2006. In fact, the surveillance DVD from October 19, 2006, shows Claimant coming and going from Dr. Bates' office. Claimant's posture was stooped over and Claimant had difficulty moving.

25. By November 29, 2006, Dr. Bates had viewed the October 2006 surveillance footage and found the video to be inconsistent with Claimant's presentation at the office and with the history obtained from Claimant. Dr. Bates promptly contacted Claimant by phone and advised Claimant that he would be discontinuing his care.

Dr. Doerr

26. Dr. Doerr also treated Claimant throughout October 2006. He evaluated Claimant on November 16, 2006 after viewing the surveillance footage from October 2006. Dr. Doerr's November 16, 2006 progress note states:

On examination today [Claimant] continues to exhibit significant pain behaviors walking with an exaggerated forward flexed posture. He claims that he is unable to stand upright ... I did review a videotape from 10/19 through 10/23/06 of [Claimant]. This shows him on every occasion walking completely upright and actually performing work including driving a backhoe and picking up trash. His mobilization is dramatically different than that which he exhibits in the office...At this point [Claimant] did have a CT myelogram on 10/02/06 revealing what appears to be a solid fusion. He has maximized his rehab. Given his multiple nonorganic signs and his inconsistent clinical presentation in the office compared with his surveillance videotape, I would be very reluctant to recommend any further interventions. In discussing the videotape with [Claimant], he and his wife [sic] became very belligerent using four letter words and threatening both myself and the State Insurance Fund. His wife [sic] stated that the insurance company was 'going to pay for this'...

He has a permanent partial impairment rating of 12% of the whole person for a single level spinal fusion residual signs and symptoms utilizing Table 15-7, page 404 of Guides to Evaluation of Permanent Impairment, 5th Edition. He has an additional 2% impairment for a second operation. Using the combined values chart, this correlates to a 14% whole person impairment. Subtracting his previous 8% whole person impairment which was awarded [sic] on 10/14/02, this results in an additional 6% whole person impairment. There is not apportionment for preexisting disease. I have released him with a permanent 50 pound lifting restriction. I do need to see [Claimant] back in May 2006 [sic] for a one year postop x-ray and exam.

Defendants' Exhibit 6, p. 3074.

27. Claimant did not return to Dr. Doerr for his one year follow-up. Rather, Claimant initiated treatment with Drs. Hajjar and Frizzell. Dr. Doerr reviewed subsequent opinions from Drs. Hajjar and Frizzell. Dr. Doerr agreed that additional diagnostic studies in the form of a CT myelogram and MRI would be appropriate to evaluate Claimant's fusion mass. Dr. Doerr felt that a neuropsychology examination and preoperative blood work for nicotine should be mandated before considering another surgery.

28. Claimant returned to Dr. Doerr on June 21, 2007 for an evaluation. Dr. Doerr noted that radiographic tests showed a solid fusion and opined that surgical intervention was not indicated. He requested to reevaluate Claimant after additional diagnostic studies.

29. Dr. Doerr evaluated Claimant on July 3, 2007 after reviewing the CT myelogram of June 27, 2006. He interpreted the CT myelogram as showing a solid arthrodesis at L5-S1 and was "very reluctant" to recommend further surgery. (Defendants' Exhibit 6, p. 3087). He recommended a nerve block to address the L4-L5 disk bulge.

30. At his post-hearing deposition, Dr. Doerr confirmed that the diagnostic studies did not show evidence of non-union of Claimant's fusion. He explained that the possible crack of the allograft bone was of little significance in light of the fact that the fusion was solid.

31. Dr. Doerr believes that Claimant's disk bulge at L4-L5 identified in the September 2005 MRI is similar to Claimant's L4-L5 presentation at the time of his 2002 MRI and surgery. The discogram performed in 2006 did not correlate Claimant's pain with the bulge at L4-L5, and the bulge at that level does not cause significant neurological impingement.

32. Dr. Doerr remains willing to treat Claimant.

Dr. Frizzell

33. Claimant sought treatment with R. Tyler Frizzell, M.D., Ph.D., on March 26, 2007. Dr. Frizzell's records reflect that Claimant was self-referred, but Claimant testified that he was referred by a friend. Dr. Frizzell indicated that he was new to the case and had not received many of Claimant's records. However, he felt that Claimant had pathology at L4-L5 that had not been addressed. Dr. Frizzell described it as a complicated case and referred Claimant to neurosurgeon, Michael Hajjar, M.D.

34. Dr. Frizzell subsequently reviewed additional records and the actual CT myelogram from June 27, 2007. He identified a cracked allograft ring at L5-S1 and a probable lumbar pseudarthrosis. He opined that this condition, as well as the L4-L5 protrusion, was causally related to Claimant's 2005 industrial injury.

Dr. Hajjar

35. Dr. Hajjar evaluated Claimant in April 2007 at the referral of Dr. Frizzell. Dr. Hajjar took Claimant's history, reviewed past diagnostic studies, and recommended additional studies. Dr. Hajjar believes that Claimant has not reached maximum medical improvement, because there is potentially additional intervention that can be provided to Claimant for his back injury.

36. Dr. Hajjar identified significant pathology at L4-L5 which has resulted in L5 radiculopathy. He also determined that Claimant had a possible pseudarthrosis at L5-S1. Pseudarthrosis means "false joint" and reflects that a fusion did not heal well. He feels that Claimant is a potential candidate for a decompression and discectomy at L4-L5 and a re-do of the L5-S1 fusion.

37. Dr. Hajjar would not schedule surgery at this time because of Claimant's smoking, methamphetamine use, and possible secondary gain issues. He believes that Claimant needs to enroll in a smoking cessation program and to refrain entirely from methamphetamine use. He skimmed the surveillance video and is aware that Claimant's high self-rated disability level is at odds with the video, which depicts a fairly active individual. Claimant would require a neuropsychological evaluation prior to additional surgical intervention.

38. Smoking at the time of surgery or just after surgery inhibits the formation of small and microscopic blood vessels, which are essential to the development of new bone growth and healing. The impact of marijuana does not impact healing in a significant way, but impacts return to work and functional status. Methamphetamine is an irreconcilable barrier to healing and Dr. Hajjar declines to operate on meth-positive patients unless it is a life-or-death matter.

39. Dr. Hajjar bases his opinion of a possible pseudarthrosis on a crack in the allograft bone as seen on diagnostic studies, and because he does not detect definitive bridging of the bone in the area where the fusion was performed.

Dr. Taylor

40. William Taylor, M.D., is a neuroradiologist who has interpreted Claimant's lumbar CT myelograms from October 2006 and June 2007. He does not identify any evidence that Claimant's L5-S1 fusion has failed. There is no obvious fracture in the allograft ring.

41. Dr. Taylor identified an osteophyte complex at L4-L5 in the left far lateral region on the June 2007 CT myelogram which is stable from the prior exam. The osteophyte complex abuts the exiting L4 nerve root complex without displacing it.

DISCUSSION AND FURTHER FINDINGS

Causation

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).

42. It is essentially undisputed that Claimant had a good recovery from his 2002 microdiskectomy at L5-S1, and that his 2005 industrial injury aggravated his pre-existing condition at L5-S1 to the extent that a lumbar fusion was required. However, a dispute has arisen regarding causation of Claimant’s disk condition at L4-L5 and whether the disk pathology at that level is a generator of Claimant’s symptoms.

43. In June 2002, Claimant’s lumbar MRI revealed:

L4-L5: Mild disc space narrowing. There is a left paracentral broad based disc bulge which extends into the neural foramen and mildly narrows the neural foramen. This does not touch the exiting L4 nerve root but may slightly impinge on the passing L5 nerve root. No significant central canal or right foraminal stenosis.

