

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN BERRY,)
)
 Claimant,)
)
 v.)
)
 ADVANCED BUILDINGS, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-014653

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

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Lewiston, Idaho, on May 5, 2009. Michael T. Kessinger of Lewiston represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and filed post-hearing briefs. The matter came under advisement on August 13, 2009 and is now ready for decision.

ISSUES

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

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment on April 18, 2008;
2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
3. Whether and to what extent Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432; and
4. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total (TPD/TTD) benefits.

The parties reserve all other issues.

CONTENTIONS OF THE PARTIES

Claimant contends that he sustained a lifting injury at work on April 18, 2008 that aggravated his pre-existing lumbar condition and resulted in a new injury requiring lumbar surgery. Claimant maintains that the surgery did not alleviate his symptoms and that he has not been able to obtain necessary medical care to reach maximum medical improvement. Claimant seeks medical benefits and TTD benefits from April 19, 2008 through the date of hearing and continuing until he reaches medical stability.

Defendants contend that Claimant's need for lumbar surgery was related to a progression of chronic back problems and previous injuries. Defendants challenge Claimant's credibility and assert that Claimant failed to give an accurate medical history to multiple medical service providers. Defendants deny Claimant's entitlement to benefits associated with the claimed injury of April 18, 2008.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits A through H;
2. Defendants' Exhibits A through L;
3. Claimant's testimony taken at hearing; and
4. The Industrial Commission's legal file.

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 born in California in 1976. He was 32 years old and resided in Orofino, Idaho, at the time of hearing. Claimant attended school through the 9th grade. He was hired by Employer as a laborer in February 2008 at a rate of \$10 per hour. Claimant's job duties consisted of general construction work such as roof building, metal cutting, installation of insulation and equipment operation. The job required Claimant to lift objects ranging from 10 to 100 pounds. Claimant worked on projects in Pierce and Weippe, Idaho.

2. Claimant was employed by Clearwater Homes from 1994 through 2006 where he participated in concrete pours and set up manufactured housing. Other than occasional odd-jobs, Claimant was unemployed from late 2006 through January 2008.

Pre-Injury Back Treatment

3. Claimant suffered a minor back injury in 1989 as the result of a horseback riding accident. He was diagnosed with a contusion and diagnostic studies were not indicated.

4. In 1991 Claimant reported intermittent back discomfort with coughing, sometimes a sharp pain. During his teenage years, Claimant was frequently treated for sinus issues and coughing which were aggravated by smoking.

5. Claimant was in a motorcycle accident in August 2001. He had multiple contusions and abrasions, including his back, but no bony injury.

6. In December 2003, Claimant was involved in a roll-over motor-vehicle accident as a passenger in a pick-up truck. Claimant was ejected from the vehicle. He reported tenderness to his ribs and back pain but did not receive back treatment as a result of the injury.

7. In February 2006, Claimant injured his rib-cage at work while pulling carpet. By early March 2006, it was noted that his back and ribs were much better.

8. In January 2000, Claimant sustained a lifting injury to his lower back while working for Clearwater Homes. A lumbar MRI performed on March 8, 2000 revealed minimal broad based disc bulges at L4-5 and L5-6 which touched exiting nerve roots at L4 and L5 without frank impingement.

9. Claimant's condition following the 2000 injury was considered non-surgical. Claimant underwent a course of chiropractic treatment and epidural steroid injections for radicular symptoms. He reported episodes of leg numbness, particularly at nighttime as well as pain going down his right leg and into his right calf. Claimant was assigned restrictions through September 2000 but was not assigned permanent restrictions or impairment as a result of the 2000 injury.

10. Claimant did not have a primary care physician and routinely sought treatment from the emergency room at St. Joseph Regional Medical Center in Lewiston (St. Joseph) or Clearwater Valley Hospital in Orofino (Clearwater).

11. On March 1, 2008, Claimant presented to St. Joseph with low back pain. He provided a history of chronic back pain and described a re-injury occurring a month prior as the result of lifting and twisting an I-beam.¹ He also mentioned pain to his right hip and groin as the result of wrestling. Claimant described on-and-off lumbar problems since his steroid injections in 2000. Claimant was diagnosed with a back strain and an exacerbation of chronic back pain with radiation to his hip. Claimant was prescribed medication and advised to follow-up if his condition worsened. He was encouraged to establish a primary care relationship with a physician instead of seeking emergency room treatment for back pain and medication.

12. On March 19, 2008, Claimant presented to Clearwater with fairly severe low back pain radiating down his left leg. He reported a tingling sensation on the top of his left foot and left leg. He was diagnosed with low back pain, perhaps secondary to a herniated disc, with radicular pain in his left lower extremity. He was instructed to follow-up on April 1, 2008. It was noted that Claimant had finished a prescription of hydrocodone and a prednisone dose pack. He was given a shot of Toradol for pain and a prescription for Norco.

13. Claimant was re-evaluated on April 1, 2008 at which time he reported slow improvement. He mentioned his injury in 2000 but reported being pain free until his recent episode of back pain. Claimant could not recall a triggering episode of falling or unaccustomed lifting. He was diagnosed with a back strain and probable disc involvement. His prescriptions for Norco and Ibuprofen were refilled.

¹ Claimant's testimony and the medical records reflect that Claimant sustained a back injury while working for Employer in February 2008. Claimant opted not to report that injury and sought treatment on his own. Claimant did not file a Complaint with the Industrial Commission regarding his February 2008 injury and compensability of that injury is not before the Commission.

Post-Injury Treatment and Evaluation

14. On April 18, 2008, Claimant bent over to lift a heavy pipe at work. He was in a hunched position and felt a sharp pain in the middle of his lower back when he lifted. The next day, he experienced pain radiating down his left leg.

15. Claimant sought treatment at Clearwater on April 21, 2008 for low back pain with pain in his left leg. He reported that the onset of pain occurred on April 18, 2008 while lifting rebar and metal pipes at work. Claimant was diagnosed with acute back pain, provided medication and advised to return if he had additional problems. Claimant underwent a drug screen that was positive for cannaboid metabolites. Claimant testified at hearing that he had not used marijuana and explained the positive test result as possibly reflecting second hand smoke inhalation because he had an acquaintance that used marijuana.

16. On April 24, 2008, Claimant was evaluated at St. Joseph. He described his onset of low back pain as occurring while pulling rebar and lifting pipe on April 18, 2008. Claimant was diagnosed with an exacerbation of chronic back pain. The examiner expressed concern regarding the amount of hydrocodone taken by Claimant in a short period of time and declined to provide additional narcotic medication. The possibility of worsening disc disease was discussed and a referral for an MRI considered. However, it was felt that Claimant should pursue treatment through a primary care physician and this was reiterated to Claimant.

17. The next day, Claimant presented to Clearwater with complaints of back pain but indicated that he could not recall a specific injury. The examiner expressed concerns about abuse of pain medication and Claimant's use of the emergency room for chronic back pain and pain medications. Claimant was described as somewhat angry and exhibiting a fair amount of pain behavior. He was instructed to follow-up with Christopher Jenkins, D.O.

18. Dr. Jenkins evaluated Claimant on April 28, 2008 and diagnosed Claimant with low back pain and radiculopathy. He reviewed Claimant's MRI results from 2000 and recommended a repeat study.

19. Claimant underwent a lumbar MRI on May 2, 2008 that revealed a disc herniation at L5-S1 with an extruded fragment encroaching on the S1 left nerve root. Degenerative changes and a broad based disc bulge were noted at L4-5.

20. On that same day, Claimant was evaluated by a physician assistant at Clearwater and requested medication for severe back pain and difficulty sleeping. He was given a refill of hydrocodone as well as a sleeping aid. Claimant requested and obtained another refill of hydrocodone a week later, on May 9, 2008.

21. On May 18, 2008, Claimant returned to Clearwater with increased pain and left lower extremity symptoms. He reported that he was out of his medications. Claimant's recent MRI findings were discussed and a referral to Gregory Dietrich, M.D., for surgical consultation was made. Claimant was admitted to the hospital overnight because of the severity of his symptoms.

22. Claimant was evaluated by Dr. Jenkins the next morning. Claimant reported left foot numbness and weakness. Dr. Jenkins noted that Claimant had severe back pain with left S2 nerve root impingement and significant L4-5 disc bulge.

23. On May 20, 2008, Claimant was evaluated by Dr. Dietrich. He noted that Claimant's onset of pain began when he bent over and lifted something at work. Claimant reported that he worked another hour following his injury but sought treatment the next day because his pain was so severe. Based on his neurological evaluation of Claimant, Claimant's

failure to improve over a period of four weeks and Claimant's MRI findings, Dr. Dietrich recommended a microdiscectomy at L5-S1.

24. Dr. Dietrich performed surgery on May 21, 2008. Reports from Dr. Dietrich in the months following surgery reflect satisfactory progress and a resolution of radicular symptoms.

25. Claimant continued to seek treatment at Clearwater for chronic low back pain and flare-ups. By September 2008, it was noted that he needed an increasing amount of narcotic pain medication and was taking more than the prescribed does of hydrocodone. Emergency room visits became less frequent but continued on an intermittent basis through at least early 2009.

26. In November 2008, Claimant's attorney forwarded correspondence to Dr. Jenkins requesting that he check "yes" or "no" to four questions regarding causation of Claimant's condition and the reasonableness of medical treatment rendered. Dr. Jenkins checked the "yes" response to all questions indicating that Claimant's work related injury of April 18, 2008 permanently aggravated his pre-existing back condition and that medical treatment performed by himself and Dr. Dietrich constituted reasonable medical care related to the injury. There is no narrative report or explanation accompanying Dr. Jenkins's responses.

27. Dr. Jenkins's responses were forwarded to Dr. Dietrich with an inquiry as to whether Dr. Dietrich agreed with Dr. Jenkins. Dr. Dietrich marked the "yes" space without additional comment.

28. On February 16, 2009, Claimant was evaluated by neurosurgeon Jeffrey Larson, M.D., at the request of Surety. Dr. Larson reviewed medical records, interviewed Claimant and performed a physical examination. Dr. Larson noted an antalgic gait that was exaggerated in the examination room as compared to his observation of Claimant in the parking lot. Claimant

acknowledged his industrial injury of 2000 when providing his history to Dr. Larson, but specifically denied seeing physicians or going to the emergency room for treatment or evaluation of his back between 2000 and April 18, 2008.

29. Dr. Larson explained that the records he reviewed were inconsistent with Claimant's representations and that there was a well-documented history of lower back pain with left radicular symptoms in the months prior to the alleged April 18, 2008 injury. He concluded that Claimant's disc herniation and subsequent surgery were not related to the April 18, 2008 injury.

30. At hearing, Claimant admitted that he did not give a complete history to Dr. Larson and explained that it was because he found Dr. Larson to be snobby and rude and he became fed up with the way Dr. Larson was acting.

31. On April 9, 2009, Claimant was evaluated by orthopedic surgeon John McNulty, M.D., at the request of his attorney. Dr. McNulty reviewed medical records, interviewed Claimant and performed a physical examination. He specifically reviewed Dr. Larson's opinion regarding causation and disagreed with it. Dr. McNulty concluded that Claimant sustained a permanent aggravation of his pre-existing lumbar spine condition as the result of his April 18, 2008 work-related injury which necessitated his May 21, 2008 lumbar surgery.

32. Dr. McNulty concluded that Claimant recovered from his back injury in 2000. He reviewed the March 1, 2008 report from the emergency room. Dr. McNulty did not have access to medical reports from March 19, 2008 or April 1, 2008 and was under the impression that there was no medical documentation of left radicular symptoms prior to the April 18, 2008 injury.

33. Dr. McNulty's conclusion is based, in significant part, on the fact that Claimant demonstrated radicular pain and numbness to his left lower extremity following the April 18, 2008 injury, but not before.

Return-to-Work Status

34. Claimant has not returned to work or sought employment since April 18, 2008.

35. In December 2008, Dr. Jenkins indicated that Claimant would benefit from retraining and could perform clerical work in an office setting without lifting or carrying heavy objects. He felt that it would be difficult for Claimant to return to a manual labor position.

36. In April 2009, Dr. McNulty determined that Claimant could perform sedentary duties but was unable to return to his previous occupation of heavy labor.

37. At the time of hearing, it was Claimant's understanding that Dr. Dietrich released him to work in July or August Of 2008, but that Dr. Jenkins had not released him. Medical records reflect that Dr. Dietrich released Claimant from ongoing care but did not specifically address Claimant's ability to return to work.

DISCUSSION AND FURTHER FINDINGS

Accident and Injury

38. A claimant must prove that he or she was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996). A claimant is not required to establish a specific time and place of injury. *Hazen v. Gen. Store*, 111 Idaho 972, 729 P.2d 1035 (1986). Rather, an accident need only be reasonably located as to the time when and the place where it occurred. *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002). To prevail on a worker's compensation

claim, a claimant must establish that an accident happened by a preponderance of the evidence. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008).

39. Claimant's testimony regarding his mechanism of injury is unrefuted and consistent with the job duties performed by Claimant. Based on Claimant's testimony and the emergency room records from Clearwater on April 21, 2008, Claimant has met his burden to establish that he was injured as the result of an accident arising out of and in the course of employment on April 18, 2008.

Causation and Medical Care

40. 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).

41. Idaho Code § 72-432(1) mandates that an employer provide reasonable medical care that is related to a compensable injury. The claimant bears the burden of proving that medical expenses were incurred as a result of an industrial injury. *Langley* at 785. The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson V. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the

medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

42. The most significant issue in this case is whether Claimant's injury of April 18, 2008 is limited to a strain/sprain super-imposed onto his pre-existing lumbar condition or whether Claimant's April 18, 2008 injury constituted a permanent aggravation of Claimant's pre-existing lumbar condition. There is at least some evidence in the record to support either determination. The nature of Claimant's lumbar condition and symptomology just prior to the April 18, 2008 injury is highly relevant to this determination.

43. Claimant's lumbar MRI from May 2008 shows a disc herniation, extruded fragment and nerve encroachment that were not present at the time of his March 2000 study. Although Claimant reported radicular symptoms in March 2008, there are no diagnostic studies to indicate the extent to which the worsening of Claimant's condition pre-dated the April 18, 2008 injury.

44. Claimant's representations regarding his pre-injury condition and the cause for his increased symptomology after April 18, 2008 are not consistent or credible. Although Claimant described a work-related injury during his emergency room visits on April 21 and 24, 2008, the report from Clearwater on April 25, 2008 reflects that Claimant could not recall a specific injury. Claimant's failure to disclose his lumbar symptoms and medical treatment during March and April of 2008 to Dr. Larson significantly impairs his credibility on this issue. Claimant tended to subtly minimize the significance of his prior symptoms and maximize the impact of his April 18,

2008 injury. For example, Claimant represented to Dr. Dietrich that the pain from his April 18th injury was so severe that he worked for one additional hour on the date of injury and sought treatment the next day when he actually worked four more hours on the date of injury and sought medical treatment three days after the injury.

45. Claimant points out the significance of his work history and asserts that his ability to perform heavy-duty work until April 18, 2008, but not thereafter, supports a conclusion that he suffered a permanent aggravation of his condition. Claimant's assertion is undercut by his actual work history and the medical records. Claimant was essentially unemployed for more than a year prior to commencing work for Employer in February 2008. Claimant experienced an exacerbation of his previous back problems within a couple of weeks of working for Employer. Claimant was prescribed and presumably taking, based on his need for refills, pain medication for back complaints from March 1, 2008 until his injury of April 18, 2008.

46. Both Drs. Larson and McNulty were hired to perform a one-time evaluation of Claimant and render opinions as to causation and other medical issues. Dr. Larson determined that the April 18, 2008 injury was not a causative factor in Claimant's disc herniation and need for surgery, whereas Dr. McNulty determined that a causal relationship existed and that Claimant's lumbar condition was permanently aggravated by the April 18th injury. The opinions of Dr. Larson are adopted over those of Dr. McNulty. It is clear that medical reports from March 18, 2008 and April 1, 2008 were not included in records reviewed by Dr. McNulty. Dr. McNulty placed significance on Claimant's left leg symptoms being first reported in late April 2008. Dr. McNulty's lack of awareness that similar symptoms were medically documented between March 1, 2008 and April 2, 2008 reduces the weight to be afforded to his conclusions.

47. Reports from both Drs. Jenkins and Dietrich mention Claimant's previous injury in 2000 as well as the April 18, 2008 injury. Neither physician provided an opinion regarding causation other than the check the box responses referenced in preceding paragraphs 26 and 27. It does not appear that either physician was provided with Claimant's medical records generated during the two months prior to Claimant's April 18th injury. Although Dr. Jenkins likely had access to other records generated at Clearwater, his "yes" check is insufficient to know what information he considered and does not provide a rationale for his opinion.

48. Claimant has failed to meet his burden of proof to establish that his lumbar disc herniation and left leg radicular symptoms were caused or permanently aggravated by the April 18, 2008 injury.

49. Claimant has established entitlement to medical benefits for treatment related to his lower back from April 21, 2008 through May 17, 2008. As of May 18, 2008, Claimant was hospitalized and treated for his disc herniation and nerve encroachment as identified on his May 2, 2008 MRI. Claimant has not established on a more probable than not basis that medical treatment received after May 17, 2008 is causally related to his April 18, 2008 injury.

TTD

50. Idaho Code § 72-408 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 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). Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to temporary disability benefits unless and until such evidence is presented that he has been released for work, or light duty work and the employer

makes light duty work available to him. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

51. Based on the above analysis, Claimant continued to be in a period of recovery for his April 18, 2008 injury from April 19, 2008 through May 17, 2008. Although Claimant was disabled and receiving medical treatment for his back after May 17, 2008, a causal relationship between such disability and the compensable injury of April 18, 2008 was not established.

52. Claimant established entitlement to TTD benefits from April 19, 2008 through May 17, 2008.

CONCLUSIONS OF LAW

1. Claimant sustained an injury caused by an accident arising out of and in the course of employment on April 18, 2008.

2. Claimant failed to establish that his industrial injury of April 18, 2008 extends to include his lumbar MRI findings of May 2, 2008 and/or the need for his lumbar surgery of May 21, 2008.

3. Claimant is entitled to medical treatment rendered for his back injury from April 21, 2008 through May 17, 2008.

4. Claimant is entitled to TTD benefits from April 19, 2008 through May 17, 2008.

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 _____ day of _____ 2009.

INDUSTRIAL COMMISSION

Susan Veltman, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____ a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

MICHAEL KESSINGER
P O BOX 287
LEWISTON ID 83501

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

jkc

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVEN BERRY,)
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 Claimant,) **IC 2008-014653**
)
 v.)
)
 ADVANCED BUILDINGS, INC.,)
)
 Employer,)
) **ORDER**
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed 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 sustained an injury caused by an accident arising out of and in the course of employment on April 18, 2008.
2. Claimant failed to establish that his industrial injury of April 18, 2008 extends to include his lumbar MRI findings of May 2, 2008 and/or the need for his lumbar surgery of May 21, 2008.

3. Claimant is entitled to medical treatment rendered for his back injury from April 21, 2008 through May 17, 2008.

4. Claimant is entitled to TTD benefits from April 19, 2008 through May 17, 2008.

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

DATED this _____ day of _____, 2009.

INDUSTRIAL COMMISSION

R. D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

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

MICHAEL KESSINGER
P O BOX 287
LEWISTON ID 83501

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

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