

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELLE KIMBALL,

Claimant,

v.

GOODING COUNTY MEMORIAL,

Employer,

and

EVEREST NATIONAL INSURANCE
COMPANY,

Surety,

Defendants.

IC 2001-018415

2001-021632

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

Filed June 4, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on July 12, 2013. Claimant was present at the hearing and represented by Dennis R. Petersen of Idaho Falls. Mindy M. Willman of Boise represented the Employer (Gooding County) and Surety (collectively, Defendants). The parties presented oral and documentary evidence and post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on February 11, 2014.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

PROCEDURAL BACKGROUND AND PREVIOUS FINDINGS

The Referee conducted two previous hearings in this case, on August 6, 2003 and on February 13, 2007. Dennis R. Petersen represented Claimant in both hearings. Glenna M. Christensen represented Defendants. By way of relevant history:

Claimant was 46 years of age and resided in Jerome at the time of the second hearing. Claimant suffered a work-related accident resulting in cervical injuries in October 2001. On October 24, 2001, she underwent a cervical discectomy and fusion at C5-6 and C6-7 with allograft bone and plating. Claimant continues to complain of cervical pain.

Kimball v. Gooding County Memorial (Jaclyn2004, 2004 IIC 01959).

As a result of these hearings, the Commission issued two Orders. The first, issued on March 8, 2004, concerned only the extent to which Defendants were liable for certain past and future medical benefits. It held, in relevant part:

3. Defendants are liable for the payment of and/or reimbursement for continuing medication prescribed to manage Claimant's chronic pain so long as the need for such medications can be reasonably related to her industrial accidents and injury.

In his Recommendation, adopted by the Commission, the Referee reasoned:

Chronic pain cases always provide a challenge in attempting to balance a remedy that may provide some relief for an injured worker who has not improved after significant treatment, and the need for case closure. This is such a case. The Referee noted that Claimant was a credible witness at hearing and no physician with whom she has been associated has questioned that her pain is anything but real; *i.e.*, not "all in her head." They simply have not been able to pinpoint a cause. Defendants make a point when they argue essentially "enough is enough." However, the Referee deems it reasonable in this case to require Defendants to reimburse Claimant for the treatment she has received up to the last time she saw Dr. Dille on or about August 30, 2003, excluding the bills associated with her brain MRI. Claimant has submitted a list of providers Claimant saw after Dr. Phillips' IME on page 9 of her Post-Hearing Memorandum. Defendants are also required to either pay for or reimburse Claimant for medications related to her industrial accidents, both past and future. *See, Poss v. Meeker Machine Shop*, 109 Idaho 920, 712 P.2d 621 (1985).

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Kimball v. Gooding County Memorial (Jaclyn2004, 2004 IIC 01959).

The second Order, issued on December 18, 2007, addressed Claimant's entitlement to continuing pain medications, additional permanent partial impairment, and permanent partial disability. At the time, Claimant was taking a number of medications to treat various aspects of her chronic pain:

Richard Sandison is a board-certified family practitioner and is Claimant's treating physician. He has been assisting her with pain management issues and, in that process, has prescribed certain medications. Dr. Sandison testified by deposition that the following medications are related to Claimant's cervical injury: Amitriptyline/Imipramine for acute neuropathic pain; Zanaflex, a muscle relaxant; Norco with Tylenol for pain; Ambien for sleep; Neurontin for pain; Duragesic patch for pain; Relpax for migraines exacerbated by neck pain; and Celebrex for pain.

Kimball v. Gooding County Memorial 2007 IIC 0923.

The second Order affirmed that Dr. Sandison's medication regimen was reasonable. The Referee summarized Defendants' position regarding Claimant's continued use of prescription pain medications:

Defendants contend that "enough is enough" regarding Claimant's pain medications. Her treating physician is prescribing medications for conditions that are both industrially and non-industrially related. Surety should not be liable for ongoing medical care that is not related to Claimant's industrially-related cervical injury. Also, by Claimant's own admission, her pain medications are of little benefit to her. Finally, Defendants question whether Claimant's treating physician, a family practitioner, is duly qualified to assume the role of a pain specialist regarding the prescribing of pain and related medications.

Kimball v. Gooding County Memorial 2007 IIC 0923.

Regarding Claimant's pain medication benefit, the Referee reasoned:

While acknowledging that chronic pain and its management often results in a seemingly endless liability for pain medications, nonetheless, this Referee is unwilling to second guess Claimant's treating physician concerning pain management without good evidence to the contrary; such is not present here.

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Therefore, the Referee finds that Defendants continue to be liable for the payment of and/or reimbursement for medications prescribed for Claimant's chronic pain so long as the need for such medications can be reasonably related to her industrial accident and cervical injury.

Kimball v. Gooding County Memorial 2007 IIC 0923.

These previous decisions were not appealed and are final.

ISSUES

By agreement of the parties at the hearing, the issues to be decided as a result of the third hearing are:

1. Whether and to what extent Claimant is entitled to further medical care; and
2. Whether Claimant must pay a no-show fee in connection with her failure to appear for an independent medical evaluation.

CONTENTIONS OF THE PARTIES

Claimant asserts she remains entitled to medical benefits for pain medications related to chronic pain from her industrial cervical spine injury. Claimant relies upon the opinion of Steven Kohtz, M.D., her treating physician, to establish that her pain medications constitute reasonable medical treatment related to her industrial injury.

Defendants counter with essentially the same arguments they made following the 2007 hearing. They rely upon the opinions of David Verst, M.D., an orthopedic surgeon, Nancy Greenwald, M.D., a physiatrist, and Michael McClay, Ph.D., a psychologist, to establish that Claimant's pain is psychologically based and, to the extent that it is not, her narcotic pain medications are providing her little to no benefit alongside increased health risks. Thus, Claimant's pain medication regimen does not constitute reasonable medical treatment for her industrial injury. Defendants also assert that Claimant had no

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justification for failing to appear at an IME with Dr. Greenwald scheduled for May 14, 2013; therefore, she should be liable for Dr. Greenwald's no-show fee.

