

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JACQUELINE (JACKI) KELSCH,

Claimant,

v.

TRINITY HEALTH CORPORATION, dba
ST. ALPHONSUS REGIONAL MEDICAL
CENTER,

Self-Insured
Employer,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2006-002608

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

Filed March 4, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced matter to Referee Michael E. Powers, who conducted a hearing in Boise on March 29, 2012. Claimant was present and represented by Darin G. Monroe and Sam Johnson of Boise. W. Scott Wigle, also of Boise, represented Employer/Surety and Kenneth L. Mallea of Meridian represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented. The parties took three post-hearing depositions and then submitted briefs. This matter came under advisement on November 15, 2012.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether the need for Claimant's cervical surgery is causally related to an industrial accident occurring on February 24, 2006, and, if so,
2. Whether Claimant is entitled to reimbursement by Employer/Surety for the costs associated with her re-do cervical fusion to correct a pre-existing pseudoarthrosis, and,
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a) Total Temporary Disability (TTD);
 - b) Permanent Partial Impairment (PPI);
 - c) Permanent Partial Disability (PPD);
 - d) Permanent Total Disability (PTD) as an odd-lot worker or otherwise;
4. Whether apportionment under Idaho Code § 72-406 is appropriate;
5. Whether ISIF is liable under Idaho Code § 72-332;
6. Whether apportionment under the *Carey* formula is appropriate; and
7. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that she permanently aggravated her pre-existing asymptomatic pseudoarthrosis at C7-T1 when her left knee gave out and she fell, landing on her right knee. She further contends that she also suffered a whiplash-type injury in her fall that created new C8 radiculopathies that caused her previous fusion to become symptomatic and necessitating the need for a re-do surgery for which she seeks reimbursement. Claimant relies on the opinions of her treating neurosurgeon to establish causation. She argues that

the permanent restrictions imposed by her physicians regarding the limited use of her hands renders her an odd-lot worker according to Claimant's and ISIF's vocational experts. Claimant is entitled to an unspecified amount of TTD benefits and PPI benefits equaling 4% of the whole person. Claimant also contends that she is entitled to an award of attorney fees because Employer/Surety did not explore the permanent aggravation aspect of this claim with their expert neurosurgeon, and did not even provide him with Claimant's expert's opinions in any event.

Employer and Surety deny that Claimant's February 24, 2006 fall contributed to the need for her revision surgery. Claimant continued working after her accident and was released from care regarding her right knee contusion after two doctor visits and was assigned a 0% whole person PPI rating. Claimant did not complain of any neck or related symptoms until much later, lending support for the proposition that she did not hurt her neck at the time of the accident. The need for the re-do surgery was caused by the natural progression of her pre-existing pseudoarthrosis. Had Claimant injured herself to the extent she now claims, the pain associated with the fusion failure would have caused immediate and severe pain and she would have immediately complained of the same. The first mention of Claimant's February 2006 accident is found in a letter authored by a physician in response to a nurse case manager's inquiries dated September 8, 2006. Claimant's treating surgeon did not mention Claimant's February 2006 fall until he authored a letter to her attorney, dated February 11, 2007. Even if Claimant's causation theory is accepted, she has, nonetheless, suffered no PPD as a result of her fall in 2006, as no PPI was assigned for that event. Finally, if total disability is found, such total disability would be

due to a combination of Claimant's pre-existing conditions constituting subjective hindrances that combines with her 2006 injury, thus triggering ISIF liability.

ISIF joins Employer/Surety in questioning Claimant's causation evidence. In the event the Commission sides with Claimant on the causation issue, ISIF contends that they bear no responsibility because she and/or Employer have failed to prove she suffered from any pre-existing impairments that constitute subjective hindrances to obtaining or retaining employment. Further, ISIF contends that Claimant and/or Employer have failed to prove any disability resulted from any combination of a pre-existing physical impairment and Claimant's 2006 accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1-27.
2. ISIF Exhibits 1-12.
3. The hearing testimony of Claimant, Claimant's friend Ann O'Dell, Claimant's husband Stephen Kelsch, and certified nurse case manager, Robin Sexton, R.N.
4. The post-hearing depositions of: Douglas Crum, taken by ISIF on April 26, 2012; Kenneth M. Little, M.D., taken by Claimant on June 21, 2012, and Barbara K. Nelson, taken by Claimant on July 18, 2012.

