

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH GERDON,

Claimant,

v.

CON PAULOS, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Surety,

Defendants.

IC 2008-019169

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

April 7, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise on September 5, 2014. Claimant was present and represented by Daniel J. Luker of Boise. Joseph M. Wager of Boise represented Employer (“Con Paulos”) and Surety (collectively, “Defendants”). The parties presented oral and documentary evidence, took two post-hearing depositions and filed briefs. This matter came under advisement on March 18, 2015.

PROCEDURAL BACKGROUND AND PREVIOUS FINDINGS

A previous hearing was held in this case, on January 30, 2012, culminating in a decision issued on October 15, 2012 in which the Commission ordered that:

1. Claimant’s treating physician is Dr. Marsh.

2. Claimant has proven that, as a result of his industrial accident, he suffered injuries including left ankle fracture, CRPS of the left lower extremity, L3-4 disc herniation, bilateral knee osteoarthritis, and temporary thoracic spine pain (now healed).
3. Claimant has proven that he is entitled to reimbursement for past medical care for his industrial injuries including, specifically, reimbursement for:
 - a. Past medical care by Dr. Marsh;
 - b. STARS cardiac workup by Dr. Parent;
 - c. December 5, 2010 urgent care and follow-up with Dr. Coughlin;
 - d. December 19, 2011 urgent care;
 - e. Physical therapy before December 2010;
 - f. The actual reasonable cost of Claimant's wheelchair (if not already paid by Surety), wheelchair ramps and handle bars installed in his house; and
 - g. Mileage reimbursement for nine roundtrips from Jerome to Boise for medical treatment, consistent with Idaho Code § 72-432(13).
4. Claimant has failed to prove he is entitled to any additional past medical care, and any future claims for medical care incurred through the hearing date will be subject to the doctrine of *res judicata*.
5. Claimant has proven entitlement to future palliative medical care from Dr. Marsh, including Methadone therapy for pain relief; as well as periodic monitoring and evaluation of his left ankle, CRPS, L3-4 herniation, and bilateral knee osteoarthritis conditions.

6. Claimant has failed to prove he is entitled to future care consisting of sympathetic nerve blocks, a spinal cord stimulator, bariatric care, gym membership, a power chair, physical therapy, or psychological care or counseling.
7. Claimant has proven he suffered PPI due to the industrial accident in the amount of 13.5% of the whole person after apportioning 3.5% to his preexisting lumbar spine condition.
8. Claimant has failed to prove that he is totally and permanently disabled under the odd lot doctrine.
9. Claimant has proven he is 50% permanently partially disabled, inclusive of impairment, as a result of his industrial injuries.
10. Claimant has proven he is entitled to attorney fees for unreasonable denial of Claimant's claim for reimbursement of costs associated with consultations with Ms. Graf, nutritionist.

Thereafter, Claimant filed a Motion for Reconsideration regarding the disability findings, which was denied by Order dated February 1, 2013. This decision was not appealed and has become final.

ISSUES

By agreement of the parties, the sole issue to be decided is whether Claimant is *now* entitled to benefits for psychological treatment pursuant to Idaho Code § 72-451.

CONTENTIONS OF THE PARTIES

Claimant contends that he is now entitled to benefits for psychological care because his industrial injuries are the predominant cause of his depression. Defendants agree that Claimant suffers from depression and that both counseling and medication treatment are reasonable.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 3

However, they contend that Claimant's preexisting psychological deficits are equally responsible for his current mental state and, therefore, he is not entitled to benefits for psychological treatment under Idaho Code § 72-451.

OBJECTIONS

All pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Exhibits admitted at the hearing:
 - a. Claimant's Exhibits 1-6; and
 - b. Defendant's Exhibits 1-3;
2. Testimony taken at the hearing from:
 - a. Claimant;
 - b. Rachel Gerdon, Claimant's wife;
 - c. Mickey Gerdon, Claimant's mother; and
 - d. Cody and Jessica Campbell, Claimant's friends; and
3. The post-hearing deposition testimony of:
 - a. Daniel Marsh, M.D., taken October 9, 2014; and
 - b. Robert Calhoun, Ph.D., taken October 22, 2014.

