

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIE ANDERSON,)
)
 Claimant,)
)
 v.)
)
 NUTRAHEALTH, INC.,)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2004-503931

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

Filed: February 20, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on September 9, 2008. Claimant, Marie Anderson, was present in person and represented by Hugh Mossman, of Boise. Defendant Employer, NutraHealth, Inc. (NutraHealth), and Defendant Surety, State Insurance Fund, were represented by Jon Bauman, of Boise. The parties presented oral and documentary evidence and later submitted briefs. The matter came under advisement on November 13, 2008.

ISSUES

The issues to be resolved are:

1. Whether Claimant suffered a compensable injury to her lower back;

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2. Whether and to what extent Claimant is entitled to medical care; and
3. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits.

ARGUMENTS OF THE PARTIES

Claimant asserts her fall at work on February 9, 2004, resulted in her lumbar disk herniation and present need for lumbar surgery. Claimant also asserts her entitlement to total temporary disability benefits from September 7, 2004, until February 24, 2005; from December 7, 2005, until December 19, 2006; and after March 27, 2008.

Defendants acknowledge Claimant's fall at work and have paid benefits for cervical and shoulder injuries due to the fall. However Defendants assert Claimant has not established that her present need for lumbar surgery is due to her fall. Defendants maintain Claimant's testimony that she has not worked since her fall is not credible; thus her claim for temporary disability during the periods in question is unconvincing.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Neil Custer taken at the September 9, 2008, hearing;
and
2. Joint Exhibits 1 through 44 admitted at the hearing.

After having considered the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

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1. Claimant was born in 1953 and was 55 years old at the time of the hearing.
2. In approximately 1980, Claimant fractured her left clavicle in a motorcycle accident.

In November 1986, she was involved in a multiple car collision and sustained cervical, lumbar, and left clavicular injuries. By February 1987, Claimant reported low back and buttock pain coming on over a period of two months. She was treated with physical therapy and medications by Rheim Jones, M.D., who described her back condition as a lumbosacral strain which made it difficult to bend and stoop. In November 1987, Claimant presented to Stephen Marano, M.D., reporting worsening back pain and pain radiating down both lower extremities to her feet. In March 1988, Claimant underwent left shoulder acromioplasty and rotator cuff repair. Her shoulder condition improved, however her cervical and left upper extremity symptoms did not.

3. In October 1990, Claimant was a passenger in a car which was rear-ended by another vehicle. She reported left arm, mid-thoracic, lumbar, and left leg pain. Claimant underwent lumbar x-rays which showed mild degenerative changes of the lumbar spine including spurring at L3-4, but no compressive fractures. A cervical MRI taken in October 1990 revealed cervical disk abnormalities, including C6-7 disk herniation. In November 1990, Claimant underwent cervical discectomy and fusion at C6-7 utilizing allograft bone from her left iliac crest.

4. In January and February 1991, Claimant reported left hip and left leg pain. A lumbar MRI revealed a central disk bulge at L4-5 with mild disk desiccation at L4-5 and L5-S1.

5. In October 1991, Claimant was involved in a head-on automobile collision and suffered multiple injuries. MRI scans revealed a cervical disk herniation with a free fragment. In November 1991, Claimant underwent cervical fusion at C3-4, and later a total left claviclectomy. By February 1992, she was found medically stable and given a 20-pound permanent lifting

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restriction of the upper extremity.

6. Claimant's cervical symptoms returned and in May 1992, she underwent C4-5 discectomy and fusion utilizing allograft bone from her iliac crest.

7. In November 1997, Claimant underwent C5-6 discectomy and fusion by Tyler Frizzell, M.D., using allograft bone from her iliac crest and a titanium plate.

8. In August 2001, Claimant sought medical attention for left hip pain. She reported six weeks of pain in her left hip which extended down her left thigh to the inside of her ankle. Claimant was tender over the sciatic notch and straight leg raising testing was painful. She was diagnosed with sciatica and received a prednisone injection. Her left hip pain worsened in September 2001, but apparently improved thereafter.

9. In December 2003, Claimant began working at Employer's facility, Stone Mill Bakery. Her duties included making bread dough, baking bread and other items, decorating baked goods, and cleaning up. Claimant's bakery work was fairly exertional. She lifted 27-pound pans with bread dough into racks and baked approximately 200 loaves of bread per day. In February 2004, Claimant was earning \$8.00 per hour and working full-time.

10. On February 9, 2004, Claimant was carrying pans of dough at work when she slipped on flour on the floor and fell. As she fell, she dropped the pans and attempted to catch herself on a nearby sink with her left hand. She yanked her left arm and landed hard on her left buttock and hip on the floor. Claimant felt immediate left neck, shoulder, and hip pain. Her greatest concern was neck pain near her esophagus at the site where she had previously had cervical fusion, including a plate affixed with screws. Claimant went home and did not complete her shift. She noted bruising from her left buttock to her left mid-thigh which persisted for approximately four weeks.