OBJECTIONS

All pending objections preserved at the depositions are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony and documentary evidence admitted at the prior hearings in this case on August 6, 2003 and on February 13, 2007;
2. The pre-hearing deposition transcript of Dr. Kohtz, taken September 10, 2012;
3. The testimony of Claimant taken at the July 12, 2013 hearing;
4. Claimant's Exhibits (CE) 1 through 51 admitted at the hearing;
5. Defendants' Exhibits (DE) A through F admitted at the hearing; and
6. The post-hearing deposition transcripts of:
 - a. Nancy E. Greenwald, M.D. taken November 1, 2013; and
 - b. David Verst, M.D. taken November 8, 2013.

After having considered all the above evidence and briefs of the parties, the Referee renders the following Findings of Fact and Conclusions of Law for consideration by the Commission.

FINDINGS OF FACT

1. Claimant was 52 years of age on the hearing date, and still residing in Jerome. Materially unchanged since the prior hearing are her weight; her chronic cervical pain of unclear etiology radiating around her bilateral shoulders, down her left arm and into her left thumb, pointer, and “bird” fingers; her incomplete pain relief from prescription medications, including narcotics/opioids; and her reliance upon a family physician to manage her medications. 2013 Hrg. Tr., p. 39.

2. Claimant’s family physician changed from Richard Sandison, M.D. to Dr. Kohtz when Dr. Sandison left the area.¹ Claimant was first evaluated by Dr. Kohtz on September 29, 2008. He remained her treating physician as of the hearing date.

3. Since the last hearing in this matter, Claimant has weathered a number of stressful situations, including the suicide of her son in 2010 and other significant family stressors. Dr. Kohtz did not refer Claimant for psychiatric evaluation because she responded well to his treatment.

4. Claimant has been unemployed since January 2012 because she cannot physically hold down a job due to her chronic neck pain. She does a little bit of the cooking at home, along with her husband, but few to none of the household chores. Claimant’s grandchildren help with those.

5. Claimant agreed that, in addition to her neck and upper extremity pain, she also suffers from diabetes, depression, migraine headaches, anxiety, sleep apnea, leg swelling, occasional back pain, and joint pain in her fingers, elbows and knees.

6. **Pre-denial treatment: Dr. Kohtz.** When he took over Claimant’s care in September 2008, Dr. Kohtz understood that her cervical pain had been present for many

¹ Dr. Sandison left Idaho to practice tropical medicine in or around August 2008. He later returned, but Claimant maintained Dr. Kohtz as her treating physician.

years and “that she was on a chronic, stable dose of medications.” Kohtz Dep., p. 48. Claimant was “Status quo with her pain medications since her neck injury in 2001 working with Dr. Sandison.” Kohtz Dep., p. 9.

7. Dr. Kohtz maintains his chronic pain patients on medications indefinitely, so long as: 1) they do not become dependent, and 2) the medications remain effective. He monitors these patients through regular exams and requires them to enter into a pain medication contract. He also administers psychological testing.

8. In September 2008, Claimant was taking medications related to her industrial neck pain including gabapentin (“Neurontin;” reduces nerve pain), Duragesic (fentanyl) patches (long-acting narcotic analgesic), Zanaflex (muscle relaxer), Ambien (sleep aid), tizanidine (muscle relaxer), imiprimine (for anxiety, depression, insomnia, and neuropathic pain), Celebrex (anti-inflammatory), Wellbutrin (for anxiety and depression, possibly related to her industrial injury pain), and Norco (short-acting narcotic analgesic). She was also taking Metformin (for diabetes), atenolol (for blood pressure), spironolactone (for leg edema, blood pressure, and other conditions), lasix (diuretic, for leg edema), potassium (related to leg edema), levothyroxine (thyroid replacement), Ritalin (depression, alertness, ADHD), relpax (anti migraine), Advair (asthma), fluoxetine (anxiety, depression), and lorazepam (benzodiazepine for anxiety). Following examination, Dr. Kohtz diagnosed (in relevant part) neck pain, acute worsening, associated with weakness and shooting pains in the left arm. He maintained Claimant’s prescriptions related to her industrial neck pain.

9. Dr. Kohtz examined Claimant again in November and December 2008, maintaining her relevant prescriptions. By February 2009, Dr. Kohtz changed Claimant’s

muscle relaxant from Zanaflex to cyclobenzaprine, and increased her fentanyl patches from 100 mcg. to 125 mcg. In March 2009, he restarted Claimant's tizanidine and Ambien after an apparent break. Claimant was examined by Dr. Kohtz several more times in 2009 and the beginning of 2010. He continued her industrially-related medications throughout this period.

10. **IME - Dr. Verst.** Dr. Verst, an orthopedic spine surgeon, does not treat chronic pain patients; he refers them to others, such as Dr. Greenwald (see below) and Clinton Dille, M.D.² He evaluated Claimant's cervical spine condition in 2002, at Dr. Dille's request, and again in 2009, at Dr. Kohtz's request. At his deposition, Dr. Verst did not recall his 2002 involvement in Claimant's case; however, medical records demonstrate that he evaluated Claimant's cervical and upper extremity pain and recommended further testing. In 2009, Dr. Verst recommended physical therapy. He did not render any opinions as a result of either of those examinations regarding Claimant's medications.