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

FINDINGS OF FACT

1. Claimant was 60 years of age and resided in Boise at the time of the hearing. She graduated from Nampa High School in 1971 followed by some training in cosmetology. Vocational expert Barbara Nelson summed up Claimant's work experience as follows:

And as far as work, she primarily worked in semiskilled jobs. She has been a day-care provider and a baker in her early years. And then later she went to work for the Boise School District in a couple of different capacities, one as a teacher's aide and the other as what they call a playground duty person. And then she worked for several years as an assistant manager of a fabric store. And lastly, she worked for Saint Alphonsus in the clerical capacity.

Nelson Deposition, pp. 12-13.

Pre-subject accident medical care

2. In 2004, Claimant sought treatment from Timothy Johans, M.D., a local neurosurgeon, for neck pain. An MRI revealed severe degenerative disk disease at multiple levels of Claimant's cervical spine. On November 10, 2004, Dr. Johans performed a C5-6, C6-7, C7-T1 anterior cervical discectomy, wide foraminotomy, and allograft fusion and plate arthrodesis. In a History and Physical prepared on November 1, Dr. Johans noted, "Jackie Kelsch is an otherwise healthy 52-year old lady whose chief complaint is horrible pain in her neck, right shoulder blade, right shoulder, all the way down the arm with progressive pain, numbness, tingling and weakness, as well as numbness and tingling in the left hand." Defendants' Exhibit 1, p. 4. Regarding the surgery itself, Dr. Johans recorded, "This was a very complex and difficult operation, much harder than usual because of the severe degenerative aspects." *Id.*, p. 7.

3. Claimant initially did well following her surgery symptom-wise; however, by March 11, 2005, extension/flexion films revealed, “. . . she does not appear to have a mature fusion at this time.” *Id.*, p. 14. Claimant was to return in six months for follow-up x-rays.

4. Not long after her 2004 surgery, Claimant suffered a fall that set back her recovery. She fell at work in November 2005 and injured her left knee that resulted in a workers' compensation claim. While her left knee was being treated, Claimant underwent a lap-band procedure in 2005 to treat her obesity. Also during this time period, her husband was deployed to Afghanistan. Further, Claimant learned that the cadaver bone used in her fusion was traced back to a mortuary that was selling contaminated body parts on the black market, thus putting her at risk for acquiring HIV, hepatitis, or other diseases.

The subject accident

5. Claimant began working for Employer in November 2001 as a patient registrar in Employer's psychiatric department. On February 24, 2006, while walking in Employer's cafeteria, Claimant's left knee gave out causing her to fall on her right knee. Claimant saw Michel Gibson, M.D., who had been treating her left knee, on the day she fell. Dr. Gibson recorded this history:

I had just seen Jacki for follow-up of her left knee contusion from a fall. Today while at work she was walking and she says she had been favoring her left knee because it is painful and she fell. She thinks she just might have caught the toe of her right foot on the carpet and it brought her to the ground striking her good knee, or the right knee. Now the right knee hurts more than the left knee ever did. She has been limping more. She has not had any treatment so far.

Defendants' Exhibit 2, p. 17.

6. Dr. Gibson ordered x-rays of Claimant's right knee that were normal. He diagnosed a right knee contusion. Claimant returned to Dr. Gibson on February 28, 2006 at which time Claimant's right knee exhibited minor tenderness but no other complications. Dr. Gibson diagnosed "knee contusion with rapid improvement." *Id.*, p. 23. At that time, Dr. Gibson released Claimant from his care regarding her right knee without restrictions or impairment. Surety accepted the claim and closed it after paying \$250.00 in medical care. Claimant missed no work as a result of her right knee injury.

Post-subject accident medical care

7. Dr. Gibson continued to treat Claimant's left knee until conservative measures failed, and he referred Claimant to Roman Schwartsman, M.D., an orthopedic surgeon. Claimant and Dr. Johans had a falling-out over the possibly contaminated allograft product. Claimant was given periodic blood tests to determine whether she had contracted a disease. Flexion/extension x-rays taken in March 2006 raised the possibility of a failed cervical fusion. In an April 7, 2006 letter to Claimant's family physician, Dr. Johans acknowledged the bone the hospital gave him to place in Claimant's neck was part of a recall. He further indicated that Claimant's blood tests were all negative and he did not think that ". . . there is [sic] any infectious concerns at this point." Defendants' Exhibit 1, p. 17. Dr. Johans indicated that despite the negative blood tests, Claimant was "very concerned" about infections. *Id.* Claimant informed Dr. Johans that she had pain in her shoulders for about five months and progressive¹ weakness in her hands, essentially the same symptoms she presented with before her first cervical fusion. She also showed Dr. Johans that she can cause spasms in her hands that he described as "bizarre." He noted that the spasms did not happen until he called Claimant and told her about the bone recall

¹ Claimant did not mention her accident of February 24, 2006, or any other traumatic event as being the cause of her symptoms.

study. He had no idea what caused the spasms. Dr. Johans was not concerned that the x-rays revealed a questionable union of Claimant's cervical fusion. Claimant was to return in three months for more x-rays; she never returned to Dr. Johans.

8. On April 26, 2006, Dr. Schwartzman performed a left knee arthroscopy. Claimant's post-operative course was uneventful and she was released to return to work without restrictions on May 11, 2006. Robin Sexton, R.N., a nurse case manager hired by Surety, accompanied Claimant to this appointment. Claimant informed Ms. Sexton that she was concerned about her cervical fusion and her deteriorating relationship with Dr. Johans. Ms. Sexton suggested that Claimant see Paul Montalbano, M.D., a Boise neurosurgeon. Claimant never informed Ms. Sexton that her neck issues had anything to do with an accident or any traumatic event; had she done so, Ms. Sexton testified that she would have informed Surety of a possible workers' compensation claim.

9. In a May 26, 2006 e-mail to Employer, Claimant indicated that she had received input from Dr. Montalbano that her cervical fusion did not take. No mention was made of Claimant's February 24, 2006 accident or any other traumatic event that may have been responsible for her cervical complaints.

10. Rather than seeing Dr. Montalbano, Claimant, on the recommendation of friends, saw Dr. Montalbano's colleague, Kenneth Little, M.D., another neurosurgeon. In a History and Physical prepared on June 6, 2006, Dr. Little noted that Claimant's chief complaints were progressive bilateral hand weakness and neck pain. Claimant did not mention her February 24, 2006 accident or any other traumatic event as being a precipitating event that may be causing her symptoms. A cervical CT obtained June 6th showed a pseudoarthrosis at C7-T1. Dr. Little diagnosed progressive bilateral C8 radiculopathies and possible early cervical myelopathy, (evidenced by difficulties with gait

and loss of fine motor coordination in her hands), secondary to C7-T1 pseudoarthrosis with associated central canal and neural foraminal compromise. Her neck pain is likely due to the pseudoarthrosis. Defendants' Exhibit 5, p. 7. There is no mention of Claimant's February 24, 2006 accident or of any other traumatic event.

11. On June 12, 2006, Dr. Little authored a letter to Claimant's primary care physician wherein he again references progressive hand weakness and progressive C8 radiculopathies. There is no mention of Claimant's February 24, 2006 accident or any other traumatic event.

12. On July 8, 2006, Dr. Little performed a C6-T1 fusion and bilateral C7-T1 foraminotomies. Post-surgery, Claimant participated in physical therapy and had a good recovery. Dr. Little did not treat Claimant as a workers' compensation patient.

13. On December 4, 2006, Dr. Schwartsman performed a total knee arthroplasty on Claimant's left knee.

14. On January 11, 2010, Dr. Little performed an L2-S1 with screw and rod fixations and caging. Unfortunately, Claimant developed an infection, and Dr. Little again performed surgery on January 28, 2010 to revise her wound and address her infection.

15. Based on cervical CT scans showing degenerative problems at C4 and foraminal narrowing at C7-T1, Dr. Little performed C4-5 laminectomy to correct a progressive cervical myelopathy. Claimant is not contending that this surgery is work-related.

16. Claimant continued to experience low back problems and diagnostic testing revealed a pseudoarthrosis at L5-S1. On April 18, 2011, Dr. Little performed a revision surgery at L5-S1 by removing and replacing the cages and allograft bone.

DISCUSSION AND FURTHER FINDINGS

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).

Dr. Montalbano

17. On September 8, 2006, Dr. Montalbano wrote a letter to nurse case manager Sexton in response to an August 23, 2006 letter she wrote to him.² Dr. Montalbano reviewed medical records but did not examine Claimant. He does not relate Claimant’s 2006 fall in any way to Claimant’s pseudoarthrosis or need for her revision surgery:

It is my medical opinion that the need for surgery performed by Dr. Little was not related to her fall on February 24, 2006 but related to a failed construct at her cervicothoracic junction. This failure of fusion at the level of C7-T1 is not considered a complication with the initial surgery but an expected issue after undergoing a multilevel anterior cervical construct.

Defendants’ Exhibit 4, p. 1.

Dr. Little

18. As previously indicated, Claimant contends that her fall in 2006 somehow disrupted her 2004 cervical fusion leading to C8 radiculopathies that led to the revision surgery. Claimant relies exclusively upon the opinions of Dr. Little to establish causation.

² This letter could not be located, so it is not in evidence. Ms. Sexton testified that she did not remember writing the letter.

Dr. Little relies exclusively on the history given by Claimant (that she was asymptomatic before and felt immediate pain after the 2006 accident) upon which to base his opinion. Initially, it is important to note that none of Dr. Little's (or any other physician's, for that matter) contemporaneous medical records contain any mention of Claimant's February 24, 2006 fall. Dr. Little agreed in his deposition that it was not until his letter to Claimant's counsel, dated February 11, 2007, that any mention of Claimant's 2006 accident, or any other trauma, appears.

19. In a letter to Claimant's counsel dated February 11, 2007, Dr. Little indicates that Claimant had no neck pain or arm symptoms after her 2004 fusion until her 2006 accident. He wrote, "On November 30, 2005, she slipped and fell on ice. Immediately after that she began to have progressively worsening neck and arm pain. She also noted that her arms were getting progressively worse. She reports having fallen again on February 6." Defendants' Exhibit 6, p. 1.

20. Dr. Little offered the following causation opinion:

On a more probable than not basis, it is my opinion that Mrs. Kelsch's fall contributed to her neck pain, arm pain, and neurologic deficits, which ultimately led to her July 8, 2006 surgery.

It is likely that she had a pseudoarthrosis at C7-T1 prior to the fall. However, it is also likely that this pseudoarthrosis was stable. It is likely that her falls destabilized this pseudoarthrosis and led to her T1 compression deformity and C8 nerve root compression. This led to her neurologic deficits.

Id., p. 2. Emphasis added.

21. Because it was clear that Dr. Little was referring to the wrong accident(s),³ he authored a "clarification" letter dated July 6, 2007, at Claimant's request, wherein he

³ The November 30, 2005 accident had already been settled and could not form the basis for a new claim.

opined that Claimant suffered a hyperextension or hyperflexion injury to her cervical spine in her February 24, 2006 fall. He does not explain the basis for that opinion, or why that opinion is in direct conflict with his February 11, 2007 letter. In any event, he further opined:

Based upon Mrs. Kelsch's history, she did not have symptoms referable to her C8 nerve root prior to her February 24, 2006 fall. Immediately after the fall, however, she began to have bilateral C8 symptoms and deficits. Therefore, based upon her history, it seems more probable than not that the February 24, 2006 fall exacerbated her underlying C7-T1 pseudoarthrotic condition. I do not think that the fall caused pseudoarthrosis, but I do think that the pseudoarthrosis at C7-T1 made this segment more vulnerable to trauma.

Id., p. 3.

22. Dr. Little authored yet another letter to Claimant's attorney on March 19, 2012, after reviewing additional medical records (Dr. Montalbano's letter). He now apportions the need for his re-do surgery as about 50% due to Claimant's pre-existing pseudoarthrosis and 50% due to her February 2006 fall. Dr. Little reasoned as follows:

I did not recommend surgery for Mrs. Kelsch in July 2006 simply because she had a pseudoarthrosis. Rather, she had quite severe C8 radiculopathies. In other words, the indication for surgery was the presence of severe and progressively worsening C8 radiculopathy. She also had neck pain with ongoing osteolysis at C7-T1; however her imaging findings were not in themselves the indication for surgery, but rather the presence of ongoing and worsening neurologic deficits.

Viewing indications for surgery in this matter is consistent with the way Mrs. Kelsch was treated when she was seeing Dr. Johans. He noted that there were in fact lucencies around the bone graft at C7-T1; however, because she was completely asymptomatic and feeling very well he appropriately elected not to simply treat Mrs. Kelsch's x-rays, but rather decided not to intervene because she was doing so well. According to the records available to me and according to Mrs. Kelsch's recollection she continued to do very well without neck pain and without arm symptoms until February 24, 2006, at which time she was in an accident.

* * *

That being said, the mechanism of trauma sustained on February 24, 2006 would not likely be sufficient to cause a collapse of a normal C7-T1 segment, it would also likely not be sufficient to cause a disk herniation in an otherwise healthy neck. Therefore, that she had a pseudoarthrosis at C7-T1 preceding the February 24, 2006 injury rendered her cervicothoracic junction more vulnerable.

In summary, if not for the presence of preexisting pseudoarthrosis, Mrs. Kelsch may not have sustained injuries during her February 24, 2006 injury to warrant surgical intervention. However, if not for the February 24, 2006 injury her preexisting pseudoarthrosis may not have become symptomatic and led to neurologic deficits. Because it is impossible to definitively determine what degree each of these conditions contributed to her needing surgery in July of 2006, I think it is most reasonable to conclude that each contributed about 50%.

Defendants' Exhibit 6, pp. 4-5.

Dr. Little deposition testimony

23. Dr. Little was deposed on June 21, 2012. He is a board certified neurosurgeon and performs between 100 and 150 cervical surgeries per year. Dr. Little first saw Claimant on May 22, 2006, about three months after her February 24, 2006 accident. He obtained a history from Claimant that she had a C5-T1 cervical discectomy on November 10, 2004 by Dr. Little's partner, Dr. Johans. He also learned that Claimant had typed out an undated paper entitled "correct information on Jacki Kelsch" with additional information including that her "original fall" was on November 30, 2005 wherein she injured her left knee and a "second fall" on February 24, 2006, wherein she injured her right knee and "whip-lashed" her neck causing damage to T1 and T2. The writing further indicated that Claimant began to experience weakening and cramping in her hands within a short time after her February 2006 fall. Exhibit 1 to Dr. Little Deposition.

24. Dr. Little testified that Claimant's more serious problem was the C8 radiculopathies that were causing progressive weakness in her arms. He reiterated his causation opinion at this deposition as follows:

So in general she had a pseudoarthrosis from her surgery with Dr. Johans which can happen whether or not she had an accident.

So I didn't think that she had a solid fusion and then she fell and it became a pseudoarthrosis, but I do think her neurologic injuries, the C8 radiculopathies, did come from the accident, and those C8 radiculopathies were potentiated by two things: One was the fact that she had neck surgery that didn't heal, and the other thing being a fall.

Dr. Little Deposition, pp. 13-14.

25. On cross-examination by Employer/Surety's counsel, Dr. Little conceded that his first mention of any trauma caused by the February 24, 2006 accident was in the letter he wrote to Claimant's counsel dated February 11, 2007. He testified that he wrote the letter at Claimant's request ". . . to explain what she perceived as the reason for needing surgery." *Id.*, p. 19. Dr. Little understood that Claimant was seeking his help to assist her in her court case:

She was - - she was seeking - -

Well, my understanding of the - - my understanding of my role was to document as best I could what happened to her because there was no attention paid to that in my documentation prior.