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11. Claimant sought medical attention on February 11, 2004, and was treated by several providers. She reported only cervical and left arm symptoms. She did not report any lumbar or hip symptoms. Medical diagnostic imaging revealed a loose screw in her cervical plate.

12. On March 18, 2004, Claimant presented to Timothy Floyd, M.D., who later performed surgery to remove the old cervical plate and install a new one. The surgery utilized allograft bone taken from Claimant's left iliac crest. Claimant knew from prior experience that allograft bone harvesting was painful and slow to heal. Unfortunately, Claimant's cervical surgery did not relieve her neck pain and she continued to have shoulder pain. Claimant did not report back pain to Dr. Floyd. However, Claimant testified at hearing that she experienced pain which radiated down to her left knee which she attributed to the allograft bone removed from her left hip. She was most concerned about her ongoing cervical and left shoulder pain. On September 1, 2004, Dr. Floyd declared Claimant stable with 10% permanent partial impairment. Defendants paid Claimant medical and permanent impairment benefits.

13. In January 2005, Claimant presented to Dr. Frizzell with radiating cervical pain complaints. Dr. Frizzell noted that Claimant was taking no medications. On April 6, 2005, Dr. Frizzell performed cervical fusion surgery and took a larger specimen of allograft bone from the posterior of Claimant's left hip. Dr. Frizzell also installed a new cervical plate. Claimant's cervical condition improved. However, her prior allograft bone harvest site was still very tender. Claimant's prior experience with allograft bone harvesting led her to expect that her hip would take significant time to heal. Defendants paid for the surgery. Claimant noted continued left hip pain even after recovering from cervical surgery.

14. In July 2005, Dr. Frizzell referred Claimant to Nancy Greenwald, M.D. Claimant had

been taking pain medication, including Vicodin, since at least early 2005. Dr. Greenwald began weaning Claimant off of pain medications, a process which lasted into 2007.

15. On April 23, 2006, Claimant presented to St. Luke's emergency room complaining of left hip and radiating left thigh pain present for the past nine days. She believed she might have sustained a stress fracture in her left hip because of the two grafts. She denied any trauma, but reported the onset of pain may have started when she rolled over in bed nine days before.

16. On April 25, 2006, Claimant presented to Dr. Frizzell reporting left hip and leg pain. She reported minimal back pain. Claimant still believed she had a left hip stress fracture. Dr. Frizzell recorded: "left lumbar radiculopathy which started spontaneously 11 days ago. She woke-up with the pain. It radiates in her left buttock and down her left thigh just to the knee. She notes no numbness nor clear weakness. She has had no relief with vicodin [sic]." Exhibit 14, p. 2072. Dr. Frizzell ordered an MRI which revealed L3-4 disk protrusion and left-sided herniation, L4-5 facet arthropathy and hypertrophy with anteriolisthesis of L4 over L5, and L5-S1 disk bulge with right-sided disk protrusion. On April 27, 2006, Dr. Frizzell indicated that Claimant's left hip pain was referred from her lumbar spine. He recommended lumbar surgery.

17. On September 1, 2006, Claimant presented to William Lindner, M.D., with shoulder complaints. MRI testing confirmed a SLAP, or labral, tear in her left shoulder.

18. Claimant's cervical pain continued and in December 2006, Michael Hajjar, M.D., surgically removed a cerclage wire from Claimant's neck. Her neck pain improved and she was able to rotate her head more freely. However, Claimant continued to suffer left leg and shoulder pain.

19. On September 12, 2007, Claimant presented to Jeffrey Hessing, M.D., for ongoing left shoulder pain. On October 30, 2007, Dr. Hessing surgically repaired Claimant's left labral tear.

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Defendants paid appropriate medical benefits. Claimant's shoulder improved. Dr. Hessing found Claimant's left shoulder medically stable on March 12, 2008, and rated her permanent partial impairment at 7%. Surety paid this rating.

20. Claimant applied for and received Social Security disability benefits for approximately one year. However at the time of hearing she was not receiving Social Security benefits. She has no medical insurance.

21. Having observed Claimant at hearing and carefully examined the record herein, the Referee finds Claimant is generally a credible witness.

DISCUSSION AND FURTHER FINDINGS

22. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

23. **Causation.** The crux of the first issue is whether Claimant's low back condition was caused by her 2004 industrial accident. A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability.

