

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY SUNDBERG,)
)
 Claimant,)
)
 v.)
)
 MANDERE CONSTRUCTION, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
 Defendants.)
 _____)

IC 2007-021018

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

2/12/09

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Susan Veltman, who conducted a hearing in Coeur d'Alene, Idaho, on May 22, 2008. Thomas B. Amberson of Coeur d'Alene represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence. Two post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on January 15, 2009 and is now ready for decision.

ISSUE

By agreement of the parties at hearing, the only issue to be resolved by this decision is whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 in the form of a lumbar fusion. The parties reserve all other issues.

RECOMMENDATION - 1

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his lower back while performing roofing work for Employer on June 7, 2007. Surety accepted the claim and paid for medical care including two lumbar surgeries performed on June 25, 2007. (Claimant was scheduled for a single operative procedure but a second surgery was performed because of complications that developed following the initial surgery). A lumbar fusion has been proposed by Claimant's treating neurosurgeon, Jeffery Larson, M.D.

Claimant asserts that the proposed fusion constitutes necessary and reasonable treatment for his industrial injury and relies on the opinion of Dr. Larson as well as neurosurgeon, Bret Dirks, M.D., from whom a second opinion was obtained. Defendants assert that Claimant is not a fusion candidate based on the opinions of independent medical examination physicians, orthopedic surgeon Keith Holley, M.D., and neurologist Lewis Almaraz, M.D.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 5;
2. Defendants' Exhibits A through N;
3. Testimony of Claimant taken at hearing; and
4. Post-hearing depositions of Jeffrey Larson, M.D., and Lewis Almaraz, M.D.

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

FINDINGS OF FACT

1. Claimant was 39 years old and resided in Veradale, Washington at the time of hearing. He graduated from high school in 1987 and received a diploma from a two year

business school in Spokane where he studied sales and marketing. Claimant's past work experience is in landscaping and various types of construction including remodels, finish work, siding, roofing, framing, foundations and rebar. Claimant began working for Employer in late 2006. Employer specializes in commercial framing projects.

2. Claimant sustained a prior back injury in the early 1990s which resulted in multi-level disc herniations and symptoms of right-sided radiculopathy. His condition improved with conservative treatment, but he continued to experience occasional flare-ups of pain.

3. On June 7, 2007, Claimant was unloading roofing materials from a forklift when he noticed soreness in his lower back that increased over time. Claimant consistently described a lifting and twisting mechanism of injury to medical service providers. He experienced new symptoms of left-sided radiculopathy.

4. Initial medical treatment following the injury was sought on June 15, 2007 at Kootenai Medical Center where Claimant was evaluated by Michael Ludwig, M.D. Dr. Ludwig noted Claimant's past history of disc herniations and right-sided radiculopathy. He related Claimant's left-sided radiculopathy to an acute disc herniation and industrial injury. Dr. Ludwig recommended a lumbar MRI.

5. Claimant's lumbar MRI of June 22, 2007 identified a large extruded disc at L4-5. Dr. Ludwig felt that surgical intervention was appropriate and arranged for an expedited referral to neurosurgeon Jeffrey Larson, M.D.

6. Dr. Larson agreed that Claimant had a large extruded disc fragment at L4-5 which compressed the L5 nerve root. A microlumbar discectomy on the left at L4-5 was recommended and promptly scheduled.

7. Claimant underwent a bilateral discectomy at L4-5 on June 25, 2007 at which time large free disc fragments were removed. Claimant awoke from surgery with lower extremity weakness. An emergency MRI was performed and Claimant was taken back into surgery because of residual disc material and stenosis related to inflammation and granulation of tissue which presented as *cauda equina* syndrome. Dr. Larson performed a laminectomy, foraminotomy and discectomy at L4-5. Claimant was discharged from the hospital on June 28, 2007.

8. Claimant's condition did not significantly improve with physical therapy. Claimant felt that he exacerbated his back pain during a Labor Day camping trip when he picked up firewood weighing 20 to 30 pounds. Dr. Larson suspected spinal instability and recommended a repeat MRI. A lumbar MRI was performed on October 29, 2007 which revealed post-operative changes with multi-level annular tears. Claimant continued to complain of lower extremity weakness and bilateral radiculopathy. Claimant was fitted with a lumbar brace which allowed him to relax his abdominal muscles, but did not alleviate his lumbar symptoms.

9. In late November 2007, Dr. Larson recommended a lumbar fusion to stabilize Claimant's remaining pedicles and facets.

IME Panel

10. Defendants arranged for Claimant's evaluation by Lewis Almaraz, M.D., and Keith Holley, M.D., in Spokane on November 29, 2007. Dr. Almaraz is a neurologist and Dr. Holley is an orthopedic surgeon. Drs. Almaraz and Holley (the Panel) reviewed medical records, conducted a patient interview with Claimant, evaluated Claimant and responded to specific questions posed by Surety.

11. The Panel concurred that Claimant's surgeries on June 25, 2007 were causally related to the industrial injury but felt that Claimant was not an appropriate candidate for a lumbar fusion. Although Claimant had pre-existing herniations and mild congenital stenosis, his condition was aggravated by the industrial injury.

12. The Panel concluded that a lumbar fusion is not appropriate because there is no objective evidence of spinal instability; Claimant continues to smoke; there are no objective findings of radiculopathy; and because Claimant demonstrated embellishment of symptoms upon examination. Claimant's symptom embellishment was demonstrated by frequent moaning and grimacing in the absence of spasm or other physiological findings.

