

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL DIAZ,)
)
 Claimant,)
)
 v.)
)
 FRANKLIN BUILDING SUPPLY CO.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2006-524449

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

Filed: December 18, 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 April 24, 2009. Claimant, Daniel Diaz, was present in person and represented by Brett R. Fox of Boise. Defendant Employer, Franklin Building Supply Co. (Franklin), and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kent W. Day of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on October 14, 2009.

ISSUE

The issues to be decided have been narrowed by the parties to the sole issue of whether Claimant is entitled to lumbar surgery as a result of his industrial accident.

CONTENTIONS OF THE PARTIES

Claimant asserts his entitlement to lumbar surgery due to his industrial accident of September 28, 2006. He relies upon the opinions of Daniel Marsh, M.D., Richard Radnovich, M.D., and Douglas Smith, M.D. Defendants acknowledge Claimant's industrial accident of September 28, 2006, but attribute his need for lumbar surgery to his preexisting lumbar condition. They rely upon the opinion of Roman Schwartsman, M.D.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant and of Christian Moreno, Claimant's son, taken at the April 24, 2009, hearing;
3. Claimant's Exhibits 1 through 10 admitted at hearing;
4. Defendants' Exhibits A through O admitted at hearing; and
5. The post-hearing deposition of Roman Schwartsman, M.D., taken on August 14, 2009.

After having considered the above evidence, and the arguments 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 born in 1968. He was 40 years old and had resided in Boise for seven years at the time of the hearing.

2. In approximately 1999, Claimant hurt his back in Mexico when he fell carrying a 30-kilo sack of beans. He noted pain in his back and left leg. He underwent back surgery in Mexico in approximately 2000, at L5-S1. He had excellent surgical results and returned to work in approximately six months. Between 2000 and 2004, Claimant worked in landscaping,

furniture building, farming, hanging sheetrock, and dishwashing, during which time he had no restrictions and no significant back, hip, or leg pain.

3. In approximately 2004, Claimant began working at Franklin. On September 28, 2006, Claimant was at work helping two other co-workers carry a 55-foot truss—a task usually requiring four people. While helping carry the truss, Claimant slipped on some gravel and fell onto his left side. The two co-workers dropped the truss and it fell on Claimant, striking his right side, hip, and buttock. He felt immediate right leg and back pain. Claimant was working at least 40 hours per week at Franklin at the time of his accident. He was also working part-time as a dishwasher at a restaurant at the time of his accident at Franklin.

4. On October 11, 2006, Claimant presented to Jacob Kammer, M.D., who noted a back contusion, paralumbar tenderness, and back pain on straight leg raise testing. Dr. Kammer continued to note Claimant's complaints of low back pain over the next two weeks. On October 19, 2006, Claimant underwent an MRI which revealed L4-5 degenerative disc disease and a broad-based disc bulge. Claimant then began treating with Daniel Marsh, M.D. Dr. Marsh treated Claimant conservatively and restricted him to light-duty work. In an October 30, 2006, letter, Dr. Marsh indicated that he reviewed the MRI scan personally and with radiology and noted, regarding the right L5 nerve root, that "there may be some slight extruded aspect to the disc herniation there." Dr. Marsh concluded: "I think the patient does have adverse neurodynamic tension, i.e., nerve root irritation of the right L5 nerve root." Claimant's Exhibit 2, pp. 36-37.

5. Claimant's symptoms gradually improved and Franklin then assigned him heavier duties as a wood stacker. His pain promptly worsened. He consulted Dr. Marsh who reaffirmed Claimant's prior work restrictions, after which Franklin again assigned Claimant lighter work. Franklin ultimately terminated Claimant's employment when he was unable to return to heavier work duties.

6. Kevin Kraft, M.D., treated Claimant from August 2007 through January 2008. Dr. Kraft released Claimant from his care in January 2008, after which Defendants ceased paying for Claimant's medical treatment. When Claimant's pain did not resolve, he personally paid for an MRI performed on September 5, 2008, which revealed an L4-5 disc extrusion impacting the right L5 nerve root.

7. On March 12, 2009, Roman Schwartsman, M.D., examined Claimant at Defendants' request and concluded that Claimant's industrial accident did not cause his disk herniation.

8. At the time of hearing, Claimant was still treating with Dr. Marsh and paying for his own medical treatment. Claimant continued to have significant and sometimes debilitating back and right leg pain. Claimant was also working as a dish washer at the Ruby River Restaurant where co-workers assisted him with heavier work duties.

9. Having observed Claimant at hearing the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

10. 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).

11. **Medical care.** The sole issue is whether Claimant is entitled to lumbar surgery due to his industrial accident. Idaho Code § 72-432(1) mandates 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. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000). 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). Thus 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).

12. In the present case, Dr. Marsh has been Claimant's treating physician since shortly after his industrial accident. Dr. Marsh attributes Claimant's L4-5 disc herniation to his slip and fall at work on September 28, 2006. Dr. Marsh's treatment notes establish that he has personally reviewed the MRI, consulted other physicians, including one or more radiologists and a neurosurgeon, and thoroughly considered the cause of Claimant's condition and symptoms. Dr. Kammer's and Dr. Marsh's notes document the presence of Claimant's low back and right leg symptoms from the outset of his industrial accident and progressing through the time of hearing.

13. Richard Radnovich, M.D., examined Claimant on April 30, 2008, and, like Dr. Marsh, concluded that Claimant's ongoing lumbar symptoms and right leg pain are caused by his

September 28, 2006, industrial accident. Neurosurgeon Douglas Smith, M.D., examined Claimant on several occasions and concluded that Claimant needs L4-5 decompression and diskectomy due to his September 28, 2006, industrial accident.

14. Dr. Schwartzman examined Claimant on March 12, 2009, and acknowledged that the L4-5 disc herniation revealed in the 2008 MRI warrants surgical treatment. However, Dr. Schwartzman testified that both the arthritis and the broad-based disc herniation at L4-5 shown in the October 2006 MRI pre-existed Claimant's September 28, 2006, industrial accident. Dr. Schwartzman explained his conclusion by noting that current orthopedic literature indicates that 40% of patients in Claimant's age group have asymptomatic incidental disc bulges as seen on MRI. Dr. Schwartzman's explanation is not entirely persuasive as his description of the relevant medical literature tends to imply that 60% of the people in Claimant's age group do not have preexisting asymptomatic disc bulges and thus it is more probable that Claimant did not have an L4-5 disc bulge prior to his industrial accident.

15. Dr. Schwartzman opined that the mechanism of injury described by Claimant was not the correct causative mechanism for his subsequent complaints. Dr. Schwartzman affirmed that a significant axial load to the lumbar spine, and bending or flexion under such a load, is commonly associated with disc herniation. However, he testified that a blow to the lateral thigh is not a mechanism for causing lumbar disc injury.

16. There are at least two mechanisms of injury present in the instant case: (1) Claimant falling onto the gravel while carrying a very heavy truss; and (2) the truss falling onto Claimant's right thigh or side. Dr. Schwartzman apparently focused on the truss landing on Claimant's right side, hip, buttock, or thigh, but did not address the potential for injury when Claimant slipped and fell while carrying a truss. That the disc extrusion may not have been caused by the truss actually landing on Claimant's right side or thigh does not establish that the

L4-5 disc extrusion is not due to the accident. Even accepting Dr. Schwartzman's testimony that the blow to the right lateral thigh did not cause L4-5 disc herniation, this does not exclude an L4-5 disc herniation from Claimant's fall while carrying a heavy truss.¹

17. The force of Claimant's fall figures prominently in the records which form the basis for the causation opinions rendered by Drs. Marsh, Radnovich, and Smith. Dr. Marsh attributed Claimant's L4-5 disc injury to his "slip and fall at work." Claimant's Exhibit 2, p. 19. Dr. Radnovich described Claimant's accident as "slipping on some gravel and landed on his left side." He then describes the coworkers dropping the truss on Claimant's right lateral upper thigh. Claimant's Exhibit 3, p. 39. Dr. Smith recorded that Claimant "fell to the floor." Claimant's Exhibit 1, p. 5. In contrast, Dr. Schwartzman fails to address the potential for injury from Claimant's fall while carrying a heavy weight and focuses solely on the likely injury from a heavy blow to Claimant's right lateral thigh.

18. The Referee finds the opinions of Dr. Marsh, Dr. Radnovich, and Dr. Smith more persuasive than the opinion of Dr. Schwartzman. Claimant has proven that his L4-5 disk herniation is due to his industrial accident. He has proven his entitlement to lumbar surgery as recommended by Dr. Smith.

CONCLUSION OF LAW

Claimant has proven his entitlement to lumbar surgery as recommended by Dr. Smith due to his industrial accident.

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¹ It is noteworthy that Claimant's 2000 L5-S1 disc injury and surgery in Mexico were caused by his fall while carrying a 30-kilo sack of beans.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 4th day of December, 2009.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

BRETT R FOX
355 W MYRTLE ST STE 100
BOISE ID 83702-7607

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sc _____

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DANIEL DIAZ,)
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 Claimant,)
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 FRANKLIN BUILDING SUPPLY CO.,)
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 CORPORATION,)
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 Surety,)
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 Defendants.)
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IC 2006-524449

ORDER

Filed: December 18, 2009

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion 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 conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has proven his entitlement to lumbar surgery as recommended by Dr. Smith due to his industrial accident.

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

DATED this 18th day of December, 2009.

INDUSTRIAL COMMISSION

/s/ _____
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 18th day of December, 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

BRETT R FOX
355 W MYRTLE ST STE 100
BOISE ID 83702-7607

KENT W DAY
PO BOX 6358
BOISE ID 83707

sc

/s/ _____