I had been more concerned with the condition she was in when she walked in my office and what I could do to help her rather than focusing on the specifics of how she got to that condition.

* * *

But it - - when I come across a patient who is having neurologic problems, I - - there are several questions that come to mind.

Number one, why is this person having neurologic problems? When I ask the question "Why," I mean, anatomically, pathologically, what's happening?

And secondarily, what do I do about it? And, of course, the event that might have led to that pathologic condition is helpful to consider.

There are pathologic conditions where the exact mechanism of trauma does not give you additional insight into understanding that problem, nor does it give you additional guidance into deciding how to help that person.

And so the failing to focus on the specifics in my mind, in some situations is absolutely reasonable.

Dr. Little Deposition, pp. 20 -22.

26. Regarding the discrepancy between Dr. Little's February 11, 2007 letter to Claimant's counsel wherein he references falls and attributes the need for his surgery to the November 2005 fall (see findings 19-20 above) and his July 6, 2007 letter wherein he blames the February 2006 fall, Dr. Little testified:

Q. (By Mr. Wigle): Okay. Let's move on, if we could. On February 11, 2007, you apparently wrote to Sam Johnson, who is one of Mrs. Kelsch's attorneys.

In that letter you wrote to Mr. Johnson, you referenced two falls that she had, one in November of 2005 and a second one in February of 2006. And the letter concludes with the expression of an opinion that - -

And in particular, I'm focusing on the third paragraph on page two of your correspondence. "It is likely that she had pseudoarthrosis at C7-T1 prior to the fall; however, it is also likely that the pseudoarthrosis was stable.

"It is likely that her falls," plural, "destabilized the pseudoarthrosis and led to her T1 compression deformity and C8 nerve root compression. This led to her neurologic deficits."

* * *

Q. What I want to focus on is the reference on the second page to "falls," plural, having caused this problem or contributed to this problem.

If I look then to the later letter that you wrote to Mrs. Kelsch's attorneys dated July 6th, 2007, you seem to be clarifying that it wasn't the November fall, but rather the February 2006 fall that caused the problem.

Do you have a recollection of why that letter was written?

A. Which letter?

Q. July 6th, 2007

A. Not a direct recollection; however, it's addressed to Johnson and Monteleone that - - to clarify my opinion.

Q. Do you know why it is important to Mrs. Kelsch that you opine that the causes of her problem related to the February 2006 fall rather than the November 2005 fall?

A. I do recall that it was important to Mrs. Kelsch that she wanted to know what my opinion was and that I clearly state my opinion. I don't - -

She did not discuss why it was important to her that I have a particular opinion.

Q. But you were apparently willing to clarify based on her history that this was the later fall and not the earlier one that was the problem?

A. If I had an opinion that it would help a person for me to be clear about my opinion, then I, generally speaking, am willing to put that down on paper.

Q. Okay. In this instance, your opinion with regard to the causation as between these two falls and any trauma in general is based on her history, is it not?

A. Correct.

Dr. Little Deposition, pp. 23-26.

27. Dr. Little agreed that he did not mention any trauma to Claimant's neck or right knee or any accident of February 24, 2006 in the History and Physical he prepared in anticipation of the surgery he performed in July 2006. He further agreed that a pseudoarthrosis can occur without trauma.

28. Claimant's contention that her February 24, 2006 fall somehow created new C8 radiculopathies and weakened her cervical fusion is not supported by either pre-accident, contemporaneous, or post-accident medical records. Claimant suffered three relatively serious falls post-fusion and before her 2006 fall. In the December 2004 fall, Claimant was concerned that it may have had an effect on her fusion and described it as a major setback. Her fall in 2005 was serious enough to result in left knee surgery and a workers' compensation claim eventually closed via lump sum settlement. There is no mention in Claimant's treating physician's contemporaneous medical records of any February 2006 fall or any trauma whatsoever as being the reason for taking Claimant to surgery for her failed fusion or C8 radiculopathies. It was not until his February 11, 2007 letter to Claimant's counsel that any fall was mentioned, and that was the wrong fall at that.