13. In his deposition, Dr. Almaraz clarified that lumbar instability must be demonstrated radiographically in order to warrant a fusion. Additionally, Claimant did not appear to be an appropriate fusion candidate to Dr. Almaraz because of Claimant's symptom magnification and continued smoking. Dr. Almaraz disagrees with Dr. Larson's theory that spinal instability results from removal of 100% of one facet or 50% of bilateral facets because, if true, Dr. Almaraz would expect to find objective evidence of instability on Claimant's flexion and extension x-rays of the spine.

14. As a neurologist, Dr. Almaraz does not perform the type of surgery that Dr. Larson performs.

Bret Dirks, M.D.

15. Dr. Larson disagreed with the Panel's assessment and requested a second opinion from neurosurgeon Dr. Dirks. Dr. Dirks evaluated Claimant on February 19, 2008 and reviewed Claimant's diagnostic studies.

16. Dr. Dirks determined that it was reasonable to consider a lumbar decompression and fusion at L4-5. Dr. Dirks described significant disc collapse at L4-5 that was identified on the October 2007 lumbar MRI. He noted that Claimant's symptoms failed to improve with three months of physical therapy and medication.

David Giles, M.D.

17. Dr. Giles is a neuroradiologist who reviewed Claimant's lumbar MRIs and flexion/extension x-rays. The x-rays do not demonstrate fracture or instability. The MRIs confirm partial disc collapse at L4-5 that is mild in nature and consistent with expected post-diskectomy findings.

Jeffrey Larson, M.D.

18. Dr. Larson considered the Panel's non-concurrence with his recommendation for spinal fusion. He reviewed the opinions of Drs. Dirks and Giles. Dr. Larson acknowledges that Claimant's objective diagnostic studies do not demonstrate spinal instability. His recommendation for a spinal fusion is based on Claimant's subjective complaints of mechanical pain with lack of improvement from conservative care and because of the nature of the surgeries he performed on Claimant on June 25, 2007.

19. During the second surgery of June 25, 2007, Dr. Larson removed the laminae and a portion of Claimant's facet joints at L4 and L5. A portion of Claimant's annulus (ligament containing disc) was also removed. The purpose of removing portions of Claimant's vertebrae was to permit decompression and relieve pressure on nerve roots. The surgery was successful in terms of returning Claimant's neurological function. However, the procedure made Claimant susceptible to disc collapse and instability at the level where vertebral portions were removed.

20. Indications for lumbar fusion include circumstances when there has been removal of 100% of one facet joint or 50% of two facet joints. This is an alternate way of looking at stability from measuring anterolisthesis and retrolisthesis.

DISCUSSION AND FURTHER FINDINGS

21. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). The claimant bears the burden of proving that the condition for which treatment is sought is causally related to the compensable injury. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 71, 714 P.2d 36 (1986). The determination as to whether or not a specific treatment is reasonable and required is determined by the employee's physician. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 722, 779 P.2d 395 (1989).

22. In the present case, the medical experts agree that Claimant's current condition is causally related to his industrial injury of June 7, 2007 and the sequelae from surgeries performed on June 25, 2007 to treat the compensable injury. It is undisputed that Claimant had a pre-existing injury to his lumbar spine and at least some amount of congenital spinal conditions that were aggravated by the industrial injury. The dispute is limited to whether or not Claimant is an appropriate candidate for a lumbar fusion.

23. Drs. Almaraz and Holley presented valid concerns about the lack of objective medical evidence of spinal instability. However, Dr. Larson considered these concerns and continues to maintain that a fusion is Claimant's best treatment option. Dr. Dirks concurs with Dr. Larson.

24. Factual disputes with regard to Claimant's credibility and symptom magnification are resolved in the favor of Claimant. Claimant's testimony at hearing was credible and

Claimant gave no indication that he was interested in having a third lumbar surgery for any reason other than hopes of gaining a more complete recovery from his injury.

25. Dr. Larson's recommendation for a lumbar fusion is supported by Dr. Dirks and is not overcome by the other evidence. Dr. Larson's role as Claimant's treating physician and the fact that both Dr. Larson and Dr. Dirks are practicing neurosurgeons tilt the evidence in Claimant's favor.

26. The outcome of the proposed surgery will depend, at least in part, on Claimant's willingness to stop smoking and the extent to which he abides by post-surgical medical advice. Claimant has demonstrated a desire to stop smoking and has decreased his smoking frequency. Neither Dr. Larson nor Dr. Dirks determined that Claimant should postpone or avoid fusion surgery because of the effects of smoking.

CONCLUSION OF LAW

The lumbar fusion surgery proposed by Dr. Larson constitutes necessary and reasonable medical treatment pursuant to Idaho Code § 72-432.

RECOMMENDATION

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

DATED this 3 day of February 2009.

INDUSTRIAL COMMISSION

/s/ _____
Susan Veltman, Referee

/s/
Thomas E. Limbaugh, Commissioner

/s/
James F. Kile, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __12__ day of __February____, 2009, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

THOMAS B AMBERSON
P O BOX 1319
COEUR D'ALENE ID 83816-1319

E SCOTT HARMON
LAW OFFICES OF HARMON, WHITTIER & DAY
P O BOX 6358
BOISE ID 83707-6358

jkc

/s/