

- a) Temporary partial and/or temporary total disability benefits (TPD/TTD);
- b) Permanent partial impairment (PPI);
- c) Disability in excess of impairment;
- d) Medical care; and
- e) Attorney fees.

At the outset of hearing, the parties offered clarification of the disputed issues and agreed that the primary issue is whether Claimant's bacterial infection in his back and right shoulder area was causally related to his industrial injury of December 28, 2006. Neither party waived the other issues in dispute. Claimant filed a pre-hearing memorandum requesting that issues beyond causation and attorney fees be reserved.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his low back on December 28, 2006 when he lifted a plastic tub from the back seat of his vehicle. Claimant was subsequently diagnosed with a Staph infection in his right sternoclavicular (SC) joint. The same type of infection was later diagnosed in Claimant's lumbar spine.

Claimant asserts that he strained his right SC joint within a few days of his back injury as the result of using his upper extremities to assist in mobility because of back pain and weakness. Claimant's injuries served as seeding sites for infection and the infection is causally related to the industrial injury. Claimant contends that he is entitled to medical benefits for treatment to the infection in his SC joint and spine. Claimant maintains that an award of attorney fees is appropriate because of unreasonable denial of benefits by Defendants.

Defendants contend that Claimant has not met his burden of proof with regard to causation and that the industrial back injury does not include the bacterial infection at either site, especially the SC joint that was not part of the initial injury. Defendants point out that

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they have accepted a 12% PPI rating assigned for Claimant's back injury and that there is no evidence of additional PPI. Claimant has not established permanent disability in excess of 12% PPI. Defendants maintain that benefits were timely paid for the back injury and that benefits associated with Claimant's infections were reasonably denied.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Hearing testimony of Claimant and his mother, Sheryl Hayes;
2. Claimant's Exhibits Bates stamped pp. 100-1226;
3. Defendants' Exhibits Bates stamped pp. 1-190; and
4. Post hearing depositions of infectious disease specialists Dennis L. Stevens, M.D., Ph.D.; Devon C. Hale, M.D., and Richard A. Nathan, D.O.

Defendants' objection to Exhibit 6 of Dr. Stevens' deposition and Claimant's objection to Exhibit 1 of Dr. Hale's deposition are sustained. All other objections made during depositions are 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

Background, Injury and Medical Care

1. Claimant was 37 and resided with his parents in Menan, Idaho, at the time of hearing. He earned a bachelor's degree in 2001 from Utah State University. Claimant has performed multiple types of work and has varied interests. He previously worked in the field of psychosocial rehabilitation with children. Claimant operates a home-based travel business that offers hunting and fishing trips via the internet. Claimant enjoys writing and videography related to outdoor travel.

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2. Employer is in the food services business. Claimant worked part-time for Employer and his job included transportation of food product and related items between Employer's main facility and a satellite location where pizza and sandwiches were sold. On December 28, 2006, Claimant was lifting a plastic tub of condiments and other food service items weighing 40 to 50 pounds from the back of his car when he felt a pulling sensation in his back.

3. Claimant's past medical history includes treatment for pain to his back and right shoulder. However, Claimant was not previously diagnosed with a significant injury or condition to either body part and was not receiving on-going treatment to either his back or right shoulder for at least a year prior to his industrial injury. Claimant is prone to infection. Claimant experienced past sinus infections, possible dental infections and lesions around his hairline. Claimant had a draining mass or furuncle on his abdomen in late 2006. Claimant reports that his abdominal infection resolved by October 2006, but one medical report describes the infection as continuing into December 2006. Claimant's previous infections did not require hospitalization or surgical intervention. Claimant is 6 feet, 5 inches, tall and weighed approximately 275 pounds at the time of his injury. Claimant's weight has fluctuated since the injury.

4. Claimant's lumbar condition deteriorated rapidly and by December 30, 2006 he was essentially bed-ridden and experienced difficulty with mobilization and completing activities of daily living. Claimant used his arms to transfer his body weight and experienced pain in his right shoulder area while doing so.

5. On January 2, 2007, Claimant sought treatment with Bryan Hammar, D.O., at Rigby Community Care Center. X-rays revealed no acute process and Claimant was

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diagnosed with a lumbar strain. He was prescribed pain medication and steroids.

6. Claimant's condition worsened and he was admitted to Madison Memorial Hospital in Rexburg for four days beginning January 7, 2007 due to back pain. Dr. Hammar was Claimant's attending physician during the hospitalization. A lumbar MRI performed on January 7, 2007 revealed annular bulging posteriorly at L5-S1 with tearing of fibers. The results were not as severe as expected by Dr. Hammar, based on the degree of pain Claimant reported. Claimant was referred to Eric D. Walker, M.D., for continued treatment of his back.

7. During his hospitalization, Claimant was evaluated by M.L. Larson, M.D., for right shoulder pain. Claimant explained that he strained his shoulder while using his arms to push up and assist in ambulation because of severe back pain. Claimant described his pain as coming from his right shoulder, across his sternum, over his pectoral muscle and up towards his neck. Early adhesive capsulitis was suspected for which Claimant was prescribed anti-inflammatories.

8. Claimant did not sleep well during his hospitalization and was noted to have fever, chills and night sweats. A bladder infection was suspected.

9. Claimant sought follow-up care for his back with Dr. Walker on January 22, 2007. Dr. Walker is a board certified spine specialist in Idaho Falls. Upon review of Claimant's MRI, Dr. Walker detected fluid, possibly blood, in the L5-S1 disc area identified as "high signal". Dr. Walker attributed the L5-S1 findings to Claimant's industrial injury. Dr. Walker documented Claimant's right shoulder pain and that Claimant related it to post-injury straining. Dr. Walker recommended physical therapy and consideration of an epidural steroid injection.

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10. On January 31, 2007, Claimant was participating in physical therapy at Madison Memorial Hospital when he noticed a lump in the area of his right SC joint and experienced pain of such severity that he was taken into the emergency room. A biopsy was performed and Staph infection was identified on February 5, 2007.

11. Claimant was referred to Richard Nathan, D.O., an infectious disease specialist in Idaho Falls. Dr. Nathan diagnosed SC joint infection/osteomyelitis. Dr. Nathan referred Claimant to Michael H. Denyer, M.D., for surgical intervention.

12. On February 7, 2007, Dr. Denyer performed surgery at Eastern Idaho Regional Medical Center (EIRMC) in Idaho Falls. Dr. Denyer removed Claimant's SC joint, collarbone, one rib and half of his sternum. Two days later, the same type of Staph infection was found in Claimant's L5-S1 disc space. Claimant remained hospitalized and received extensive treatment at EIRMC until February 21, 2007, when he was discharged to a rehabilitation unit.

13. Claimant continued treatment at EIRMC's rehabilitation unit from February 21, 2007 through March 2, 2007. Claimant continued to receive treatment at the rehabilitation center on an out-patient basis through at least mid-March 2007. Claimant and his mother temporarily moved into the Evergreen Gables Motel in Rexburg during Claimant's outpatient treatment because travel between the facility and their home in Menan was not practical, considering Claimant's condition.

14. In addition to payments made to medical service providers and facilities, Claimant incurred costs (paid by his mother) in the amount of \$1,365 for a lift chair, a second-hand hospital bed and a foam mattress. Claimant and his mother incurred additional expenses totaling \$2,259.52 for hotel, food and related expenses during Claimant's rehabilitation.

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Expert Medical Opinions Regarding Causation of Infection

Eric D. Walker, M.D.

15. Dr. Walker re-evaluated Claimant on March 30, 2007. He reviewed records regarding Claimant's infection and course of treatment. He discussed the case with Dr. Nathan. In hindsight, Dr. Walker felt that the fluid collection shown on Claimant's January 2007 lumbar MRI at L5-S1 was more likely related to infection than a traumatic injury to the disc. Dr. Walker rejected the theory that the work injury caused Claimant's discitis (infected disc) and felt it was more likely that the discitis was actually the cause of Claimant's symptoms. Dr. Walker noted that he had never seen a case of trauma causing an infection to seed and that he had no experience with such a scenario.

16. Dr. Walker performed an impairment rating for Claimant's back injury. He opined that maximum medical improvement would have been reached for a lumbar strain within 6 to 12 months of Claimant's injury. Dr. Walker assigned a 12% whole person impairment rating utilizing the 6th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. No apportionment was necessary since Dr. Walker did not include pre-existing conditions.

17. Dr. Walker maintains that the timing of Claimant's back strain and infection was coincidental and that Claimant's back strain neither caused the lumbar infection nor the SC joint infection. To the contrary, he feels that Claimant's unrelenting back pain may have been caused by the infection.

Richard A. Nathan, D.O.