29. There is no question that Claimant's pseudoarthrosis preceded her February 24, 2006 fall. Failed fusions can happen without any traumatic event, and sometimes just happen according to Dr. Little.⁴ Both Dr. Little and Claimant agree that had her February 2006 fall disrupted her fusion, such would be a very painful event. Yet, Claimant, for whatever reason, chose not to inform any of her medical care providers of this event until sometime after Dr. Little's February 11, 2007 letter to Claimant's counsel.⁵ At the time of the first surgery, Dr. Johans found severe degeneration and numbness, tingling and weakness in her arms and left hand. These are practically the same symptoms she now claims arose from her February 2006 fall. By March 11, 2005, x-rays revealed that the fusion may not have "matured."

30. Claimant related to Dr. Little that she experienced immediate neck pain and radicular symptoms within days following her fall. However, the medical records indicate that she experienced many, if not all, those same symptoms before her February 2006 fall. See Finding number 2 above. It is also notable that in his letter of April 7, 2006, (see Defendant's Exhibit 1, p. 17) Dr. Johans reported that Claimant had been complaining of neck and shoulder pain for about five months, which would date the onset of those symptoms to November or December of 2005, some months prior to the date of the subject accident. Further, Claimant testified that she told Dr. Little of her February 24, 2006 fall at the time of her first visit. She has no explanation for why that information was not documented.

⁴ As an example, Claimant's lumbar fusion at the hands of Dr. Little also required a revision without any traumatic event.

⁵ Claimant did not meet with Dr. Montalbano and Dr. Little was not provided with his September 8, 2006 opinion letter until after his own first two opinion letters.

31. Claimant was generally a credible witness. While Claimant may sincerely believe that her February 2006 fall is the genesis for all her cervical problems, the objective medical evidence simply does not support that belief. Based on Dr. Montalbano's opinion, as well as the inherently inconsistent opinions of Dr. Little, the Referee finds it more likely than not that Claimant's pseudoarthrosis and C8 radiculopathies were progressive in onset and her relatively minor fall causing a contusion to her right knee did not cause the need for her cervical surgery at Dr. Little's hands.

32. Dr. Little made no effort at his deposition to explain the glaring inconsistency between his February 11, 2007 letter and his July 6, 2007 letter. While he attempted to apportion causation between the pre-existing pseudoarthrosis and her February 2006 fall, he made no similar attempt to apportion causation between the 2005 and 2006 falls. He has apparently chosen to ignore what he opined about the 2005 fall rather than to explain it. Although given every opportunity, Dr. Little did not even attempt to unring that bell. It is clear that Dr. Little was Claimant's advocate and would do all he could to assist her with her litigation and his causation opinions are taken in that light.

33. The Referee finds that Claimant has failed to prove that her fall on February 24, 2006 necessitated the need for her reconstructive surgery performed by Dr. Little on April 18, 2011.

34. All remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove her accident of February 24, 2006 caused the need for the surgery to revise her pre-existing cervical pseudoarthrosis.

2. All remaining issues are moot.

RECOMMENDATION

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

DATED this 25th day of February, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JACQUELINE (JACKI) KELSCH,

Claimant,

v.

TRINITY HEALTH CORPORATION, dba
ST. ALPHONSUS REGIONAL MEDICAL
CENTER,

Self-Insured
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and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2006-002608

ORDER

Filed March 4, 2013

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 recommendation 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 has failed to prove her accident of February 24, 2006 caused the need for the surgery to revise her pre-existing cervical pseudoarthrosis.
2. All remaining issues are moot.

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

DATED this __4th__ day of __March__, 2013.

INDUSTRIAL COMMISSION

____/s/_____
Thomas P. Baskin, Chairman

____/s/_____
R. D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __4th__ day of __March__ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

SAM JOHNSON
405 S 8TH ST STE 250
BOISE ID 83702-7100

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680-0857

ge

____/s/_____