

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CATHRINE HULAC,

Claimant,

v.

LIFECARE MANAGEMENT SERVICES, LLC,

Employer,

and

LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

Surety,  
Defendants.

**IC 2011-000696**

**IC 2011-005134**

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

Filed

January 8, 2016

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on January 27, 2015. Claimant, Cathrine Hulac, was present in person and represented by W. Breck Seiniger, of Boise. Defendant Employer, Lifecare Management Services, LLC, (Lifecare), and Defendant Surety, Liberty Mutual Fire Insurance Company, were represented by Kent W. Day, of Boise. The parties presented oral and documentary evidence. A post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on September 3, 2015.

**ISSUES**

Although the issue of causation was noticed for hearing, Defendants' post-hearing briefing concedes "there really is no causation dispute at this time." Employer/Surety's Responsive Brief, p. 2. Thus the issues to be decided presently are:

1. Claimant's entitlement to medical care provided by Dr. Radnovich;
2. Claimant's entitlement to temporary disability benefits; and

3. Claimant's entitlement to attorney fees.

All other issues are reserved.

### **CONTENTIONS OF THE PARTIES**

Defendants acknowledge that Claimant sustained an industrial accident on January 1, 2011, while helping transfer a patient at work and on February 19, 2011, while turning a patient by herself. Defendants provided medical treatment and Claimant continued working modified duties until April 10, 2011, when she left her employment. Defendants continued providing medical treatment until May 15, 2012, when Michael McMartin, M.D., pronounced Claimant medically stable. Thereafter Claimant underwent additional treatment by Richard Radnovich, D.O., who pronounced her medically stable on September 24, 2012. Claimant alleges entitlement to additional medical treatment and medications prescribed by Dr. Radnovich, temporary disability benefits from April 11, 2011, through September 24, 2012, and attorney fees for Defendants' alleged unreasonable denial of medical treatment. Defendants assert they have reasonably denied further benefits.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits A-Z, AA-GG, OO-ZZ, and AAA, admitted at the hearing;
3. The testimony of Claimant and Dr. Radnovich taken at the January 27, 2015 hearing; and
4. The post-hearing deposition testimony of Dr. McMartin, taken by Defendants on March 18, 2015.

All pending objections are overruled. Defendants' Motion to Strike Claimant's Supplement to Claimant's Reply Brief is granted as said supplement effectively constitutes an over-length and untimely filed brief in violation of JRP 11.

After having considered the above evidence and the arguments 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 born in 1958. She is right-handed. At the time of the hearing, she was 56 years old and lived in Meridian.

2. **Background.** Claimant was raised in Glendale, California and graduated from high school in 1976. She received her associate's degree in nursing from Boise State University in 1993 and her bachelor's degree in general studies from the University of Nebraska in 2000. She has been a registered nurse for the past 20 years with licensure in Alaska, California, Idaho, and Nebraska.

3. During her career as a registered nurse, Claimant has worked as a director of nursing services, supervising nurse at a rehabilitation facility, health care coordinator for an emergency staffing agency, hospital nurse in neurosurgery, orthopedics, pediatrics, geriatrics, PICU, NICU, obstetrics, labor and delivery, traveling NICU and OBGYN nurse in Alaska, and self-employed home health nurse.

4. Lifecare Management is a business that at all relevant times operated as Complex Care Hospital (Complex Care) providing medical care to the critically ill or injured.

5. Claimant started with Complex Care as a registered nurse in July 2010. She had no difficulty performing her job duties. By January 1, 2011, she was working at Complex Care

two 12-hour shifts each weekend. She also worked part-time at Kohl's, a retail department store, during the week.

6. **Significant prior medical history.** In 1993, Claimant sustained a fractured jaw and whiplash and underwent right temporomandibular joint arthroscopy. Also in 1993, she underwent right temporomandibular joint discectomy construction with a temporalis muscle flap. In 2000, she underwent a LeFort I sagittal split osteotomy and LeFort I osteotomy and mandibular sagittal split osteotomy to correct a malocclusion. She developed an infection and required removal of the plates and screws from her maxilla. In 2003 she underwent a repeat LeFort I osteotomy and mandibular split sagittal split osteotomy which was more successful. In 2008, Claimant had a plate and screws removed from her maxilla due to temperature sensitivity.