After considering 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

BACKGROUND

1. Claimant was 36 years of age at the time of the hearing and resided in Jerome, Idaho. His preexisting medical and psychological conditions, as well as his industrial injuries and difficult recovery, are detailed in the former recommendation and order and will not be repeated here.

2. At the recent hearing, Claimant testified that he is in constant pain from his left leg crush injury. He has regular ankle swelling from walking, tripping, and stubbing his foot. He sleeps the day away, but can only sleep for three or four hours at night, when he ruminates on what he cannot do. This leads to stress, which increases his pain. Sometimes he thinks his wife and daughter would be better off without him. Activity around him makes him cranky, mad, and mean, so he prefers to stay home. He has a quick temper which leads to arguments with his wife. He feels his brain is fuzzy, perhaps from stress, anxiety, or nerves. He feels his condition has worsened since the last hearing.

3. Claimant elected to leave the courtroom while his mother, wife, and friends testified.

4. Claimant's mother, a registered nurse, lives in Arizona three months out of the year and near Claimant during the remaining nine months. When she is in Arizona, she communicates with Claimant at least daily via telephone or Skype. He calls when he's upset, and she calls when she's worried about him. She became especially worried about him around June 2014, when she found him listless and he told her that he wanted to drive over the falls because he couldn't take the pain. She was also present at Claimant's July 1 appointment with Dr. Marsh when he reported he had thought about driving his car off into a canyon within the

previous five days. The history portion of that chart note identifies Claimant's then-current subjective state and a number of reasons for his despondency:

Patient has changed his diet and [sic] using a low carb [sic] app. He is having an increase in pain. His hips are awful and he cannot sleep. The Workers comp [sic] had not approved the diagnosis of PTSD and depression. Patient is more frustrated and more depressed which has affected his appetite and sleep. He has a 5yo girl and he is unable to participate. He has not been out of the house for 2 weeks. She [sic] has not seen his daughter do gymnastics for 4 months. She won the state championships and he was not there. He sits and stares all day and does not even watch TV. This leads to arguments. He is suicidal, it crosses his mind. He has thought of driving the car off the canyon as recently as 5 days ago. His mother has lost one child to suicide.

CE-3(33).

5. Claimant's mother, wife, and friends all testified that Claimant was an optimistic, fun-loving person with no history of anger before his industrial accident, but he became withdrawn, hostile, self-pitying, and unlikable afterward. Their testimony regarding the change in Claimant's personality following his industrial accident is undisputed and persuasive, and it need not be detailed here.

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).

PSYCHOLOGICAL CARE

6. *Claim preclusion.* As a result of the prior hearing, the Commission adopted the following finding regarding Claimant's general request for psychological care:

Psychological care and counseling. Although Claimant seeks a determination that he is entitled to future psychological care and counseling, he has failed to address any of the requirements to prove such entitlement under Idaho Code § 72-451. Further, no on-going psychological care has been prescribed. Claimant has failed to establish entitlement to benefits for future psychological care and counseling.

7. Defendants have not raised claim or issue preclusion as a defense to this claim for psychological treatment. Therefore, this issue will not be addressed. *Deon v. H&J, Inc.*, 157 Idaho 665 (2014).

8. *Law.* In 1994, the Idaho State Legislature adopted Idaho Code § 72-451 regarding the compensability of certain types of psychological injuries. Generally, the statute recognizes the compensability of so called “physical/mental” and “mental/physical” injuries, yet forecloses claims for “mental/mental” injuries. The instant case posits a “physical/mental” injury. Compensable psychological claims, because of their subjectivity, must meet certain elements to be recognized. Specifically, the statute provides:

Psychological accidents and injuries. - - Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by an accident and physical injury as defined in section 72-102(18)(a) through 18(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such accident and injury must be the **predominant cause** as compared to all other causes combined of any consequence for which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered, and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994.

Id., (emphases added.)

9. *Disputed element.* Of the six required elements enumerated in Idaho Code § 72-451, one is disputed by Defendants. That element is whether Claimant's industrial injuries are the predominant cause of his psychological condition.