11. On January 28, 2010, Dr. Verst again evaluated Claimant, at Surety's request. Prior to authoring a letter to Surety regarding his findings and opinions, Dr. Verst reviewed Claimant's medical records, interviewed her, and examined her. On exam, Dr. Verst noted positive Waddell's signs and give-away weakness in Claimant's upper left extremity "likely psychosomatic in nature." CE 47-1. Dr. Verst diagnosed "classic global psychosomatic chronic pain syndrome" unrelated to her industrial injury, as well as narcotic dependence, gross obesity, hypertension, diabetes, and ADHD (attention deficit

² Dr. Dille (or his assistant) treated Claimant's chronic industrial cervical and left arm pain from February 8, 2002 until August 19, 2003. Dr. Dille administered pain injections and started Claimant on the Duragesic patch, among other things. At his deposition on October 13, 2003, he opined that "there may not be any cure for this radicular pain that she has." *Id.* at 25. "I am sure she is going to require long-term medication management, and with that, frequent physician visits as well." *Id.* at 26.

hyperactivity disorder). CE 47-2. He recommended losing weight and ceasing pain medications with the aid of professional treatment, but not at Surety's expense.

12. **Surety's denial of benefits.** On March 15, 2010, Surety denied any further medical benefits based upon Dr. Verst's IME.

As you will see, he has reviewed the course of treatment to date on this claim and the "enormous" amount of prescription medication that has been prescribed by numerous physicians. After review of the records and examination of the claimant, Dr. Verst finds no basis for continuing prescription medication, or any other medical treatment on an industrial basis. Therefore, please be advised that we will no longer authorize or voluntarily pay for any further medical treatment on this claim.

CE-51. Subsequently, Claimant relied upon her personal medical insurance to help pay for her medications.

13. **Post-denial treatment: Dr. Kohtz.** By April 6, 2010, Dr. Kohtz had apparently reviewed a copy of Dr. Verst's IME report. That day, he summarized in a chart note that Dr. Verst had recommended that Claimant stop all narcotics "as there has not been evidence of painful pathology, according to her back surgeon, Dr. Verst."³ Kohtz Dep., p. 25. As a result, Dr. Kohtz referred Claimant to Boise Pain Clinic for an evaluation, even though he did not believe the referral would lead to a change in Claimant's medications.

Q. At that point in time, was the referral or the discussion with Ms. Kimball regarding the referral to the pain clinic, is that something you thought would be helpful to her?

A. From a medication management standpoint, I did not necessarily feel that the referral was going to be - - was going to result in any change of her medications.

Q. And why is that, Doctor?

³ Dr. Kohtz apparently confused Dr. Verst with Dr. Verska, who performed Claimant's back surgery.

A. When I had taken over her care, she was on a chronic, stable dose of narcotics. And even though she admitted that, you know, her pain wasn't in great control, she had not wanted to go up further because she did not want to experience more side effects. And she understood that she was already on a high dose and felt that if she continued to go up, she would still not necessarily have her pain controlled.

Q. Okay.

A. That was my - -

Q. Okay. So to paraphrase that just a little bit to make sure I understand, the pain medication that you had her on was controlling her pain enough for her to function?

A. Yes.

Q. And so based upon that, it was your opinion that the pain clinic would not be that helpful?

A. Yes.

Q. And so it was your opinion, based upon a reasonable degree of medical probability or more likely than not, that she should continue the course of pain treatment that you were recommending?

A. It was.

Q. It is?

A. It is, yes. It is today, sorry.

Kohtz Dep., pp. 27-28.

14. Claimant did not follow up on Dr. Kohtz's referral for an evaluation by a pain specialist, and Dr. Kohtz maintained her medications until October 12, 2010, when Claimant lost her medical insurance and could no longer afford the 25 mcg. Duragesic patches. At that time he switched her to methadone because it was cheaper. Claimant still had some 100 mcg. patches, and she continued to use those until they ran out. Had it not been for the cost, Dr. Kohtz would have maintained Claimant on the patches.

15. On October 29, 2010, Dr. Kohtz noted that the methadone was making Claimant nauseated. Also, because she was no longer on her former patch prescription,

Claimant's pain was now "severely uncontrolled, sharp and stabbing in her neck with radiation down her arm." Kohtz Dep., p. 32. Dr. Kohtz prescribed phenergan for Claimant's nausea, which made the methadone bearable.

16. On December 6, 2010, Claimant reported pain radiating down her right arm after falling at the courthouse. Dr. Kohtz continued her medications. A week-and-a-half later, he added a Medrol Dosepak to reduce inflammation in her right arm, unrelated to her industrial injury.

17. Dr. Kohtz continued to treat Claimant through 2011, for both industrially and non-industrially-related symptoms. He maintained her relevant medications throughout this period.

18. On January 9, 2012, Claimant reported increased neck pain. "Her pain is uncontrolled and seems to be worsening. Cannot afford the patches, which controlled her pain in the past." Kohtz Dep., p. 37. Dr. Kohtz recommended an EMG/nerve conduction study in an attempt to identify and document the source of Claimant's pain so that her treatment options might increase. However, Claimant did not follow up on the recommendation.

19. On May 17, 2012, Dr. Kohtz increased Claimant's Norco from three to four pills per day for breakthrough pain. He also increased her methadone. Claimant testified that she often took five or six Norco pills per day while she was on the methadone. Dr. Kohtz's records reflect that Claimant sometimes increased her Norco intake to reduce her headaches.

20. On August 20, 2012, Dr. Kohtz again examined Claimant. By this time, Claimant was only taking methadone and Norco for pain, apparently due to financial issues. She was having non-industrial low back pain at that time, which Dr. Kohtz attributed to osteoarthritis or degenerative disc disease related to her weight. Upon performing a DIRE assessment and determining that Claimant was at low risk for psychological dependency from narcotics, Dr. Kohtz maintained her methadone and Norco. He predicted that she would require them into the indefinite future:

Q. Okay. Crystal ball just a little bit, based upon seeing her now for four years, is it your opinion, based upon a reasonable degree of medical probability, that this pain medication is going to continue into the future?

A. Yes.

Q. Do you see any - - and once again, based on the four years that you've been seeing her, do you see any indication that she's become hooked or going over with her pain medications?

