

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSE GALLEGOS,)
)
 Claimant,)
)
 v.)
)
 LUIS M. BETTENCOURT,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-020633

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

November 17, 2009

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 Twin Falls, Idaho, on June 24, 2009. James C. Arnold of Idaho Falls represented Claimant. E. Scott Harmon of Boise represented Defendants. The parties submitted oral and documentary evidence and post-hearing briefs. The matter came under advisement on September 29, 2009 and is now ready for decision.

ISSUES

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

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident of June 19, 2008;

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

3. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits (TPD/TTD).

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that his present need for lumbar surgery is causally related to his industrial accident of June 19, 2008. He seeks medical benefits associated with the recommended surgery and temporary disability benefits from June 27, 2008 and continuing until he reaches medical stability.

Defendants contend that there is no causal nexus between Claimant's work and the proposed lumbar surgery. Defendants dispute Claimant's entitlement to additional medical or income benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits A through N admitted at hearing, which includes the pre-hearing depositions of David B. Verst, M.D. and Joseph Verska, M.D.;

2. Testimony taken from Claimant at hearing with the benefit of a Spanish/English interpreter; and

3. The Industrial Commission's legal file.

All objections made during the pre-hearing 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, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

Background

1. At the time of hearing, Claimant was 47 years old and resided in Jerome, Idaho. Claimant attended school through the 6th grade in Mexico and moved to the United States in approximately 1999. Claimant performed general labor, construction and house painting in Mexico. Since 1999, he has worked for various dairies in Idaho's Magic Valley. Claimant speaks only Spanish and has minimal English comprehension.

2. Claimant was hired by Employer on April 29, 2008. Employer operates a dairy. Claimant's job duties included bringing cows from corrals to the milking machines and general clean-up of the milking area. Picking up towels from the floor was a task that Claimant performed on a daily basis.

3. There is no evidence that Claimant received medical treatment to his spine or that he had physical limitations attributable to back problems prior to June 19, 2008.

Injury and Initial Treatment

4. On June 19, 2008, Claimant bent over to pick up a towel from the floor of the dairy.¹ He experienced pain as he stood up. The pain was initially mild but became worse after Claimant continued working for a few days. Tr. p. 29, 1 2-4.

5. Claimant sought treatment at St. Benedicts Family Medical Center (St. Benedicts) the same day. His history was obtained using a bilingual hospital employee. He reported right-sided low back pain when he stood up from picking up towels. It was noted that the towels were not heavy and that Claimant did not slip or fall. Claimant did not have leg pain, numbness or

¹ Some medical reports reflect that Claimant picked up multiple towels or a bag of towels. Claimant confirmed at hearing that he picked up a single towel.

tingling. He was diagnosed with low back pain and advised to apply ice, gentle massage and take Tylenol or ibuprofen.

6. On June 24, 2008, Claimant sought follow-up care at Jerome Family Clinic (JFC). Claimant reported right-sided low back pain at an intensity of 4 or 5 out of 10 when he bent over. He denied radicular symptoms. Claimant was diagnosed with low back pain, referred to physical therapy and given work restrictions.

7. Claimant returned to JFC on June 27, 2008 with increased pain and right-sided radicular symptoms. The physician assistant who evaluated Claimant noted that Claimant demonstrated medical non-compliance by obtaining chiropractic care for his injury.² A lumbar MRI was recommended to rule out significant pathology based on the severity of Claimant's symptoms. It was noted that objective findings did not support Claimant's complaints- normal blood pressure despite reported severe pain and positive Waddell's sign with axial compression. Claimant was taken off work.

8. On July 1, 2008, Claimant was rechecked at JFC and reported less severe neurological deficits. An MRI was deferred after delays in obtaining authorization for payment and Claimant was again referred to physical therapy. Claimant was diagnosed with an improving lumbar sprain.

9. On July 3, 2008, Surety issued a notice of denial of Claimant's claim for workers' compensation benefits stating that bending over to pick up a towel did not constitute an "accident" or "injury" pursuant to Idaho Code § 72-102.

² At hearing, Claimant testified that he had not been evaluated by a chiropractor but had sought physical therapy as instructed and had been misunderstood at JFC. Medical records reflect that Claimant attended physical therapy on June 20, 2008. There are no chiropractic records in evidence.