10. Idaho Code § 72-451(3) does not present a "but for" standard of causation. The Commission described the proof necessary to establish a predominant cause in *Smith, 2009 IIC 0179.1.*:

Under the predominant cause standard, it is not sufficient that the industrial injury be merely the proverbial "straw that breaks the camel's back." Although an employer takes an employee as he is, in determining the predominant cause of a psychological condition, the contribution of all of the employee's pre-accident factors must be weighed against the contribution of the industrial accident. To be the predominant cause, the work injury must be a greater cause of the psychological condition than all other causes combined. Thus, if a percentage of contribution were assigned to each and every factor which collectively produce a claimant's psychological condition, the contribution of the industrial accident

must be more than 50% of the total of all of the causes. Against this standard, the evidence, including expert testimony, produced by the parties must be evaluated.

Id.

11. This issue turns on expert opinion evidence regarding Claimant's pre- and post-industrial injury psychological condition. Proper evaluation of the effect of Claimant's preexisting psychological condition on his post-injury condition is necessary to this determination.

EXPERT OPINIONS

12. Robert Calhoun, Ph.D., is a clinical neuropsychologist who treats patients with either psychological conditions, chronic pain, or both. Daniel Marsh, M.D., is a pain specialist who has been Claimant's treating physician since 2011. Both physicians are qualified to opine regarding Claimant's condition, and both provided post-hearing deposition testimony.

13. *Undisputed facts.* Drs. Marsh and Calhoun agree that:

- Claimant has no known history of treatment for any psychological difficulties.
- Chronic pain patients, in general, are at significantly greater risk for depression than the general population.
- Claimant suffers from depression, in part related to the chronic pain he experiences as a result of his industrial accident.
- Claimant should obtain treatment including both counseling and appropriate psychotropic medication.

14. Also, as found, above, Claimant's mental state has significantly declined since the industrial accident. Before, he was optimistic and fun-loving around his friends and mother. By the time of the hearing, his mother worried that he, like his brother, may succumb to suicide, and his friends didn't like to spend time with him anymore because he had such a negative attitude.

15. *Dr. Marsh.* Dr. Marsh specializes in treating patients with chronic pain. He prescribes certain psychotropic drugs that are also associated with decreasing pain, and he generally monitors his patients' moods – particularly those of patients, like Claimant, who are taking opioid medications. He does not treat psychological conditions.

16. Dr. Marsh opined that Claimant's industrially related chronic pain is the predominant cause of his depression. He based his opinion on his history of treating Claimant's pain and Claimant's lack of any prior treatment for psychological conditions. He was unaware of any psychological testing Claimant has undergone, or what those tests may have indicated.

17. *Dr. Calhoun.* Dr. Calhoun has formally evaluated Claimant's psychological state three times: for a work hardening program on April 22, 2009, for a spinal cord stimulator trial on May 14, 2010, and, to determine the etiology and proper treatment for his current psychological condition, on July 31, 2014. He also treated Claimant in several individual therapy sessions, and participated in working group meetings regarding Claimant's overall treatment in the work hardening program in 2009.

18. Prior to preparing his report following the July 2014 evaluation, Dr. Calhoun conducted a diagnostic interview of Claimant, reviewed his medical records (including Dr. Marsh's), ascertained the behavioral aspects of Claimant's pain problems, administered/interpreted a battery of psychological testing,¹ and developed a clinical synthesis of all of the information.

19. Dr. Calhoun explained that objective testing is important because diagnostic interviews don't always reveal more subtle psychological characteristics that the testing can identify. In Claimant's case, the 2014 testing indicated that he 1) is at high risk for

¹ Dr. Calhoun administered and interpreted Claimant's responses to the Minnesota Multiphasic Personality Inventory-2, the Millon Clinical Multiaxial Inventory-III, the Psychopathic Personality Inventory-Revised, and the State-Trait Anger Expression Inventory-2.

overexaggerating his level of experienced illness, 2) can be very self-pitying and views himself as lacking coping resources, 3) somaticizes stress, 4) is at risk for chronic low-grade depression (dysthymia) which can develop into major depressive episodes when he's stressed, 5) is very self-deprecating and will likely take out his anger on others, 6) is at risk for substance abuse, 7) was experiencing chronic and acute psychopathology, 8) was a hostile individual with anger issues and prone to depression before the industrial accident, and these traits were consistently evident through all of Dr. Calhoun's evaluations.