A. Great question. And I think the way I think of this is physical addiction, does her body develop - - has it developed a tolerance? Yes.

Q. Okay.

A. Does it take, you know, more of the medicine to give her the same amount of pain control? She's been on a fairly stable amount, so it looks as if, even though she's on a high dose, we've hit a spot where she's on a stable amount. Would she go through withdrawals if we stopped the medications suddenly? Yes. So a physical addiction is there.

Q. Okay.

A. In terms of dependence, using the medicine for reasons other than pain, you know, loss of being able to control her medication use, using it even though it's causing harm in her life, I don't believe that I have seen evidence that she is demonstrating dependence.

Kohtz Dep., pp. 42-43.

21. Dr. Kohtz did, however, intend to cease Claimant's hydrocodone by 2013. He explained why he intended to transition all of his non-cancer chronic pain patients off of short-acting narcotic pain medications like Norco (hydrocodone):

According to my specialty's regularly published journal, there was an article on narcotic use for noncancer [sic] pain. And in it, it described that long-term pain control is not improved by using short-acting pain meds and recommended long-term pain medication only if you're going to use that type of medicine in chronic noncancer [sic] pain.

And so I'm in the process of informing my patients that I will be switching them to long-acting pain medications and hope to do that by 2013.

...

[With respect to Claimant:] My hope would be to either continue her methadone unchanged or go up on the methadone to offset the decrease in the narcotics that she is getting from the hydrocodone.

...

Kohtz Dep., p. 101. As mentioned, above, if Claimant could afford Duragesic patches, he would maintain her on those instead of methadone. Dr. Kohtz was still prescribing Norco for Claimant at the time of the hearing.

22. Dr. Kohtz explained that Claimant's pain was likely exacerbated, at times, by life stressors and acknowledged that her pain complaints over the last few years have increased. At Claimant's direction, however, Dr. Kohtz has rarely increased her pain medications. Dr. Kohtz agreed that Claimant's increased pain complaints could indicate a loss of effectiveness in her pain medication; however, he is not convinced that the medications do not reduce Claimant's pain.

23. **IME Followup: Dr. Verst.** On October 29, 2012, Dr. Verst signed a check-box letter prepared by Defendants in which he confirmed the following opinions:

- It is unreasonable for Claimant to continue taking pain medications.

- Because she has been taking pain medications longer than ten years, they are no longer providing any pain reduction in regard to her 2001 industrial injury.
- Continuing to prescribe pain medication related to the 2001 industrial injury and subsequent cervical fusion are contrary to the reasonable standard of medical care in Idaho.

CE 47-15. Dr. Verst further confirmed these opinions in his deposition.

24. On March 11, 2013, Dr. Verst again evaluated Claimant. Claimant's husband accompanied her and expressed his disagreement with Dr. Verst's opinions expressed in his January 2010 report. As a result, Dr. Verst referred Claimant to Dr. Greenwald.

25. In April or May of 2013, Claimant was accepted into a one-year assistance program sponsored by Johnson & Johnson, whereby she has been receiving free Duragesic patches. After restarting the patches, Claimant's methadone use fell from six pills per day to one pill at night, as needed (usually about five pills per week). Her Norco use has fallen from four to six pills per day to one to three pills per day. She also received assistance from Lilly for a one-year supply of Cymbalta, which was scheduled to expire in February 2014.

26. **IME - Dr. McClay.** On July 18, 2013, Dr. McClay performed a psychological evaluation. He interviewed Claimant, reviewed her medical records, and administered testing. He opined that Claimant has had conversion disorder and other somatically-related tendencies since before her industrial accident. As a result of her psychological profile, and further because no pain source has been objectively identified, Dr. McClay opined that Claimant is dependent on narcotics and should cease taking them.

27. **IME - Dr. Greenwald.** Dr. Greenwald's practice consists of approximately 30% chronic pain patients, down from about 50% before she gained additional practice partners who now share part of her caseload. Dr. Greenwald prescribes narcotics on a long-term basis to some of these patients. However, over the past several years, she has limited her use of narcotics to treat chronic pain in non-cancer patients because "sometimes the risks outweigh the benefits for the treatment of pain." Greenwald Dep., p. 16. Also, over time, the body builds up a tolerance to opioids by creating more pain receptors. As pain receptors increase, so does the pain sensation. So, ever-increasing doses are required to keep the pain at bay. As dosages increase, so do the risks, including death from respiratory arrest. As a result, Dr. Greenwald works with her patients to reduce, as much as possible their use of narcotic pain medications.

. . . Over the past several years I've realized that what's happened is people do build up a tolerance and I just feel like it doesn't work as well. And we keep going up and up and up until we hit one of these side effects and then we realize we just can't do this and then I do a slow wean.

. . .

. . . I'm sure if we put up the computer, I know I write long-acting narcotics. And I think each person, it has a special thing - - reason why I'm doing it.

. . .

But over the years I definitely have changed my practice just because of experience. I found in the long run it just hasn't helped the patients as much as we had wanted.

Greenwald Dep., p. 21-22.

28. Dr. Greenwald completed a review of Claimant's medical records and then performed an IME on June 26, 2013, at Surety's request. After taking a detailed history, Dr. Greenwald conducted her examination.

29. On exam, Dr. Greenwald administered testing including a pain disability questionnaire on which Claimant scored 133 out of 150, indicating she is severely disabled by pain. “[W]hen you see a high pain disability questionnaire score like this, it’s obviously [sic] the narcotics are not helping her out in the community at all and not helping her function at all.” Greenwald Dep., p. 36. Dr. Greenwald also administered a questionnaire regarding activities of daily living, which indicated Claimant had some difficulties in that area, and a Beck’s Depression Inventory which indicated Claimant was moderately depressed.