18. Dr. Nathan treated Claimant's infection as of February 6, 2007. He believes that the industrial injury pre-dated the lumbar infection. The "injury first" sequence is supported by

the January 7, 2007 MRI which is negative for infection. The origin of Claimant's bacteria is unknown, but some people have transient bacteremia present in their body at any given time. Claimant's history of skin infection and abscess are not likely related to his Staph infection. Dr. Nathan concludes that the most likely scenario is that the back injury and back infection came first and that bacteria spread from the lumbar area to Claimant's SC joint. Dr. Nathan opines that, based on a reasonable degree of medical certainty, the back injury happened first, the back infection happened second and the SC joint infection happened third. He concludes that neither infection would have occurred if Claimant had not suffered a back injury.

19. Dr. Nathan thinks it is possible that Claimant injured his shoulder area while mobilizing post-injury, but that the bacteria traveled from the back infection to the SC joint irrespective of whether the SC joint was injured.

20. Dr. Nathan last evaluated Claimant in February 2007. He does not recommend additional treatment for Claimant's infections.

Dennis L. Stevens, M.D., Ph.D.

21. Dr. Stevens is an infectious disease specialist who performs consultation, teaching and research through the Boise VA hospital. He spends approximately 40% of his practice researching Gram-positive bacteria caused by Staph aureus and other organisms. His knowledge on the subject is based on both research and clinical experience. Both Staph aureus and Streptococcus pyogenes are Gram-positive bacteria although they have different genus and species.

22. Injuries attract Gram-positive bacterial infections even when the injuries are minor and/or non-penetrating. Clinical research links deep Staph aureus infections with muscle

strains. On a more likely than not basis, Dr. Stevens believes that Claimant's back injury attracted infection. His opinion is based on review of medical records as opposed to an evaluation of Claimant.

23. Medical records support that Claimant had recurrent superficial Staphylococcal infections prior to his industrial injury. Transient bacteremia seeded in Claimant's lower back and SC joint. The sequence of infection or whether they occurred simultaneously is unclear. Claimant's back was not infected at the time of his MRI on January 7, 2007. The back injury occurred before the infection seeded in Claimant's back. If the back infection pre-dated the December 28, 2006 injury, there would have been more soft tissue swelling and signs of bone infection on the MRI. The notation of chills, fever and night sweats during the hospital admission at Madison Memorial is consistent with this sequence of events.

24. Dr. Stevens believes that the SC infection was seeded by the same type of transient bacteremia that seeded the back infection and that Claimant's back injury was a pre-disposing condition to the infection. The lumbar infection site was seeded separately from the SC joint. It is unlikely that the SC joint infection resulted from a bacteremia originating in the back.

Devon C. Hale, M.D.

25. Dr. Hale is an infectious disease specialist who previously practiced in Idaho Falls but has spent the past 24 years at University of Utah in Salt Lake City. He reviewed medical records and evaluated Claimant at the request of Surety.

26. Based on the medical records and history provided by Claimant, Dr. Hale believes that Claimant has Staph infections on a regular basis. These are evidenced by the abdominal lesion in late 2006, reports of facial lesions and pustules identified by Dr. Hale along

Claimant's hairline at the time of his evaluation.

27. Dr. Hale initially opined that Claimant's back infection pre-dated his industrial injury and that the initial back pain felt by Claimant was at least partially related to the infection. At that time, he felt that the infection in Claimant's abdomen in late 2006 caused the infection in Claimant's back and that the industrial injury led Claimant to discover the infection rather than the injury causing the infection.

28. However, Dr. Hale's opinion regarding the chronology of events changed after taking a history directly from Claimant and reviewing the diagnostic studies from January 7, 2007 with a radiologist. The radiologist was unable to confirm whether the fluid shown on the MRI between the L5-S1 disc space on January 7, 2007 was infection or blood from an injury. Dr. Hale is unable to say which scenario is more probable - that the infection pre-dated the injury and caused lumbar symptoms or that the injury occurred first and led to the back infection. He believes that either scenario is possible and that it is impossible to determine which is more likely.

29. Dr. Hale believes that bacteremia in Claimant's bloodstream seeded both the back infection and SC joint infection at approximately the same time from a single episode of bacteria in the blood. He does not think it is likely that the back infection pre-existed the SC joint infection and/or caused the SC joint infection because there was not enough pressure in the back infection to cause it to reseed the bloodstream in early to mid-January. This conclusion is also based on the January 7, 2007 diagnostic studies.

30. Dr. Hale considered the possibility of Claimant injuring his right shoulder by lifting himself up after the injury. He thinks that it is more likely that Claimant felt the pain in his right shoulder area because of the on-set of infection and not because of a straining injury.

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The SC joint is a stabilizing joint and not a weight bearing joint. The SC joint is not easily injured by lifting, pushing or pulling.

Surety's Claim Handling

31. Surety initially accepted the claim and sent a letter to Claimant on February 8, 2007 advising that the claim was approved. On February 21, 2007, Surety sent a letter to Claimant advising him of a change in status and indicating that additional medical information was needed before compensation would be initiated. On April 12, 2007, Surety advised Claimant that medical bills for the hospitalization at Madison Memorial had been paid but that medical bills from EIRMC were denied. The April 12, 2007 letter explains that treatment related to the infectious process in Claimant's back and SC joint was denied based on a determination of Surety's staff physician consultant.

32. Surety paid TTD benefits from January 7, 2007 through February 15, 2007. Surety initiated PPI benefits upon receipt of Dr. Walker's impairment rating assessment. No alternate PPI assessment has been issued.

33. Surety initially relied on the opinions of Dr. Walker and its staff physician. Surety did not change its position upon receipt of either the opinion of Dr. Nathan or a copy of a factually similar case in which the Industrial Commission found in the claimant's favor and awarded attorney fees to the claimant based on the surety's unreasonable denial. *See Miller v. Gem State Paper and State Insurance Fund*, IC 2004-527494 (2007).

34. Surety subsequently obtained an opinion from Dr. Hale.

DISCUSSION AND FURTHER FINDINGS

35. **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). An employee may be compensated for the aggravation or acceleration of a pre-existing condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(17).

36. Both parties did an excellent job in their offer of relevant expert medical evidence and in articulating their positions during post-hearing briefing. Dr. Walker provided an initial common-sense orthopedic opinion. Drs. Nathan, Stevens and Hale are well-credentialed infectious disease specialists to whom all of the right questions were asked. The opinions of Dr. Walker regarding causation are rejected in favor of the analyses proffered by the specialists.

Back Infection

37. The evidence establishes that Claimant was prone to infection and had Staph bacteria in his body that pre-existed his industrial injury and was not caused by the injury. However, a Staph infection was not present in Claimant’s L5-S1 disc space until after the industrial injury as confirmed by the January 7, 2007 lumbar MRI. Testimony from both Dr. Nathan and Dr. Stevens establishes that the injured tissue attracted bacteria and that Claimant’s back infection was a compensable consequence of his back injury. Dr. Hale does not reject this theory of causation.

38. Claimant has met his burden of proof to establish that his back infection is causally related to his industrial injury of December 28, 2006.

SC Joint Infection

39. Claimant’s theory that he injured his right shoulder area on or about December 30, 2006 while using his upper extremities to mobilize and compensate for his

back weakness is plausible and supported by the history given by Claimant during his hospitalization at Madison Memorial Hospital. Claimant suggests that the right SC joint infection either occurred in the same manner as the back infection - by bacteria being attracted to injured tissue or that the lumbar infection pre-dated the SC joint infection and subsequently seeded that area.

40. None of the experts determined the possible shoulder area strain to be a significant factor in the development of the SC joint infection. Dr. Nathan suggests that the back infection pre-dated the SC joint infection and that the back infection seeded the SC joint without regard to whether there was damaged tissue in the SC joint area. Dr. Stevens refutes this theory because the lack of significant infection in Claimant's back as confirmed by the January 7, 2007 MRI does not correlate with the back infection having enough severity or pressure to have seeded the SC joint area. Dr. Hale credibly opined that an injury to Claimant's right SC joint would not likely have resulted from lifting or straining.

41. Both Drs. Stevens and Hale believe that the back infection and SC joint infection were seeded by transient bacteremia at the same time or near the same time and that the back infection is not what caused bacteremia to infect the SC joint. The pain that Claimant attributed to a shoulder strain was more likely a symptom of his developing infection.

42. Although Claimant's theories regarding causation of the SC joint are possible and supported by at least some of the evidence, Claimant has failed to establish a causal relationship on a more likely than not basis. Claimant's SC joint infection is not causally related to his industrial injury.

43. **Medical Benefits.** Claimant is entitled to medical benefits for treatment related to his back infection but not for his SC joint infection. Medical treatment rendered to Claimant

for the purpose of treating both infection sites is owed by Defendants if such treatment would reasonably have been required to treat only the back infection.