20. Based upon that synthesis, Dr. Calhoun opined that the industrial injury of June 13, 2008 is not the predominant cause of Claimant's present depressed state. Instead, it is 50% due to his chronic pain from his industrial injuries, and 50% due to Claimant's preexisting personality traits of hostility, anger, resentment, and dysthymia, which were consistently identified by psychological testing over time. Dr. Calhoun further opined that, even if Claimant had not suffered the industrial accident, he probably would have experienced some other event at some point in his life that would have resulted in "significant psychological decompensation." Calhoun Dep., p. 31.

21. Dr. Calhoun's opinions are credible and well-supported by his clinical experiences with Claimant, as well as his testing results over time. Dr. Marsh's opinion is credible, but it is limited by its narrow foundation. It lacks the depth of information about Claimant that Dr. Calhoun utilized, particularly in regard to Claimant's preexisting psychological condition. Whereas Dr. Marsh assumed that because Claimant had not previously received psychological treatment, he was not at higher than normal risk than other chronic pain patients for depression, Dr. Calhoun's undisputed analysis of information related to Claimant's preexisting psychological condition establishes that he was. Also, Dr. Marsh believed that the

Idaho workers' compensation law "takes a claimant as found" in regard to psychological treatment, leading him to conclude that the industrial injury was the predominant cause of Claimant's depression without the need to further assess Claimant's preexisting condition. As Defendants assert, and as set forth, above, this is an inaccurate understanding of the predominant cause standard. Because Dr. Marsh's opinion does not address the appropriate standard, it should be given little weight.

22. Claimant makes a valiant argument encouraging the Referee and the Commission to find that, within the 50% of Claimant's current depressive state that Dr. Calhoun attributes to preexisting hostility, anger, resentment, and dysthymia, at least 1% is attributable to his industrial injury and, thus, Claimant has proved the 51% necessary to meet the predominant factor standard. Such a holding, however, would require the rejection of Dr. Calhoun's well-founded, clearly stated opinion, which the evidence in the record does not justify. Also, Dr. Calhoun specifically rejected this interpretation of his opinion.²

23. The observations of Claimant's mother, wife, and friends are inadequate to overcome Dr. Calhoun's opinion as to Claimant's preexisting psychological condition.

24. The prior recommendation in this case exceeded 100 pages. The relative brevity of this recommendation should not be interpreted as dismissive of Claimant's very difficult circumstances. Instead, it is the result of the Referee's recognition that Dr. Calhoun's opinion is the only opinion that considers all of Claimant's relevant preexisting factors and the appropriate

² Claimant argues that under Idaho Code § 72-451(5), it is only where an injured worker seeks impairment/disability for psychological injury, that such claimant must prove a diagnosis under the DSM by the testimony of a duly licensed psychologist or psychiatrist. Therefore, even though Dr. Marsh is not a duly licensed psychologist or psychiatrist, his opinion should nevertheless be considered since the issue before the Referee is not Claimant's entitlement to impairment/disability for psychological injury, but only his entitlement to medical care for psychological injury. The Referee finds that this argument does not need to be addressed since even if it be assumed that Dr. Marsh is appropriately qualified under Idaho Code § 72-415(5), his testimony is wanting, as compared to the testimony of Dr. Calhoun.

legal standard and, thus, it is the only persuasive medical opinion on the issue at bar. As a result, there was much less need to parse facts and expert opinions, such as was necessary in the last recommendation. Thus, findings of fact regarding Claimant's specific symptoms, treatments, and responses to treatment, for example, were unnecessary to reach a determination. Claimant's depression is clearly a serious problem that requires immediate attention; however, he has failed to prove by clear and convincing evidence that his industrial accident was the predominant cause of his depression and, therefore, he is not entitled to additional benefits for psychological treatment.

CONCLUSION OF LAW

1. Claimant has failed to prove he is entitled to additional psychological care pursuant to Idaho Code § 72-451.

RECOMMENDATION

Based on 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 20th day of March 2015.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2015, 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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sjw

/s/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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Claimant,

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CON PAULOS, INC.,

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ORDER

April 7, 2015

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove he is entitled to additional psychological care pursuant to Idaho Code § 72-451.

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

DATED this 7th day of April, 2015.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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