30. Dr. Greenwald also conducted a physical exam. Her findings were consistent with a chronic condition. Claimant’s bilateral biceps and brachioradialis reflexes were “a little bit down.” Greenwald Dep., p. 39. Also, she had sensory changes in a nondermatomal pattern. Her manual muscle testing showed good strength and dexterity, she had no muscle atrophy in her arm, and her C7 triceps looked healthy.

31. Dr. Greenwald concluded:

I feel that her recovery is slower than I would anticipate with this type of surgery that she had done, and I feel that some of her other things that are going in her life and that are preexisting probably have stalled her from a complete recovery. She’s just stuck into this chronic pain - - and I call it a swirl. She’s just swirling in this chronic pain swirl is how I describe it.

Greenwald Dep., p. 40.

32. Dr. Greenwald opined that Claimant should be slowly weaned off of all narcotic (opioid) pain medications. She reasoned that, even though Claimant has pain from her industrial injury, the risks of narcotic pain medications outweigh the benefits:

. . . I think at this point I would not recommend opioid medications. It doesn’t seem to be helping her with her quality of life or her functional status

by all those indicators we've talked about, the pain disability questionnaire, what she's doing or not doing and, you know, she hasn't been able to get back to work.

Greenwald Dep., p. 43.

Well, again, I look at each person, not the length of time. I look at each person and I do these indicators of what they're doing in the community and are they functioning and she's just not functioning well. So it doesn't seem to be helping her. So why keep doing it and giving it to her. That's how I look at it.

Id. at 44.

33. According to Dr. Greenwald, the risks associated with long-term opioid use - for anyone - include increased risk of respiratory arrest from overdose, constipation, and cognitive disturbances that create safety risks in everyday activities like driving and Claimant's work as a nurse. For Claimant, who is obese and has attention deficit disorder and obstructive sleep apnea, she opines the risk is unreasonable. Also, Claimant's medical records, at times, indicate that she is feeling mentally foggy or constipated.

34. Dr. Greenwald recommended some non-narcotic medications to control Claimant's pain, including Neurontin (gabapentin), Lyrica (pregabalin), and Cymbalta. Also, since Claimant's pain is likely exacerbated by her stressors through her conversion disorder (diagnosed by Dr. McClay; see below), she recommended counseling.⁴

35. Dr. Greenwald also diagnosed, among other things, benzodiazepine dependence related to Claimant's non-industrially related use of Lorazepam. She recommended that Claimant cease using this medication due to its addictive properties and Claimant's comorbidities.

⁴ Claimant does not seek counseling, so this recommendation is not addressed further.

DISCUSSION AND FURTHER FINDINGS

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). However, the Commission is not required to construe facts 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).

REASONABLE MEDICAL CARE

36. 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 was 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, 412-13, 18 P.3d 211, 217 (2001). Although these rulings are related to determinations of industrial cause, it is also appropriate to accept a physician's plain and unequivocal testimony that recommended treatment is reasonable.

37. It is clear that in order to recover medical benefits, the injured worker must prove both that the need for medical care is causally related to the accident and that the

medical care is “reasonable.” See *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006). Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment is reasonable. See, *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

38. Under the facts presented in *Sprague*, medical treatment already received was deemed reasonable when: 1) the claimant made gradual improvement from the treatment; 2) the treatment was required by the claimant’s physician; and 3) the treatment was within the physician’s standard of practice, the charges for which were fair, reasonable, and similar to charges in the same profession. *Id.* Where the contemplated treatment has not yet been rendered, and where it is palliative in nature, there is no direct guidance from the Court. Therefore, regarding future and palliative treatment, the Commission should consider the totality of circumstances in determining what is “reasonable.”

39. Prior holdings in this case established that pain medications, including narcotics, were reasonable to treat Claimant’s chronic pain on an ongoing basis. Claimant was still following her physician’s orders, taking pain medications, when Surety ceased her benefits on January 28, 2010.

40. The finality of prior orders of the Commission must be preserved. However, it must also be recognized that Idaho Workers’ Compensation Law only holds employers

and their sureties liable for treatment that is reasonable and necessary. Therefore, Defendants in this case must carry the burden of establishing some material change affecting Claimant's medical treatment since the last hearing (February 13, 2007) before the burden shifts to Claimant to prove that the treatment is, or remains, medically reasonable. Claimant has not placed the reasonableness of Surety's denial at issue, so her claim will be analyzed only as of the date of the hearing, July 12, 2013.

41. Defendants argue that narcotic pain medications, such as Duragesic patches, Norco, and methadone, are not reasonable treatments for Claimant's industrial cervical and upper extremity pain. They assert that the evidence fails to establish a likelihood that these medications are efficacious. Further, the risk of serious side effects, including death, far outweighs any potential analgesic effect, rendering such medications unreasonable treatment. As for her non-narcotic medications, they argue she should only be taking Neurontin (gabapentin) *or* Lyrica (pregabalin), and Cymbalta while she weans off of the narcotics.

42. The Commission already determined that Claimant's medications, including narcotics, were reasonable. Therefore, in order to prevent a retrial of formerly adjudicated issues, Defendants must now establish some material change in connection with this treatment that, after February 13, 2007, justified a permanent discontinuation of Claimant's pain medications. Toward that end, the record contains evidence of: 1) a change in treating physicians; 2) a shifting standard of care regarding the treatment of chronic pain patients, 3) changes (including, at times, dosage increases) in Claimant's medications, and 4) changes in Claimant's pain levels which are not attributable to her industrial accident, and

5) changes in Claimant's industrial condition. These alleged changes are addressed, in turn, below.

43. **Change in treating physicians.** Following Dr. Sandison's departure in 2008, Claimant came under the care of Dr. Kohtz. Both are family practitioners. Defendants argue that because Dr. Kohtz does not have specialized training in pain management, he is less qualified to treat Claimant's chronic pain than Dr. Greenwald. Thus, the Commission should adopt Dr. Greenwald's opinions over Dr. Kohtz's, even though Dr. Kohtz has treated Claimant for several years. They also assert that Dr. Kohtz has not considered Claimant's relevant preexisting factors and comorbidities in continuing to prescribe narcotic pain medications.

44. Dr. Kohtz did not always recall all of Claimant's historical details during his deposition. However, his medical records demonstrate that he is aware of her relevant medical history and comorbidities, as well as her personal life stressors, and has considered these facts in determining what treatment is appropriate.

45. Dr. Kohtz monitors his chronic pain patients through office visits and a pain medication contract. He stays current with medical research concerning the use of narcotic pain medications. He is aware of Claimant's relevant medical history. Under his care, Claimant has found partial relief from her chronic pain for several years.

46. Dr. Greenwald's testimony demonstrates she is a knowledgeable and compassionate chronic pain physician. However, Dr. Kohtz also fits this description. Moreover, the evidence of record does not establish that Dr. Kohtz is less qualified or

diligent than Dr. Sandison, whose treatment, as a family physician, was previously approved by the Commission.

47. The Referee finds that Dr. Kohtz is qualified to treat Claimant's chronic pain. Therefore, the change in Claimant's physician since the last hearing provides inadequate grounds upon which to base a different holding now.

48. **Change in Claimant's medications.** At all relevant times, Claimant was taking both short-acting and long-acting narcotics. Since the last hearing, Claimant's narcotics dosages have fluctuated. Defendants do not argue that Claimant's medication changes were not reasonable; they assert that her use of narcotics altogether is unreasonable. Accordingly, these medication changes are immaterial. The Referee finds the changes in Claimant's narcotics prescriptions since the last hearing provide inadequate grounds upon which to base a different holding now.

49. Claimant was taking other, non-narcotic, medications related to her industrial injury when she came under Dr. Kohtz's care. These include Imiprimine, Zanaflex, Ambien, Neurontin, Relpax, and Celebrex. At the hearing, Dr. Kohtz also attributed Claimant's Wellbutrin (possibly) and tizanidine to her industrial injury. As well, Dr. Greenwald and Claimant (citing her experience taking it) both touted Cymbalta for its analgesic effect. Dr. Kohtz did not address Cymbalta at his deposition. Dr. Greenwald recommended Neurontin and Lyrica, as well, instead of narcotics.

50. Claimant does not assert that Defendants are liable for the cost of her Wellbutrin, so the Referee finds they are not. Claimant does, however, seek reimbursement for her tizanidine and Cymbalta. Therefore, these changes are material and constitute

grounds to require Claimant to establish the new medication amounts to reasonable medical treatment.

51. Claimant testified that tizanidine, a muscle relaxer, helps prevent muscle spasm in her neck, shoulders, and left upper extremity which primarily come on at night. They have eased up since she is again using Duragesic patches, so she is using less tizanidine. Dr. Kohtz's and Claimant's testimony establish that tizanidine constitutes reasonable medical treatment related to her industrial injury.

52. Dr. Greenwald testified that Claimant should take Cymbalta while she is weaning off narcotics, to treat her industrially-related chronic pain. Claimant persuasively testified that Cymbalta aids in her pain relief while she is also taking narcotic pain medication. Thus, these medications, as monitored by Dr. Kohtz, are medically reasonable to treat Claimant's pain.

53. Dr. Greenwald testified that Claimant should be taking gabapentin (Neurontin) *and* pregabalin (Lyrica) to treat her industrially-related chronic pain instead of narcotics. She does not opine that they should not be taken with narcotics, just that Claimant should not take narcotics. Dr. Kohtz has prescribed these medications at times for Claimant's pain, in tandem with narcotics, without serious complications. The Referee finds these medications, as monitored by Dr. Kohtz, are medically reasonable to treat Claimant's pain.

54. Unlike Dr. Sandison, Dr. Kohtz did not include Relpax in his list of industrially-related medications. Claimant does not assert that Defendants are liable for

her Relpax cost from February 13, 2007 through January 28, 2010, so the Referee finds that they are not.

55. From summer 2010 through winter 2011-12 and at times thereafter, Dr. Kohtz prescribed lorazepam (a benzodiazepine) for anxiety and panic attacks, unrelated to her industrial accident or injury. In 2010, Claimant's anxiety increased due to the multiple suicide attempts of her son, one of which she foiled by resuscitating him with CPR, and his eventual death by suicide. She apparently continued to take lorazepam as needed off and on through the hearing date.

56. Dr. Greenwald opined that Claimant should not be taking benzodiazepines, which are highly addictive, with her narcotic pain medications. Although Claimant's benzodiazepine use is not related to the industrial injury, the addition of another addictive drug to her polypharmacy, on a long-term basis, does affect the risk-benefit ratio associated with the use of narcotics to control her industrially related pain. The Referee finds this medication change is sufficiently material to shift the burden to Claimant to prove it is medically reasonable to continue taking her narcotic pain medications with a benzodiazepine.

57. The scant evidence offered on this point is summarized above. It has already been determined that Dr. Kohtz is qualified to administer Claimant's pain medications. He has testified that he would not maintain a patient on medication if she had become dependent upon it. Claimant apparently takes one pill a couple of times a week, or less, and she had done so on and off for three years with no recorded ill effects at the time of the hearing.

58. On the totality of evidence presented, the Referee finds Claimant's use of a benzodiazepine as prescribed and monitored by Dr. Kohtz does not render her use of narcotics for control of her industrially-related pain medically unreasonable.

59. **Change in standard of care.** Dr. Kohtz and Dr. Greenwald both agree that new information is emerging from medical research into opioids and chronic pain treatment. Neither asserts that any strict prescription timeline or any new all-encompassing rules for administering these drugs now applies. Both are adjusting their relevant practices in this regard. Most importantly in this case, Dr. Kohtz agrees that, based on new research, Claimant should not be taking Norco along with long-acting narcotics. He had planned to cease Claimant's Norco prescription by around the beginning of 2013. Therefore, the Referee finds that the continued prescription of short-acting narcotics (such as Norco) prescribed in tandem with long-acting narcotics (such as Duragesic/fentanyl patches and methadone) after December 2012 is not medically reasonable.