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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 plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

24. Claimant argues that Dr. Frizzell’s letter of July 7, 2006, sufficiently establishes that her lumbar radiculopathy is related to her February 2004 industrial accident. Defendants contend that Dr. Frizzell’s letter stops short of declaring causation and that other medical providers clearly opine Claimant’s 2004 fall did not cause her lumbar disk disease diagnosed in April 2006.

25. Claimant’s counsel wrote to Dr. Frizzell on May 25, 2006, and June 12, 2006, seeking Dr. Frizzell’s opinion that Claimant’s lumbar radiculopathy is related to her February 9, 2004, work accident to a reasonable degree of medical probability. Dr. Frizzell responded to both letters. His letter dated July 7, 2006, states:

I had the pleasure of seeing Marie Anderson in clinic on 7/7/06. I reviewed the history with her regarding her February 9, 2004, work injury. While working at the bakery she slipped on flour which was on the floor. She placed her left arm out to try to keep herself from falling, but her left arm did not hold, and she fell onto her left buttock. She notes that she had a significant left hip bruise following the incident. However, the pain in the neck was worse at that time. She subsequently underwent an evaluation for her neck and underwent two neck surgeries.

She noted that she continued to have pain in the left hip and buttock region, but she thought it was related to the bone grafts that she had both anteriorly in the left iliac crest and posteriorly as well. That pain has persisted.

As you are aware, her MRI dated 4/25/06 shows an extruded disk fragment on the left at L3-4 causing her lumbar radiculopathy.

Based on her history, I think it is reasonable to state that Marie has had

symptoms consistent with left lumbar radiculopathy since the 2/9/04 accident at the Stonemill [sic] Bakery.

Exhibit 14, p. 2080.

26. On February 28, 2007, Dr. Hajjar wrote to Dr. Frizzell: “Ms. Anderson strongly believes that her lumbar spine condition is also caused by the work related incident. I would like to seek your guidance in answering that question regarding the lumbar spine” Exhibit 31, p. 15024. There is no record of any other correspondence between Dr. Hajjar and Dr. Frizzell from February 28, 2007, until May 4, 2007, on the question. On May 4, 2007, Dr. Hajjar wrote to the Surety: “Marie Anderson’s pathologies in her lumbar spine are most consistent with degenerative issues.” Exhibit 31, p. 15025.

27. Claimant’s counsel wrote Dr. Frizzell yet again on November 28, 2007, advising Dr. Frizzell that the Surety “is still not willing to accept the causal relationship between the 2/9/04 accident and the lower back disk problem at L3-4.” Claimant’s counsel specifically requested from Dr. Frizzell “confirmation of your opinion that the lower back problem is causally related to the 2/9/04 accident.” Exhibit 30, p. 5. The record contains no response from Dr. Frizzell to Claimant’s counsel’s November 28, 2007, letter.

28. Dr. Greenwald was Claimant’s treating physician from approximately 2005 until 2007. At Defendants’ request, Dr. Greenwald reevaluated Claimant’ low back pain and left L3 radiculopathy. In her letter of August 11, 2008, Dr. Greenwald opined:

Clearly having a fall and landing on your buttocks could set up an injury to your back. The issue that is difficult to understand is that the patient had multiple encounters with multiple different physicians and multiple opportunities to write down back pain even including the graft site and it was never done. So therefore, I cannot relate her present complaint of back pain from an emergency room visit that she states started nine days prior to that emergency room visit in 2006 to a work related injury on 02/09/04. With the mechanism of injury I sometimes allow people

up to six months time to give them the opportunity to talk about the back pain. Obviously the patient was having a lot of neck issues but not once did she ever mention any back pain or thigh pain. Therefore, I cannot relate her present left L3 radiculopathy to her work related injury of 02/09/04.

Exhibit 27, p. 11029.

29. The medical records demonstrate that Claimant was examined or treated by medical providers well over 30 times during the 26 months between her February 9, 2004, fall and her first report of lumbar and left leg symptoms on April 23, 2006. Claimant justifies her delay in reporting lumbar symptoms by explaining that her left hip was painful from repeated bone grafting and her prescription pain medications masked her lumbar symptoms.

30. Claimant was apparently still taking Vicodin at the time she first reported her lumbar and left leg symptoms in April 2006. The emergency room note and Dr. Frizzell's notes indicate that she had Vicodin on hand and was taking it when she presented for evaluation on April 23 and 25, 2006. Claimant originally described her back pain as commencing at a discrete day and time—when she awoke on April 14, 2006—nine days prior to April 23, 2006, and 11 days prior to April 25, 2006, as documented in emergency room reports and Dr. Frizzell's records. This is not consistent with her testimony at hearing that her left hip pain and back pain were ongoing from February 9, 2004.