10. On July 8, 2008, Claimant returned to JFC for follow-up care and was advised of the denial of his claim and that further medical care to his back would be at his personal expense. Claimant stated that he would hire a lawyer and that the lawyer would find him a doctor to take care of his back. It was noted that Claimant limped into the examination room but exited the room without a limp once he became angry.

11. Claimant returned to St. Benedicts on July 11, 2008 and underwent a lumbar MRI that revealed a mass at L3 that was concerning for metastatic disease that was subsequently ruled out by additional testing. The MRI also revealed multi-level disc bulges and protrusions at L4-5 and L5-S1. Claimant had moderate to severe spinal canal stenosis at L4-5 with congenital narrowing.

12. Claimant presented to JFC on July 17, 2008 based on follow-up instructions from the emergency room. Claimant was reminded that he would be financially responsible for his treatment and became agitated. Claimant was referred to David B. Verst, M.D.

David B. Verst, M.D., and Subsequent Treatment

13. Dr. Verst is an orthopedic surgeon who specializes in spinal surgery and other treatment of the spine. Claimant was initially evaluated by Dr. Verst on July 31, 2008. Claimant provided a history to Dr. Verst that included the onset of back pain as he was bending over to pick up a towel with the subsequent development of right leg symptoms.

14. Dr. Verst diagnosed degenerative disc disease, spinal stenosis and a central disc bulge. He initially recommended rehabilitative treatment, including epidural steroid injections for which he referred Claimant to Clinton Dille, M.D.

15. Claimant could not initially pursue treatment with Dr. Dille due to denial of his claim and lack of alternate insurance or funds. He sought emergency room treatment for pain on

August 14, 2008 at which time he was provided with medication and instructed to return to Dr. Verst.

16. Claimant returned to St. Benedicts on September 2, 2008 with back pain and swelling of the right leg. He explained that his claim had been denied by workers' compensation insurance and that he had been advised to come by the emergency department to try and re-establish the injury as work-related. Claimant was instructed to follow-up with the occupational medicine clinic.

17. Surety initiated benefits in October 2008. Medical benefits totaling \$3,886.49 were paid and a total of \$3,790.24 in temporary income benefits were paid from October 16, 2008 through January 1, 2009 (eleven weeks and one day). Surety's Answer to Complaint filed in September 2008 reflects that the existence of an accident and injury are in dispute. Neither party requested that an issue regarding the existence of an accident and injury be adjudicated at the bifurcated hearing.

18. Claimant was able to pursue injections by Dr. Dille in mid-September 2008. The injections improved Claimant's condition and were repeated in early October 2008.

19. Dr. Verst re-evaluated Claimant on November 13, 2008, at which time he recommended physical therapy. Claimant's condition did not improve with conservative treatment and Dr. Verst recommended surgical intervention when he evaluated Claimant on December 11, 2008. Surgery was indicated because of Claimant's persistent leg pain, nerve pain running down his leg, the impact of his pain on his daily activities and his inability to maintain gainful employment.

20. Based on review of Claimant's lumbar MRI findings, Dr. Verst determined that Claimant's degenerative changes were reflective of a chronic condition and not caused by

bending over to pick up a towel. Dr. Verst estimated that Claimant's degenerative changes progressively worsened over the past 10 to 20 years.

21. On December 18, 2008, Surety forwarded a questionnaire to Dr. Verst inquiring as to whether the need for the proposed surgery was a result of Claimant picking up a towel. Dr. Verst responded "No. Likely coincidence with picking up a towel and underlying spinal stenosis, natural history." Ex. E, p.45e.

22. Both parties sought clarification of Dr. Verst's causation opinion. During cross-examination at his deposition, Dr. Verst agreed that persistent leg pain was causally related to the incident of picking up the towel and that the purpose of the proposed surgery was to relieve that pain. Verst Depo., p.13, l. 23- p.14, l. 7.

23. However, Dr. Verst was asked to explain his seemingly inconsistent opinions and explained that::

[Claimant] was bending down, picking up a towel. It could have been a sneeze, it could have been tying his gym shoe that suddenly can cause leg pain. The onset occurred while he was at work. Do I feel like the underlying pathology was the result of picking up a towel? The answer is absolutely not. There is no evidence on that MRI scan of an acute event. It just happened while he was at work with picking up a towel.