60. Both Dr. Kohtz and Dr. Greenwald acknowledge that long-acting narcotics are inappropriate if they become inefficacious or if the patient becomes dependent upon them.

61. The Referee is persuaded by the testimony of Dr. Kohtz and Claimant that methadone and, to a greater extent, Duragesic/fentanyl patches, remain sufficiently effective in controlling her chronic pain.

62. As to dependence, Dr. McClay opined that Claimant's psychological profile, combined with the lack of an objectively identifiable physiological pain source, indicates she is dependent upon narcotics and, thus, should stop taking them altogether. Dr.

Greenwald adopts Dr. McClay's opinion even though she does not doubt Claimant has ongoing pain related to her industrial injury. Dr. Kohtz, on the other hand, has not seen evidence of dependence over the years, pointing out that he would have increased Claimant's dosages at times in the past but for Claimant's objection on the grounds that she did not want to become dependent. Further, Claimant's DIRE test results in 2012 indicated she was not at undue risk for dependence.

63. As a result of the prior holdings in this case, Dr. McClay's opinion is only persuasive, in terms of limiting Defendants' liability, to the extent that it establishes some new condition, with onset since the prior hearing, that changes Claimant's chronic pain treatment. To proceed otherwise would allow Defendants to retry causation issues which have already been decided. Dr. McClay opined that Claimant likely had the psychological conditions he identified in his evaluation before her industrial injury. Based upon Dr. McClay's opinions, Claimant should have been taken off narcotics at least by the time of the last hearing. However, that issue has already been tried. Dr. McClay's opinions may very well influence Dr. Kohtz's treatment going forward. However, as a legal matter, they do not establish any change in Claimant's condition since the last hearings that would justify a change in prior holdings concerning Defendants' liability for Claimant's benefits.

64. Dr. Greenwald's adoption of Dr. McClay's opinions in finding that Claimant is psychologically dependent on narcotic pain medications is insufficient to establish that Claimant's condition has changed since the last hearing. To the extent that her opinion in this regard is based upon her own testing, independent of Dr. McClay's, Dr. Kohtz's

opinion is more persuasive, having been developed over years of treating Claimant and gauging her reactions to her medications.

65. It is also worth noting that Dr. Greenwald's and Dr. Kohtz's opinions are not that divergent. They do not agree as to the current treatment for Claimant, but they do not necessarily represent separate standards of care. Although Dr. Greenwald opined that Claimant should not be taking narcotics, she repeatedly recognized that each patient is different, and there is no set medication course or timeline that is appropriate for everyone. She, herself, maintains some patients on long-acting narcotics for years, and she does not doubt that, for some of these, she has probably also prescribed short-acting narcotics. She works closely with her patients and does not prescribe any narcotics lightly, but she finds them appropriate in some cases.

66. Dr. Greenwald emphasized functionality – is the patient functioning adequately in the community? She concluded that Claimant is not adequately functioning because she is now not working, nor keeping up with all of her activities of daily living. Further, she still reports significant pain. The opioids are apparently not helping Claimant function so there is no reasonable justification to keep prescribing them. In fact, they may be keeping her from working due to the cognitive dysfunction they can cause.

67. On the other hand, Claimant reports significant relief from a portion of her pain with narcotics, especially with the Duragesic patches. Although they do not relieve all of her pain, she is more functional with this medication. Further, Claimant could not keep working, even at a desk job, due to pain and numbness in her left upper extremity, regardless of cognitive issues. The record also reflects that Claimant does – and has for

years – served a vital function within her distressed family community by raising a granddaughter and being available for her other grandchildren, whose parents are apparently ill-equipped to handle them without Claimant’s assistance. To conclude that Claimant’s pain medications are not helping her to function would require the Commission to ignore material evidence to the contrary.

68. Defendants have established a change in the standard of care, based upon Dr. Kohtz’s testimony, that persuades the Referee to recommend altering the prior holdings regarding Claimant’s medical treatment to exclude short-acting narcotics (such as Norco) in tandem with long-acting narcotics, from Claimant’s treatment regimen as of January 1, 2013. Otherwise, Claimant has established that Dr. Kohtz’s narcotics regimen, including Duragesic patches supplemented by methadone, is medically reasonable.

69. **Changes in Claimant’s pain levels attributable to non-industrial causes.** When Claimant is more active, and when she is distressed, her pain experience increases. The record establishes that Claimant’s pain has historically waxed and waned, and that she has suffered from depression and, possibly, other psychological conditions that may affect her pain levels, since before her industrial injury. Defendants have failed to establish a change in Claimant’s pain levels attributable to non-industrial sources that persuades the Referee to recommend altering any of the prior holdings regarding Claimant’s medical treatment.

70. **Changes in Claimant’s industrial condition.** Claimant’s industrial pain has persisted for years. As a result of Surety’s cessation of her medical benefits in 2010, Claimant was required to take methadone, instead of Duragesic patches. As a result, she

suffered side effects, including nausea. Dr. Kohtz prescribed phenergan to control Claimant's nausea. Claimant's need for phenergan constitutes both a material change in her industrial condition, and a reasonable treatment related to her industrial injury, and is compensable.

71. As to the remaining medications found medically reasonable as a result of the last hearing, Defendants have failed to establish any material change in circumstance that would require Claimant to re-establish their compensability. Therefore, Neurontin, Imiprimine, Zanaflex or cyclobenzaprine, Ambien, and Celebrex remain medically reasonable treatments for her industrially-related chronic pain.

LIABILITY FOR FAILURE TO ATTEND IME WITH DR. GREENWALD

72. Claimant had notice of an IME with Dr. Greenwald, scheduled for May 14, 2013. Nevertheless, for unknown reasons, Claimant failed to attend on that date. Defendants assert that Claimant is, therefore, liable for Dr. Greenwald's no-show charge.

73. Idaho Code § 72-433 authorizes an employer to require an injured worker to submit to a medical examination set up by employer. Idaho Code § 72-434 provides that if an injured worker unreasonably fails to submit to, or otherwise obstructs, the Idaho Code § 72-434 exam, the injured worker forfeits his right to prosecute his claim, and his right to compensation, at least as long as his obstruction continues. This is the only penalty imposed by the statute for an injured worker's refusal to cooperate in a medical exam. Idaho law does not recognize a right to reimbursement for the charges incurred by employer in setting up an Idaho Code § 72-433 exam. See *Romriell v. Smith Food & Drug Centers, Inc.*, 1996 IIC 0844 (1996).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 29

CONCLUSIONS OF LAW

1. Defendants remain liable for the payment of, and/or reimbursement for, continuing medication prescribed to manage Claimant's chronic pain, so long as the need for such medications can be reasonably related to her industrial accidents and injury.

2. Defendants have established a material change in the standard of care related to Claimant's use of short-acting narcotics in tandem with long-acting narcotics since the last hearing.

3. Claimant failed to prove that her use of short-acting narcotics along with long-acting narcotics after January 1, 2013 constitutes reasonable medical care for her industrial chronic pain; therefore, Defendants are not liable for the cost of Claimant's Norco after January 1, 2013.

4. Defendants have established material changes in Claimant's medication regimen related to her industrially-related chronic pain since the last hearing as the result of the addition of tizanidine, Cymbalta, and Lorazepam, and the subtraction of Relpax.

5. Claimant has proven that tizanidine and Cymbalta are medically reasonable to treat her industrially-related chronic pain. Defendants must reimburse Claimant's costs related to tizanidine and Cymbalta incurred since February 13, 2007.

6. Claimant has proven that her narcotics regimen, so long as it is in compliance with this order, is medically reasonable treatment for her industrially-related chronic pain, even with the use of Lorazepam as currently prescribed by Dr. Kohtz.

7. Claimant has failed to prove that Relpax remains medically reasonable to treat her industrially-related chronic pain. Defendants are no longer liable for Claimant's costs related to Relpax as of July 12, 2013.

8. Claimant has proven that Lyrica and phenergan related to methadone use are medically reasonable to treat her industrially-related chronic pain. Defendants must reimburse Claimant's costs related to these medications incurred since February 13, 2007.

9. Defendants have failed to establish any material change in circumstance that would require Claimant to re-establish that Neurontin, Imiprimine, Zanaflex or cyclobenzaprine, Ambien, and Celebrex remain medically reasonable treatments for her industrially-related chronic pain. Defendants remain liable to reimburse Claimant for her costs associated with these medications.

10. Defendants are entitled to a credit for amounts already paid toward compensable medications.

11. Defendants shall reimburse Claimant for the full invoiced amount of the denied medical bills which the Commission has found to be compensable. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

12. Claimant is not liable for Defendant's costs, if any, associated with Dr. Greenwald's no-show charge for Claimant's failure to appear at the IME scheduled for May 14, 2013.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHELLE KIMBALL,

Claimant,

v.

GOODING COUNTY MEMORIAL,

Employer,

and

EVEREST NATIONAL INSURANCE
COMPANY,

Surety,

Defendants.

**IC 2001-018415
2001-021632**

ORDER

Filed June 4, 2014

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. Defendants remain liable for the payment of, and/or reimbursement for, continuing medication prescribed to manage Claimant's chronic pain, so long as the need for such medications can be reasonably related to her industrial accidents and injury.

2. Defendants have established a material change in the standard of care related to Claimant's use of short-acting narcotics in tandem with long-acting narcotics since the last hearing.

3. Claimant failed to prove that her use of short-acting narcotics along with long-acting narcotics after January 1, 2013 constitutes reasonable medical care for her industrial chronic pain; therefore, Defendants are not liable for the cost of Claimant's Norco after January 1, 2013.

4. Defendants have established material changes in Claimant's medication regimen related to her industrially-related chronic pain since the last hearing as the result of the addition of tizanidine, Cymbalta, and Lorazepam, and the subtraction of Relpax.

5. Claimant has proven that tizanidine and Cymbalta are medically reasonable to treat her industrially-related chronic pain. Defendants must reimburse Claimant's costs related to tizanidine and Cymbalta incurred since February 13, 2007.

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7. Claimant has failed to prove that Relpax remains medically reasonable to treat her industrially-related chronic pain. Defendants are no longer liable for Claimant's costs related to Relpax as of July 12, 2013.

8. Claimant has proven that Lyrica and phenergan related to methadone use are medically reasonable to treat her industrially-related chronic pain. Defendants must reimburse Claimant's costs related to these medications incurred since February 13, 2007.

9. Defendants have failed to establish any material change in circumstance that would require Claimant to re-establish that Neurontin, Imiprimine, Zanaflex or

cyclobenzaprine, Ambien, and Celebrex remain medically reasonable treatments for her industrially-related chronic pain. Defendants remain liable to reimburse Claimant for her costs associated with these medications.

10. Defendants are entitled to a credit for amounts already paid toward compensable medications.

11. Defendants shall reimburse Claimant for the full invoiced amount of the denied medical bills which the Commission has found to be compensable. *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009).

12. Claimant is not liable for Defendant's costs, if any, associated with Dr. Greenwald's no-show charge for Claimant's failure to appear at the IME scheduled for May 14, 2013.

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

DATED this __4th__ day of __June__, 2014.

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 __June__ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

MINDY M WILLMAN
PO BOX 829
BOISE ID 83701

ge

_____/s/_____