31. Claimant denied any traumatic event between her February 2004 fall and her April 2006 report of back pain. However, Claimant also denied performing any work after her 2004 fall; nevertheless sub rosa surveillance clearly established that Claimant performed work activities in May, June, and July 2004. Claimant explained that she did not perform these work activities for pay. There is no persuasive evidence in the record that Claimant suffered any traumatic event between her 2004 fall at work and her diagnoses of lumbar disk herniation in April 2006. However,

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it is not Defendants' burden to prove that her present lumbar condition is not work-related. Rather, Claimant bears the burden of proving that her present lumbar condition is work-related.

32. Dr. Frizzell's carefully worded letter of July 7, 2006, and the absence of any response from Dr. Frizzell to Claimant's counsel's letter of November 28, 2007, is most supportive of the conclusion that Dr. Frizzell did not hold the causation opinion that Claimant's counsel requested he confirm. Drs. Hajjar and Greenwald declined to relate Claimant's current lumbar condition to her February 9, 2004, work accident.

33. Claimant has not proven that her fall at work on February 9, 2004, caused her lumbar condition, including disk herniations, diagnosed in April 2006.

34. **Additional medical treatment.** Idaho Code § 72-432(1) requires that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

35. As noted above, having failed to prove that her present lumbar condition is due to her industrial accident, Claimant has also failed to prove that her current need for medical treatment of her lumbar condition is due to her February 9, 2004, industrial accident.

36. **Temporary disability.** Claimant alleges entitlement to additional temporary

disability benefits. Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical 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, 605 P.2d 939 (1980). Furthermore:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

37. In the present case, Claimant has not proven her entitlement to temporary disability benefits for her lumbar spine condition. However, Claimant also asserts her entitlement to temporary disability benefits from September 7, 2004, until February 24, 2005, and from December 7, 2005, until December 19, 2006, due to her cervical and shoulder injuries alone. Defendants question Claimant’s entitlement to time loss benefits during these periods in light of evidence that Claimant performed work activities subsequent to her industrial accident.

38. Claimant testified at hearing that she has not worked for pay since her fall in February

2004. Periodic discreet visual surveillance of Claimant by investigator Neil Custer commencing May 28 and continuing through July 5, 2004, established that Claimant performed work activities at a café and donut shop from midnight until approximately 2:00 p.m. on a number of occasions. Claimant was observed at the café mopping, wiping counters, carrying chairs and signs, and repeatedly taking and delivering customers' orders. Claimant told Custer, upon whom she waited, that she arrived at work at midnight to start cooking donuts and worked until closing at 2:00 p.m. Sub rosa video surveillance taken of Claimant during this time documented that Claimant wiped counters, served donuts, and arranged light furniture. Claimant testified at hearing that she was not paid for her activities, but rather went to the café with her boyfriend every night because she did not want to be home alone. Claimant acknowledged mopping up spilled coffee and wiping down counters. She explained that she was doing at the café essentially what she did at her own home. None of these work activities exceeded her asserted physical restrictions, and, more significantly, none are alleged to have occurred during either period for which she now requests temporary disability benefits.

39. From September 7, 2004, until February 24, 2005, Claimant was still suffering from cervical spine instability which required surgical intervention by Dr. Frizzell, including cervical fusion and installation of a new cervical plate, in April 2005. From December 7, 2005, until December 19, 2006, Claimant suffered cervical pain and restricted motion due to a cervical cerclage wire which Dr. Hajjar surgically removed on December 19, 2006. Moreover, from the time of her industrial accident until October 30, 2007, Claimant was also suffering ongoing left shoulder symptoms which were ultimately diagnosed as a left labral tear requiring surgical repair performed by Dr. Hessing on October 30, 2007. Thus from September 7, 2004, until February 24, 2005, and

from December 7, 2005, until December 19, 2006, Claimant was still in a period of recovery. There is no evidence that during these periods Employer offered her light-duty work or that other suitable work was available. There is no persuasive reason to ignore Idaho Code § 72-408 and the mandate of Malueg.

40. Claimant has proven her entitlement to temporary total disability benefits for the periods of September 7, 2004, until February 24, 2005, and from December 7, 2005, until December 19, 2006. Claimant has not proven her entitlement to temporary disability benefits after March 27, 2008.

CONCLUSIONS OF LAW

1. Claimant has not proven that her lumbar spine condition was caused by her industrial accident of February 9, 2004.

2. Claimant has not proven that she is entitled to additional medical care.

3. Claimant has proven she is entitled to temporary total disability benefits from September 7, 2004, until February 24, 2005, and from December 7, 2005, until December 19, 2006. Claimant has not proven her entitlement to temporary disability benefits after March 27, 2008.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 11th day of February, 2009.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee