BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT H. KILLMAR, Claimant, v. TRI BUILDERS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2005-505241** **2007-031706** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION,** **Filed March 30, 2015**

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 Lewiston on October 16, 2014. Claimant was present along with his attorney, Ned A. Cannon, of Lewiston. Mark T. Monson of Moscow represented Employer/Surety (Defendants). Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on February 3, 2015.

ISSUES

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

1. Claimant's entitlement to total temporary disability benefits (TTDs) from April 21, 2011 through February 25, 2013.

2. Claimant's entitlement to an award of attorney fees for Defendants' unreasonable denial of the TTD benefits referenced above.

CONTENTIONS OF THE PARTIES

Claimant contends that his treating physician and a Defense-requested IME physician erroneously declared him at MMI on or around April 21, 2011. The two physicians did not know at the time that a screw inserted during a lumbar fusion surgery had broken and the surgery had to be redone. Claimant reasons that because he has been in pain since his original lumbar fusion, the pain must have been due to the broken screw and he was never medically stable and is owed TTD benefits during that time frame. Claimant further asserts that Defendants' denial of the contested TTD benefits was unreasonable and an award of attorney fees is warranted.

Defendants counter that the only available objective evidence at the time Claimant was declared at MMI showed an intact union. When subsequent diagnostic testing revealed a broken screw and a non-union, TTDs were once again commenced. No medical provider could say when the screw broke, so it is only reasonable that TTDs begin when the screw was objectively discovered. As Defendants did nothing unreasonable in stopping and restarting Claimant's TTD benefits, Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife taken at the hearing.
2. Claimant's Exhibits (CE) 1-6, admitted at the hearing.
3. Defendants' Exhibits (DE) A-C, admitted at the hearing.
4. Defendants' Exhibit D, admitted by stipulation post-hearing.

5. The post-hearing deposition of Rodde Cox, M.D., taken by Claimant on November 14, 2014.

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 63 years of age and residing near Kamiah at the time of the hearing. He has two years of college, but no degree. At the time of his accident, he was a working foreman for Tri Builders, whose primary work was building grain elevators.

2. In early September 2007, Claimant reported that he had hurt his back while operating a skid steer spreading gravel over a period of a few days. Defendants accepted his claim and began paying TTDs.

3. On November 9, 2010, Claimant underwent an L5-S1 lumbar fusion at the hands of neurosurgeon Donald S. Soloniuk, M.D.

4. The surgery alleviated Claimant's radicular symptoms, but not his back pain.

5. Dr. Soloniuk released Claimant on April 8, 2011, noting that Claimant had been making slow but progressive improvement. "Overall as he is doing well I am discharging him from my care." CE-30.

6. On May 27, 2011, Rodde Cox, M.D., a physiatrist, performed an IME at Defendants' request. Dr. Cox found Claimant to be a good historian and did not detect any symptom magnification.

7. Dr. Cox found Claimant to be at MMI[1] and assigned an 11% PPI whole person rating without apportionment.

8. Defendants stopped paying TTDs on April 22, 2011 based on Drs. Soloniuk's and Cox's opinions and began paying PPI benefits

9. Claimant testified that he continued to experience back pain of various degrees since before and after his original lumbar fusion. The records of Claimant's treating surgeon and his family doctor note some pain from time to time, but not generally of the duration or intensity described by Claimant. The Referee finds that Claimant credibly testified that he has experienced back pain of varying degrees of duration and intensity both before and after his fusion surgery.

10. On November 20, 2012, Claimant returned to Dr. Soloniuk complaining of continuing back pain. Dr. Soloniuk noted:

> **History of Present Illness:**
>
> The patient is a 51-year-old white male who comes to clinic today because of continuing issues with his back. The patient continues to have low back pain. It has now been bothering him for the last 3-4 months. He did have surgery on his back a little over a year ago. At that time, he seemed to get pretty good relief of his back pain and leg pain. However, this summer, he did work at the grain bins and seemed to really exacerbate his back problems. He now says it continues to bother him almost on a daily basis. Some days are worse than others. Still sleeping on the floor about every third or fourth day.

Exhibit 10 to Dr. Cox Depo.

11. Dr. Soloniuk recommended a CT scan, extension/flexion x-rays, and a bone scan to address the stability of Claimant's fusion.

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[1] Dr. Cox defined MMI as: " . . . the date after which further recovery and restoration of function can no longer be anticipated based upon a reasonable degree of medical probability." CE-47.

12. On March 19, 2013, Dr. Soloniuk reviewed Claimant's updated MRI findings and noted that the rods and screws appeared to be in position and intact. *See* Claimant's Exhibit 5, p. 74. Dr. Soloniuk recommended a CT scan. *Id*. On April 8, 2013, Dr. Soloniuk wrote to Dr. Teel and noted that the CT and bone scan revealed a broken screw and non-solid fusion at L5-S1. Claimant's Exhibit 5, p. 76. Dr. Soloniuk recommended a repeat L5-S1 surgery. *Id*. It is medically impossible to determine when the hardware failed.

13. Dr. Soloniuk assessed a broken screw and non-solid fusion at L5-S1 and recommended a revision of the fusion. Defendants approved this procedure which was accomplished on October 8, 2013.

DISCUSSION AND FURTHER FINDINGS

TTDs

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total

temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg, Id.*

14. Claimant contends that because a screw broke at some point at his fusion site, he is entitled to TTD benefits from the time he was released by Drs. Soloniuk and Cox until they were recommenced after the broken screw was discovered in April 2013. The problem with this contention is that no physician involved in Claimant's care can say just when the screw broke. Claimant appears to be arguing that because he continued to experience pain in his back after his initial lumbar fusion the screw must have broken between that date and the date he was declared at MMI. However, both Drs. Soloniuk and Cox relied upon x-rays taken in December of 2010 and January 2011 that showed a solid fusion. Dr. Soloniuk summed up his opinions in a November 10, 2014 letter to Claimant's counsel this way:

> This letter is in regards to our conversation about Robert. As you know, Robert underwent x-rays of his lumber spine in December of 2010 and in January of 2011. At that time the fusion appeared to be solid and intact with the rods and screws in position. I gave him a note to return to light duty work as of February 2011 and in April of 2011 I recommended that he undergo an MRI for determination of level disability. At that time it appeared that Robert's fusion was solid and intact.

> Based on the history that Robert gave me he has had no further trauma to his back. He presented to me in March 2013 with evidence of a broken screw.[2] A broken screw would indicate the presence of a pseudoarthrosis, that is an incomplete fusion. Although I do not know specifically when the screw broke, in hindsight it would appear that the fusion may not have been solid at the time he returned to work.

DE-D.

15. Dr. Cox testified that under the circumstances, a repeat lumbar surgery was reasonable:

> So, I think - - I think that the tough part is that yes, he did indeed have a fractured screw. But - - and I just looked over these records this morning,[3] but I think that although the screw was fractured but I thought that the CT scan indicated that the actual fusion or at least that part of the fusion was solid. So I don't know if his [Dr. Soloniuk's] thought process was that the screw was broken because there was movement there that caused the screw to break, in which case then yes, the fusion was indicated. If the screw was broken simply because it was stressed at some point in time and broke but the fusion was solid, then it wouldn't make sense necessarily to repeat the fusion.

Dr. Cox Depo., p. 21.

16. Dr. Cox also testified that a broken screw does not necessarily mean that the fusion was not intact. He further testified that as of the January 26, 2011 x-rays, the hardware was intact. The information Dr. Cox received shortly before his deposition regarding the broken screw did not change his mind regarding his finding of MMI in May 2011:

> No, because I think he was, based on the information that I had, which was a few months previously he had an x-ray that showed his fusion was intact, and in looking at the definition of maximum medical improvement, you know, it doesn't mean - - you're not saying someone is asymptomatic. You're not saying someone is back to normal. You're just saying that based

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[2] Dr. Soloniuk's records indicate that it was in April (not March) 2013 that the non-solid fusion was documented.

[3] Defendants never sent Dr. Cox any more medical records after his IME, so he was unaware of Claimant's failed fusion until the morning of his deposition.

> on the information we have at this point in time, we feel like they're about as good as they're going to get.
>
> And so I still I would stand by the fact that I think he was at maximum medical improvement when I saw him, and sometime subsequent to that his fusion failed and it was - - and I think his claim should have been reopened. And if, indeed, the fusion failed, then it needs to be fixed.

Dr. Cox Depo., p. 25.

17. Without knowing when the screw failed and whether such failure caused Claimant's low back pain (remember, Claimant, according to his own testimony, experienced continuing back pain since before his original fusion surgery and continuing at least up to his revision surgery), makes it impossible to "back date" his entitlement to TTD benefits in the interim. The evidence suggests that the screw failed sometime before April 2013 at which time Defendants reinstituted TTD benefits. Just because Claimant's fusion may have failed subsequent to when he was declared at MMI by Drs. Soloniuk and Cox, such does not mean he was not at MMI when so declared.

18. Without knowing when the screw broke, there is no way to know when the TTD benefits Claimant seeks should begin. To arrive at such a date would be an exercise in pure speculation.[4] It is significant that no physician has taken Claimant off work after he was declared at MMI. In fact, after he was at MMI, Claimant worked within his restrictions at a grain mill during the harvest seasons for years adding further confusion regarding the timing of the broken screw. Drs. Soloniuk and Cox have opined that the existence of pain does not negate a finding of MMI. There is no good proof that Claimant's pain was as a result of the broken screw because Claimant was experiencing

[4] While Dr. Soloniuk indicated in his November 2014 letter to Claimant's counsel that in hindsight the Claimant's fusion may not have been solid at the time he was returned to work, he provides no foundation for that statement.

pain during the time when his fusion was documented as solid in December 2010 and January 2011 (and even before his first fusion surgery).

19. The Referee finds that Claimant has failed to prove his entitlement to additional TTD benefits.

Attorney fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

20. The Referee finds that Defendants acted reasonably when they stopped TTD benefits based on the opinions expressed by Drs. Soloniuk and Cox and were also reasonable in restarting them when it was objectively determined that Claimant's fusion was not solid.

21. The Referee finds that Claimant has failed to prove his entitlement to attorney fees.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he is entitled to additional TTD benefits.

2. Claimant has failed to prove he is entitled to an award of attorney fees.

RECOMMENDATION

Based upon the foregoing Substitute 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 _16th_ day of March, 2015.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __30th____ day of ___March____, 2015, a true and correct copy of the foregoing **SUBSTITUTE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION, THE COMMISSION'S PRIOR DECISION DATED MARCH 25, 2015 IS WITHDRAWN** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT H. KILLMAR, Claimant, v. TRI BUILDERS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2005-505241** **2007-031706** **ORDER** **Filed March 30, 2015**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended substitute 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 substitute 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 that he is entitled to additional TTD benefits.
2. Claimant has failed to prove he is entitled to an award of attorney fees.

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

DATED this __30th___ day of __March___, 2015.

INDUSTRIAL COMMISSION

___/s/_____
R. D. Maynard, Chairman

_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _30th__ day of _March__ 2015, a true and correct copy of the foregoing **SUBSTITUTE ORDER, THE COMMISSION'S PRIOR ORDER DATED MARCH 25, 2015 IS HEREBY WITHDRAWN** was served by regular United States Mail upon each of the following:

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