44. Claimant and his mother acted reasonably in obtaining a lift chair and a hospital bed. Such items were recommended by medical service providers during Claimant's hospitalization at EIRMC. Claimant's impression that Surety was denying treatment at the time the items were purchased was reasonable and Claimant should not be penalized for failing to seek these items through Surety. Claimant is entitled to reimbursement in the amount of \$1,365.

45. Claimant's decision to reside at the Evergreen Gables Motel during rehabilitation was reasonable under the circumstances, but Claimant failed to establish medical necessity for this expense. No medical service provider recommended the arrangement or specifically restricted Claimant from travel by car. However, the decision to stay in Rexburg prevented Claimant from having to make a daily trip from his home in Menan to EIRMC in Idaho Falls which is a round-trip of approximately 48 miles. Surety is liable for the lesser of either the amount of mileage that Claimant would have accrued if he made daily trips to his out-patient rehabilitation at EIRMC or his actual expenses of \$2,259.52.

46. **TTD, PPI and PPD.** Issues regarding income benefits are not ripe for adjudication based on the lack of certification of medical stability and a rating for PPI/PPD that takes Claimant's lumbar infection into account. It would be unfair to Claimant to determine a lack of PPI and PPD when these issues have not been medically addressed. It would be similarly unfair to Defendants to assume that Claimant is entitled to ongoing TTD when a retro-active date of medical stability is likely appropriate.

47. **Attorney Fees.** Claimant's comparison between this case and *Miller v. Gem State Paper and State Insurance Fund*, IC 2004-527494 (2007) is well taken but not determinative on the issue of attorney fees. In *Miller*, the Surety denied the existence of the underlying back strain based on an unsupported challenge of the claimant's credibility.

48. This case was not denied in its entirety by Surety. The case was affirmatively accepted and benefits initiated. Surety's subsequent denial of Claimant's infectious conditions was supported at the time it was made by the opinion of Dr. Walker. After receiving Dr. Nathan's opinion on causation and a copy of the *Miller* case, Surety obtained the opinion of Dr. Hale. Dr. Hale's initial opinion supported Surety's denial. Dr. Hale's revised opinion was more favorable to Claimant than his initial opinion but continued to support a denial of the infectious conditions to the extent that Dr. Hale felt that it was not possible for Claimant to meet his burden of proof by establishing that one sequence of events was more likely than another.

49. Documentary evidence refutes Claimant's assertion that benefits were not paid on this claim until a month before hearing. Medical benefits for the Madison Memorial hospitalization and for prescription medicine were paid in February, March and April of 2007.

50. Dr. Nathan's description of the rude and dismissive treatment he received from Surety's staff physician during a phone consultation is troubling and Surety would be wise to address this situation.

51. Although the opinion of Dr. Walker was rejected in favor of the opinions of specialists and the testimony of Drs. Nathan and Stevens was more persuasive than that of Dr. Hale regarding the back infection, Defendants' actions do not warrant an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant’s back infection is causally related to his December 28, 2006 industrial injury.

2. Claimant’s SC joint infection is not causally related to his December 28, 2006 industrial injury.

3. Claimant is entitled to medical benefits for treatment related to his back infection, including reimbursement of \$1,365 for durable medical equipment and the lesser of either mileage reimbursement or lodging expenses as discussed in this decision.

3. Claimant is not entitled to an award of attorney fees.

4. Issues regarding income benefits are not ripe for adjudication and are deferred.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 21ST day of January, 2009.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHANE HAYES,)
)
 Claimant,) **IC 2007-000914**
 v.)
)
 KELSEY KLASSEN, LTD.,) **ORDER**
)
 Employer,)
 and) **FILED JAN 27 2009**
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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’s back infection is causally related to his December 28, 2006 industrial injury.
2. Claimant’s SC joint infection is not causally related to his December 28, 2006 industrial injury.

3. Claimant is entitled to medical benefits for treatment related to his back infection, including reimbursement of \$1,365 for durable medical equipment and the lesser of either mileage reimbursement or lodging expenses as discussed in this decision.

3. Claimant is not entitled to an award of attorney fees.

4. Issues regarding income benefits are not ripe for adjudication and are deferred.

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

DATED this 27TH day of January, 2009.

INDUSTRIAL COMMISSION

/S/ _____
R. D. Maynard, Chairman

/S/ _____
Thomas E. Limbaugh, Commissioner

/S/ _____
James F. Kile, Commissioner

ATTEST:

/S/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27TH day of JANUARY, 2009 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Jonathan W. Harris
266 West Bridge Street
Blackfoot, ID 83221

Steven R. Fuller
P.O. Box 191
Preston, ID 83263

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/S/ _____

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