Verst Depo., p.15 l. 3-12.

24. Dr. Verst clarified that, while he believed Claimant's pain came on at the time he picked up the towel, he did not believe the act of picking up the towel required sufficient force to elicit severe neurogenic pain and reiterated that:

I'm not convinced that...picking up a towel could create enough force biomechanically to elicit severe nerve pain. I've been doing this for a long time, and I just cannot see where picking up a towel, that – the weight of a feather, is going to do this. So, biomechanically, I don't think so.

Verst Depo., p.17, l. 14-22.

Joseph Verska, M.D.

25. Dr. Verska is an orthopedic surgeon who specializes in surgical and non-surgical management of spine-related problems. He evaluated Claimant on February 19, 2009 at the request of Claimant's attorney. Dr. Verska reviewed Claimant's medical records, including reports from Dr. Verst and Claimant's lumbar MRI study.

26. Dr. Verska concluded that Claimant failed to achieve resolution of his symptoms with conservative care and recommends a lumbar laminectomy at L4-L5.

27. Dr. Verska opined that:

I believe the fact that the patient has symptoms coming on after his work-related injury directly link his symptoms to the work-related injury. There is no doubt that the patient probably has some preexisting congenital stenosis but he does not have the disc herniation. I believe this preexisting spinal stenosis made him vulnerable for symptomatic spinal stenosis and the lifting injury caused him to herniate the disk at L4-L5, thus creating more compression on the nerve roots making his central canal stenosis more symptomatic.

Ex. J, p. 88.

28. In his report, Dr. Verska described Claimant's mechanism of injury as repetitive lifting, twisting and bending to pick up towels. During his deposition, he explained that his initial causation opinion was not rendered based on a single lifting incident. However, his opinion is based on the fact that Claimant had no pain prior to the work-related injury but developed pain during and after the work-related injury. His causation opinion was unchanged based on clarification of Claimant's mechanism of injury. He further explained that pain is an indication that something is wrong and picking up a towel was the event that caused Claimant's pain.

Return to Work

29. Claimant continued to work for Employer through June 27, 2008. He has not worked since June 28, 2008.

30. Claimant was taken completely off work by JFC on June 27, 2008. Dr. Verst did not address Claimant's work limitations in his initial reports, but responded to a letter of clarification from Claimant's attorney and indicated that Claimant was unable to work as of the date of his injury.

DISCUSSION AND FURTHER FINDINGS

Causation and Medical Care

31. 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 his or her 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).

32. 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).

33. Defendants presented legal argument and analysis in their post-hearing brief regarding the definitions of "accident" and "injury" from Idaho Code 72-102. Defendants articulated the difference between an injury arising when the strain of ordinary work becomes sufficient to overcome the resistance of a claimant's body (compensable) and when a claimant merely experiences the onset of pain at work that is unrelated to an accident or injury (not compensable). Such analysis is consistent with the position initially taken by Surety when the claim was denied in its entirety based on the absence of an accident and injury. However, the issue of whether Claimant sustained an injury arising out of an accident in the course of his employment was not raised in this proceeding and is not before the Commission as a stand-alone issue.

34. The primary issue in the present case is whether Claimant's mechanism of injury of bending over to pick up a towel caused Claimant to become a surgical candidate, including whether the injury aggravated Claimant's pre-existing lumbar condition to the point that his need for surgery was accelerated. However, a determination as to whether Claimant sustained *any* injury is necessary to resolve issues regarding medical and temporary income benefits.

35. It is undisputed that Claimant experienced pain as he stood up from bending over to pick up a towel at work. Claimant sought medical treatment on the date of injury and

provided a history consistent with his testimony at hearing. The evidence is sufficient to establish that Claimant sustained a lumbar strain as diagnosed at JFC on July 1, 2008.

36. Claimant met his burden of proof to establish that he sustained a soft-tissue injury and did not merely experience pain that was unrelated to his employment.

37. The medical experts disagree with regard to whether Claimant's mechanism of injury was sufficient to cause or accelerate Claimant's need for surgery. Dr. Verst does not believe that Claimant's injury caused or accelerated Claimant's need for surgery. He relies on biomechanics and his experience as to what mechanisms of injury are sufficient to result in a disc injury and the need for lumbar surgery. Dr. Verst believes that Claimant's MRI findings developed over time and support his opinion.

38. Dr. Verska believes that Claimant's injury caused a disk herniation at L4-5 and prompted Claimant's need for lumbar surgery. He relies on the temporal relationship between Claimant's injury and the onset of symptoms. Dr. Verska believes that Claimant's pre-existing condition was aggravated by the injury and that Claimant's MRI findings support his opinion.

39. Both the opinions of Dr. Verst and Dr. Verska are possible and are supported by at least some evidence. However, the opinions of Dr. Verst are adopted over those of Dr. Verska. Dr. Verst's biomechanical explanation is more persuasive than Dr. Verska's temporal relationship explanation.

40. Dr. Verska's temporal relationship opinion supports the conclusion that Claimant sustained a strain/sprain injury, but is not sufficient to establish that Claimant's lumbar MRI findings and need for surgery are causally related to the injury on a more probable than not basis.

41. Dr. Verst is the treating doctor and had the opportunity to evaluate Claimant on multiple occasions, whereas Dr. Verska performed a one-time evaluation.

42. During re-direct examination, Dr. Verst clarified that Claimant's onset of pain at the time he picked up the towel was coincidental and the mechanism of injury would not be sufficient to cause the type of neurogenic pain that Claimant developed. Dr. Verst's clarification response is consistent with the initial opinion he offered in December 2008 and is adopted. Dr. Verst's opinion that Claimant's mechanism of injury did not cause Claimant's neurogenic pain and need for surgery does not overcome the evidence that Claimant sustained a sprain/strain injury that temporarily aggravated Claimant's pre-existing lumbar condition.

43. Claimant is entitled to medical care for his lumbar spine from June 19, 2008 through July 31, 2008 at which time Dr. Verst's treatment plan was based on diagnoses of degenerative disc disease, spinal stenosis and a central disc bulge. Treatment rendered prior to July 31, 2008 was for a back pain and a lumbar strain. Defendants are not liable for diagnostic studies and treatment performed to rule-out metastatic disease in the mass found at L3 that is not related to the compensable injury.

Temporary Disability

44. 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). Generally, a claimant's period of recovery ends when he or she is medically stable. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

45. Claimant established temporary disability as of June 28, 2008 when he first lost time from work due to his injury. Although Claimant continued to be unable to work, he failed to establish a causal relationship between his work-related injury of June 19, 2008 and his disability beyond July 31, 2008. As of August 1, 2008, Claimant's disability was related to his pre-existing conditions of degenerative disc disease, spinal stenosis and a central disc bulge.

CONCLUSIONS OF LAW

1. Claimant's need for lumbar surgery is not causally related to the industrial accident of June 19, 2008.

2. Claimant is entitled to medical care to his lumbar spine from June 16, 2008 through July 31, 2008, but not thereafter. Defendants are not liable for diagnostic studies performed to rule-out metastatic disease at L3.

3. Claimant is entitled to temporary disability benefits from June 28, 2008 through July 31, 2008. Defendants are entitled to a credit for benefits already paid.

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 27 day of October 2009.

INDUSTRIAL COMMISSION

/s/ _____
Susan Veltman, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of November a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

JAMES ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

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

jkc

 /s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSE GALLEGOS,)	
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Claimant,)	IC 2008-020633
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v.)	
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LUIS M. BETTENCOURT,)	
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Employer,)	ORDER
)	
LIBERTY NORTHWEST)	
INSURANCE CORPORATION,)	November 17, 2009
)	
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's need for lumbar surgery is not causally related to the industrial accident of June 19, 2008.
2. Claimant is entitled to medical care to his lumbar spine from June 16, 2008 through July 31, 2008, but not thereafter. Defendants are not liable for diagnostic studies performed to rule-out metastatic disease at L3.

3. Claimant is entitled to temporary disability benefits from June 28, 2008 through July 31, 2008. Defendants are entitled to a credit for benefits already paid.

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

DATED this 17 day of November, 2009.

INDUSTRIAL COMMISSION

participated but did not sign
R. D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of November, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

JAMES ARNOLD
P O BOX 1645
IDAHO FALLS ID 83403-1645

E SCOTT HARMON
LAW OFFICES OF HARMON, WHITTIER & DAY
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/s/ _____