Defendants’ Exhibit 5, p. 2003. In September 2005, Claimant’s lumbar MRI revealed:

L4-L5: There are mild to moderate bilateral facet osteoarthritic changes with small bilateral facet osteophytes and thickening of the ligamentum flava. There is disk desiccation and disk height loss in association with circumferential disk bulge with superimposed left lateral to far left lateral disk herniation. Herniated disk material appears to abut the exiting left L4 nerve root in the far left lateral

aspect. This is best seen on sagittal images. There is not evidence of significant overall spinal canal stenosis or right-sided foraminal narrowing at this level.

Defendants' Exhibit 11, p. 6004. In October 2006, Claimant's lumbar CT myelogram revealed:

L4-L5: There is a left dominant disk bulge, similar to that seen on the MRI of April 18, 2006. It extends into the neural foramen on the left, and results in moderate to severe left neural foraminal narrowing.

Defendants' Exhibit 11, p. 6029.

44. The medical experts disagree as to the significance of the progression of changes at L4-L5 and whether the changes following the 2002 MRI were caused by the 2005 industrial injury. Dr. Frizzell attributes causation of Claimant's pathology to the 2005 industrial injury, but there is no indication that Dr. Frizzell reviewed Claimant's 2002 medical records. Dr. Frizzell's conclusion appears to be based on one examination of Claimant in March 2007 and review of select medical records generated in 2007 and 2008.

45. Dr. Hajjar attributes Claimant's pathology to the 2005 industrial injury and compared the 2002 MRI findings to the October 2006 CT myelogram findings. He testified that the 2006 findings were "more substantial in the lateral recess area on the left side where the L4-L5 nerve roots exit." (Dr. Hajjar Deposition, p. 42). However, Dr. Hajjar acknowledged that:

Based on looking at the films alone you can't make any determination what caused the change, whether it be a single traumatic event or a progression of symptoms that gradually occurred over a period of time.

Dr. Hajjar Deposition, p. 43. Dr. Hajjar based his opinion, in part, on the history of injury given by Claimant, which included the existence of radicular symptoms immediately following the 2005 injury.

46. Dr. Doerr testified in his post-hearing deposition that Claimant's pre-existing condition at L4-L5 was temporarily aggravated by the 2005 injury, but that Claimant has returned to his baseline condition regarding that level of the spine. Diagnostic studies reflect a

progression of degenerative changes at L4-L5 and do not show nerve compression at that level. The March 2006 diskogram findings were consistent with the L5-S1 level being the source of Claimant's pain and not the L4-L5 level.

47. Dr. Taylor describes the changes at Claimant's L4-L5 level as consistent with chronic lumbar spine degenerative disk disease.

48. Initial medical reports from Primary Health reflect that Claimant's pain was initially localized to the lower back and that radicular symptoms were not reported by Claimant during the first two months following the 2005 injury. On June 29, 2005, Claimant described his pain as "moderate to severe without radiation to his legs or elsewhere." Claimant completed a pain diagram on July 12, 2005 that reflected moderate pain in the low back without radiation. On July 26, 2005, Claimant denied "any radiation of pain into his lower extremities or any numbness or tingling." Normal sensation in the lower extremities without pain was noted on August 8, 2005. On August 23, 2005, there was "no numbness or tingling going down the legs." Claimant's Exhibit 7.

49. The evidence establishes that Claimant's L5-S1 disk condition is a result of the 2005 injury, subject to apportionment of permanent impairment attributable to the 2002 injury. Claimant has failed to meet his burden of proof to establish that his current disk pathology at L4-L5 is causally related to his 2005 injury. The opinions of Drs. Doerr and Taylor are adopted over those of Drs. Frizzell and Hajjar. Dr. Doerr had the benefit of treating Claimant for both his 2002 and 2005 injuries. Dr. Frizzell failed to explain his conclusory opinion regarding causation of Claimant's L4-L5 disk pathology, and there is no indication that he reviewed diagnostic studies from 2002. Dr. Hajjar admits that the cause of Claimant's L4-L5 disk condition cannot

be determined by review of diagnostic studies alone. Dr. Hajjar relied on an inaccurate history regarding the onset of radicular symptoms provided by Claimant.

Medical Benefits.

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). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). “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). In the event that medical treatment is determined to constitute reasonable medical care which is causally related to a compensable injury, liability of an employer/surety for the treatment may be negated if the treatment is not performed at the direction or referral of the employee’s treating physician and requirements of Idaho Code § 72-432(4) relating to change of physician are not otherwise met. *Quintero v. Pillsbury Co.*, 119 Idaho 918, 811 P.2d 843 (1991).

50. Medical treatment rendered prior to Dr. Doerr’s certification of maximum medical improvement on November 28, 2006 is not in dispute. Claimant seeks payment for medical care rendered after November 2006, as well as future medical benefits for the care proposed by Drs. Frizzell and Hajjar.

51. Based on the above findings regarding causation, Claimant is not entitled to medical treatment at the L4-L5 level of his spine beyond the date of this decision. Claimant continues to be entitled to reasonable medical treatment to the L5-S1 level.

52. Claimant opted to seek treatment outside of Dr. Doerr's referral after the falling-out between Claimant and Dr. Doerr at the evaluation of November 16, 2006. In spite of the behavior of Claimant and his girlfriend, Dr. Doerr remained and continues to be willing to serve as Claimant's treating physician. Dr. Doerr recommended that Claimant return to him for a one-year post-operative examination and x-ray on May 2007. Dr. Doerr authorized additional diagnostic studies in 2007.

53. Defendants continued to provide reasonable medical care for Claimant's industrial injury, and Claimant is not entitled to medical treatment outside of Dr. Doerr's referral. Defendants are liable for the costs of any unpaid diagnostic studies that were recommended or approved by Dr. Doerr after November 2006, and continue to be liable for costs of reasonable medical care for the 2005 industrial injury at the direction or referral of Dr. Doerr.

54. The evidence establishes that Claimant is not a surgical candidate at this time. Claimant has failed to meet his burden of proof to establish that a re-do of his L5-S1 fusion is medically necessary. There is conflicting medical evidence as to whether Claimant's fusion is solid, and the opinions of Drs. Doerr and Taylor are adopted over the opinions of Drs. Frizzell and Hajjar. Dr. Hajjar has merely indicated the possibility of a failed fusion. Drs. Doerr and Taylor credibly testified that the diagnostic studies show a solid fusion. Dr. Hajjar agrees with Dr. Doerr that Claimant is a poor surgical candidate based on his continued smoking and drug use.

TTD/TPD

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001). A claimant who has reduced wages attributable to an occupational injury may establish entitlement to partial disability benefits during periods of his or her period of recovery. TPD benefits are paid at an amount equal to sixty-seven per cent (67%) of the decrease in wage-earning capacity, but not to exceed the income benefits payable for total disability.

55. With regard to the period of time from the June 28, 2005 injury until Claimant's termination of September 9, 2005, payroll records confirm that his weekly earnings averaged approximately \$60 less than his agreed-upon average weekly wage of \$536.13. Claimant maintains that the reduction in wages was the result of light-duty work and a reduction in the hours that Claimant was able to work because of his injury. Although Claimant had lifting restrictions from the day after his injury until August 23, 2005, the medical evidence does not indicate that Claimant was medically restricted from working his regular hours. Testimony from both Claimant and Mr. Archuletta establishes that Claimant was able to perform most of his pre-injury job functions as a supervisor and delegate any lifting tasks that would exceed his

restrictions. Claimant has failed to establish entitlement to temporary partial disability benefits from his date of injury through September 9, 2005.

56. With regard to the period of time from September 9, 2005 until Surety initiated temporary total disability benefits on April 11, 2006, Claimant asserts that he is entitled to TTD benefits because he was either under restrictions or in an off-work status and Employer did not continue to provide him with light-duty employment.

57. Claimant had been released to return to work without restrictions and was working regular duty at the time of his termination on September 9, 2005. Claimant's work status did not change until September 29, 2005, when Primary Health took Claimant off work pending evaluation by Dr. Doerr. (Defendants' Exhibit 8, p. 4045). Dr. Doerr evaluated Claimant on October 15, 2005, and released Claimant to return to work with a 50-pound lifting restriction. (Defendants' Exhibit 6, p. 3032).

58. Surety initiated TTD benefits on April 11, 2006, when Claimant was taken off work pending his May 8, 2006 surgery, and continued the payment of TTDs until November 16, 2006, when Claimant was certified at maximum medical improvement and released to return to work with a 50-pound lifting restriction by Dr. Doerr.

59. Claimant has established entitlement to TTD benefits from September 29, 2005 until October 14, 2005. During that period of time, it is undisputed that Claimant was in a no-work status and that Claimant continued to be in a period of recovery.

60. Claimant has failed to establish entitlement to TTD benefits from September 9, 2005 through September 28, 2005, because he received a full duty release to return to work and was under no medical restrictions during that period of time. Claimant was unable to work because of his termination.

61. Claimant has failed to establish entitlement to TTD benefits from October 15, 2005 through April 10, 2006. During that period of time Claimant was under a 50-pound lifting restriction. The evidence establishes that Claimant would have been able to return to his regular pre-injury job had he not been terminated. In the event that the 50-pound lifting restriction required Claimant to perform light-duty work, Mr. Archuletta credibly testified that such work would have been available to Claimant if he had not been terminated for cause.

62. Claimant is not entitled to TTD benefits after November 16, 2006, because he failed to establish that he continued to be in a period of recovery and because his inability to return to work for Employer is due to his termination for cause rather than his industrial injury.

CONCLUSIONS OF LAW

1. Claimant's current disk pathology at L4-L5 is due to a natural progression of a pre-existing condition and not causally related to the June 28, 2005 industrial injury. Claimant's current disk pathology at L5-S1 continues to be causally related to the 2005 industrial injury.

2. Claimant is entitled to ongoing reasonable and necessary medical care, if any, for his L5-S1 injury at the direction of Timothy Doerr, M.D. Defendants are not liable for medical care obtained by Claimant outside of Dr. Doerr's referral and Claimant is not entitled to payment for medical treatment by Tyler Frizzell, M.D. or Michael V. Hajjar, M.D. Claimant is not currently an appropriate surgical candidate.

3. Claimant is entitled to additional temporary total disability benefits from September 29, 2006 through October 14, 2006.

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 __24th ____ day of November, 2008.

INDUSTRIAL COMMISSION

____/s/_____
Michael E. Powers, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GAYLAND GRIFFIN,)
)
 Claimant,)
)
 v.)
)
 EXTREME RV,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

IC 2005-514555

ORDER

Filed December 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’s current disk pathology at L4-L5 is due to a natural progression of a pre-existing condition and not causally related to the June 28, 2005 industrial injury. Claimant’s current disk pathology at L5-S1 continues to be causally related to the 2005 industrial injury.
2. Claimant is entitled to ongoing reasonable and necessary medical care, if any, for his L5-S1 injury at the direction of Timothy Doerr, M.D. Defendants are not liable for medical

care obtained by Claimant outside of Dr. Doerr's referral and Claimant is not entitled to payment for medical treatment by Tyler Frizzell, M.D. or Michael V. Hajjar, M.D. Claimant is not currently an appropriate surgical candidate.

3. Claimant is entitled to additional temporary total disability benefits from September 29, 2006 through October 14, 2006.

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

DATED this 5th day of December, 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 5th day of December 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

STEPHEN K STARK
1019 2ND ST S
NAMPA ID 83651

JAMES A FORD
PO BOX 1539
BOISE ID 83701-1539

ge

Gina Espinosa

ORDER - 2