7. In approximately 2007 Claimant was at work assisting an obese patient who pulled on Claimant's arm and neck, injuring Claimant's right shoulder and neck. The injury produced pain in the back of her neck and right shoulder. She received conservative care.

8. In 2008 Claimant began treating with Richard Radnovich, D.O., who prescribed medications for her right shoulder and neck injury. Claimant called the State Board of Nursing in 2008 and was told she could not work as a nurse while taking Norco or Valium. Dr. Radnovich examined and treated Claimant periodically through September 2010.

9. Claimant was out of work from July 2009 to July 2010 while caring for her mother who underwent a leg amputation due to complications from diabetes. In 2010, Claimant had facial shingles.

10. On September 28, 2010, Dr. Radnovich examined Claimant in followup for her right shoulder and neck pain. At that time Claimant had taken or was taking Norco, Cymbalta, Effexor, and Gabapentin for pain; Baclofen, Norflex, and Valium as muscle relaxers; Flector

patches for inflammation, Celesta for depression, and Ambien as a sleep aid. Claimant refilled several pain medications just 90 days before January 1, 2011.

11. Claimant suffered arthritis and relapsing polychondritis. Polychondritis is a rare form of arthritis of the cartilage which may cause fevers, rashes, inflammation, joint swelling, and pain and may involve the nose, ears, trachea, elbows, and wrists.

12. By January 2011, Claimant typically worked two 12-hour shifts each weekend at Complex Care. She earned \$36.00 per hour, plus a differential of approximately 15% for weekends and nights. Claimant also worked at Kohl's.

13. **January 1, 2011 industrial accident and treatment.** On January 1, 2011, Claimant was involved at work in a three-person transfer of a patient weighing 357 pounds. The patient resisted; however the lead therapist directed those involved to proceed with the transfer. Claimant gritted her teeth and pulled to help complete the transfer. She felt immediate pain and swelling in her face. A coworker commented that Claimant's face looked red and swollen. Claimant reported her injury immediately and her supervisor sent Claimant to the hospital emergency room where she received medication. She felt stabbing and spasming pain in her facial and front neck muscles, different than any previous TMJ or facial pain she had experienced.

14. On January 2, 2011, Claimant returned to the emergency room reporting facial pain. She was given Percocet and restricted from lifting more than 10 pounds. On January 4, 2011, Claimant returned again to the emergency room and was examined by Paige Cline, PA-C, who assessed low back pain, cervical strain, and facial muscle strain with a history of multiple reconstructive surgeries. Cline prescribed Mobic, Percocet and Valium to use at

home, Robaxin to use at work, and physical therapy. She restricted Claimant to lifting 15 pounds. Claimant returned to work with restrictions.

15. On January 10, 2011, Claimant presented to Cody Heiner, M.D. who recommended physical therapy, which she initially declined. On January 20, 2011, Claimant returned to Dr. Heiner with decreased symptoms. However, she reported that heavy lifting, driving, or extensive talking increased her symptoms. Claimant continued working on restricted duty and avoided taking Percocet or Valium while working. She attended multiple physical therapy sessions.

16. On February 7, 2011 Dr. Heiner released Claimant to full-duty work. Claimant was concerned and told her physical therapist she did not feel her condition had improved sufficiently to resume her full work duties.

17. On February 15, 2011, Claimant underwent speech therapy evaluations at Idaho Elks which revealed clinical evidence of moderate oral pharyngeal dysphagia (difficulty swallowing) and mild to moderate dysphonia (difficulty speaking). On February 17, 2011, Dr. Heiner examined Claimant and recorded her report of right jaw and neck pain which increased with lifting, pushing, pulling, or turning her head to the right.

18. **February 19, 2011 industrial accident and further treatment.** In accordance with Dr. Heiner's full-duty work release, Claimant returned to her full work duties on February 19, 2011. At the commencement of her shift that day, Claimant tried to turn a patient by herself and felt the immediate return of her facial pain. Claimant presented at the emergency room that day and was instructed to follow up with other physicians.

19. On February 21, 2011 Claimant presented to Arthur Jones, M.D., who ordered a cervical and head MRI. He diagnosed idiopathic neuropathy. Claimant understood this to relate

to numbness in her palate and throat. Dr. Heiner reinstated her 10-pound lifting restriction. On March 7, 2011, Claimant underwent a cervical MRI that showed C6-7 mild posterior end plate hypertrophy without stenosis, but no other abnormality.

20. On March 24, 2011, Claimant returned to Dr. Heiner again. She had been off work for two weeks during which time her symptoms had improved. Dr. Heiner apparently suspected Claimant's persisting facial pain was related to her prior TMJ surgeries; however, Claimant told Dr. Heiner her symptoms were in her cheek and jaw, not her ear area. Dr. Heiner apparently doubted her description and told her that if he could not find the problem, it did not exist. Dr. Heiner's records note his suspicion of a psychiatric component to Claimant's symptoms. He referred her to clinical psychologist Michael McClay, Ph.D., for psychological evaluation. Claimant had been diagnosed with situational depression shortly after her divorce years earlier, but never had any other prior psychological issues.

21. Beginning in March 2011, Claimant started applying for other work. Although still employed at Complex Care, she began seeking office work consistent with her 10-pound lifting restriction that did not require transferring and turning patients.

22. On March 27, 2011, Claimant, believing her duties at Complex Care required her to exceed her lifting restrictions, gave two-weeks notice that she was resigning from her job at Complex Care. She also resigned from her job at Kohl's.

23. On April 7, 2011, Claimant presented to Dr. Heiner who recorded her continued apprehension about heavy lifting or other straining. Claimant was then attending physical therapy three times each week and improving. She noted that massage therapy was particularly helpful. Dr. Heiner again recommended a referral to Dr. McClay for psychological evaluation.

24. On April 10, 2011, Claimant resigned from Complex Care. She continued to have substantial facial pain, which initially improved once she stopped working.

25. After leaving Complex Care, Claimant unsuccessfully sought other employment. She applied for positions as a Medicare case manager, RN pre-service reviewer, RN medical reviewer, staff RN, lead RN, regional nurse consultant, office RN, assistant director of nursing, and pre and post-op RN.

26. On May 4, 2011, Claimant presented to Dr. McClay at Defendants' request. Dr. McClay administered various psychological tests, including the MMPI-2, and then met with Claimant to review the results. Dr. McClay found Claimant's MMPI-2 scores were valid and all clinical scales were in the normal range. He advised Claimant that her test results were normal. On June 28, 2011, Dr. McClay provided his written report indicating Claimant had psychological factors influencing her medical condition because she had situational depression and was frustrated with not being able to fully communicate with Dr. Heiner. Dr. McClay reported Claimant had elements of a chronic pain syndrome, including heightened pain sensitivity, somatic complaints, and a secondary sleep disorder. He recommended discussing a neurological consultation and provided Claimant several biofeedback sessions which she found helpful.

27. Claimant received little treatment from April until September 2011 and her facial pain worsened.

28. On September 22, 2011, Claimant was examined by orthopedic surgeon Brian Tallerico, D.O., at Defendants' request. Claimant reported pain and muscle spasms in the front of her neck producing headaches and numbness down the left side of the roof of her mouth extending down into her throat. Dr. Tallerico diagnosed myofascial strain injury to the anterior cervical strap and maxillofacial muscles related to the industrial accident, prior open reduction

internal fixation of the mandible unrelated and not aggravated by the industrial accident, and prior temporomandibular joint dysfunction that may contribute to her complaints. He recommended “evaluation by an otolaryngologist and perhaps even a neurologist to determine what the etiology of her complaints may be.” Exhibit L, p. 263.

29. On October 6, 2011, Claimant saw Dr. Heiner again but he provided no further significant treatment. He referred Claimant to oral maxillofacial surgeon Michael Bailey, M.D., D.D.S., but indicated this referral did not relate to her industrial accident.

30. On October 11, 2011, Claimant saw Dr. Bailey at her own expense. He concluded her complaints were not related to TMJ and recommended referral to a neurologist for assessment of altered sensation of the soft palate and hard palate on the left and testing for lack of sensation of the posterior oropharynx and hypopharynx. Dr. Bailey referred Claimant to neurologist Allen Han, M.D., and also to craniofacial specialist Jameson Spencer, D.M.D., M.S. After Claimant filed a Petition for Change of Physician, Defendants agreed and on November 9, 2011, the Industrial Commission directed Surety to arrange for Claimant to be evaluated by Dr. Han and by Dr. Spencer.

31. On December 1, 2011, Claimant was examined by Dr. Han who recorded his impression of post-traumatic dystonia of the facial and throat musculature and decreased sensation on the left side of the palate and throat of unknown etiology. He prescribed Gabapentin and Diazepam and recommended a brain MRI and a video swallowing evaluation. On December 2, 2011, the video swallowing evaluation revealed normal swallowing mechanism with occasional proximal esophageal dysmotility.

32. On January 3, 2012, Claimant was evaluated by Dr. Spencer who concluded her symptoms were not related to TMJ issues.

33. On January 11, 2012, Claimant returned to Dr. Han reporting that her symptoms were improved by the prescription medications but worsened with lifting more than 10 pounds with either arm or 20 pounds with both arms. A throat CT scan revealed a very small tracheal opening and Dr. Han referred Claimant to an ENT specialist for evaluation of the narrowed tracheal opening.

34. On February 29, 2012, Claimant presented to Cameron Kuehne, D.M.D., a partner of Dr. Spencer, at her own expense. Dr. Kuehne assessed temporal tendonitis, injury of face/neck, and late effect of accidental injury of January 1, 2011. He recommended a soft diet and restricted Claimant from lifting over 10 pounds and from heavy pushing or pulling. He also recommended splint therapy, which was denied by Surety. Dr. Kuehne referred Claimant to Dr. Radnovich for pain management.

35. On March 14, 2012, Dr. Han discussed with Claimant the results of her December 2, 2011 brain MRI which showed “small vessel approaching and possibly abutting the left trigeminal nerve” but otherwise normal. Exhibit O, p. 282. The medications Dr. Han prescribed were helpful but Claimant still had facial pain. Dr. Han agreed with the referral of Claimant to Dr Radnovich for pain management.

36. On April 2, 2012, Surety contacted Dr. Kuehne who opined Claimant’s narrowed tracheal opening was unrelated to her industrial accident. Defendants then denied the referral to Dr. Kuehne. Defendants did not authorize treatment by Dr. Radnovich but rather arranged for Claimant to be examined by physiatrist Michael McMartin, M.D.

37. On May 15, 2012, Dr. McMartin examined Claimant at Defendants’ request. Claimant offered him all her medical records, which Dr. McMartin declined, indicating the Surety would provide him the records he needed. Dr. McMartin reviewed the records of Drs.

Heiner, Hahn, Bailey, and Radnovich. Claimant also brought the records of Drs. Jones and Tallerico and her physical therapy notes. Claimant answered Dr. McMartin's questions and provided a thorough description of her symptoms and history. Dr. McMartin reported Claimant was a good historian. He opined Claimant had chronic recurrent myofascial pain syndrome. Dr. McMartin suspected a psychological basis for her ongoing complaints.

38. Claimant was declared disabled commencing June 1, 2012, due to her relapsing polychondritis and was thereafter awarded Social Security Disability benefits of \$908 per month.

39. On June 19, 2012, Dr. McMartin issued his written report noting pain amplification behaviors and concluding Claimant would benefit from psychological treatment but it would not be related to her industrial accident. Dr. McMartin also opined Claimant had a "five plus year history of narcotic use with probable physical dependency" and recommended "progressive tapering to completion of narcotics in this high risk patient for addiction." Exhibit Q, p. 310. At hearing Claimant recalled no discussion with Dr. McMartin about her psychological condition or risk of addiction. After Dr. McMartin's report, Surety denied payment for further medications.

40. On August 6, 2012, Claimant presented to Dr. Radnovich who commenced treating Claimant for her persisting facial and neck pain. Claimant herself paid for all treatment and prescriptions by Dr. Radnovich. After starting treatment with Dr. Radnovich, her facial and neck pain decreased substantially and she was eventually able to decrease her use of prescription medications. On September 24, 2012, Dr. Radnovich found Claimant had reached maximum medical stability and permanently restricted her from continual talking.

41. In October 2012, Claimant began working one day per week as a school nurse and substitute teacher.

42. On September 23, and November 18, 2013, Claimant asked Dr. Radnovich to decrease her pain medications. She decreased her use of Kadian and continued to take Savella and Baclofen regularly.

43. **Condition at the time of hearing.** At the time of hearing, Claimant continued to have facial pain with extensive talking. Her pain medications included Kadian and Dilaudid as needed. She continued to work one day per week and receive Social Security Disability benefits.

44. **Credibility.** Having observed Claimant and Dr. Radnovich at hearing and compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

#### **DISCUSSION AND FURTHER FINDINGS**

45. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

46. **Additional medical benefits.** The first issue is whether Claimant is entitled to additional medical benefits due to her industrial accident. Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an "employer

cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease.” Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Idaho Supreme Court overruled in part Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), regarding the determination of reasonable medical treatment, stating:

This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72-432(1) is a question of fact to be supported by substantial and competent evidence.

....

[T]he central holding of Sprague, which remains valid, is simply: “It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable.” 116 Idaho at 722, 779 P.2d at 397.

The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

Chavez, 158 Idaho at 797-798, 353 P.3d at 418-419.

47. In the present case, Claimant alleges that her January 1, 2011 industrial accident required additional treatment after Dr. McMartin opined she was medically stable. Thus Claimant asserts Defendants are liable for additional medical care and medications prescribed by Dr. Radnovich from August 6, 2012, until she became medically stable on September 24, 2012, and continuing thereafter for ongoing pain management. Defendants maintain that Claimant reached medical stability from her industrial accident by May 15, 2012 as declared by Dr. McMartin. Defendants thus deny liability for medical care given or medications prescribed by Dr. Radnovich after that date. The opinions of Drs. McMartin and Radnovich are examined below.

48. Dr. McMartin. Dr. McMartin is board certified in physical medicine and rehabilitation. He has never treated Claimant but examined her at Defendants' request on May 15, 2012. He found her cervical range of motion approximately 80% of normal with pain at end range. He also noted tenderness to palpation in bilateral temporalis, masseter, sternoclavicular, and scalene muscles. Dr. McMartin disagreed with a diagnosis of trigeminal neuralgia. He opined Claimant had experienced "an acute strain to the muscle/ligament structures of the facial muscle and the jaw muscles." McMartin Deposition, p. 12, ll. 6-8. He testified that her facial strain should have resolved in a matter of weeks. He concluded she suffered a chronic and recurrent cervical facial myofascial pain syndrome. Dr. McMartin reported pain amplification with psychological overlays and a high risk for addiction. Dr. McMartin expressly noted Claimant's prior multiple TMJ surgeries and her multiple facial surgeries, including 2000 LeFort I sagittal split osteotomy and LeFort I osteotomy and mandibular sagittal split osteotomy, subsequent infection and surgical removal of hardware from her maxilla, 2003 repeat LeFort I osteotomy and mandibular split sagittal split osteotomy, and finally, 2008 surgical removal of hardware from her maxilla due to temperature sensitivity. He believed that at the time he examined Claimant "she at that point was dealing with a chronic condition that was unrelated to the industrial injury." McMartin Deposition, p. 13, ll. 22-24.

49. Dr. Radnovich. Dr. Radnovich is Claimant's treating physician. He is board certified in family medicine and sports medicine, and specializes in pain management. On August 6, 2012, Claimant began treating with Dr. Radnovich for her 2011 industrial injury. He recorded that she strained during a patient transfer on January 1, 2011 and had onset of face and jaw pain. Dr. Radnovich testified that the care he provided Claimant on and after August 6, 2012, was related to her 2011 industrial accident. He had previously treated

Claimant's right shoulder and neck injuries from another accident, so he was confident that she could be helped. Dr. Radnovich reviewed the medical records from all providers and observed that Claimant's reported symptoms were consistent all along. He sought to treat the source of Claimant's pain and not just the pain itself. Dr. Radnovich identified both an inflammatory and a muscle component to her pain. He prescribed a high dose steroid taper and Baclofen. Dr. Radnovich tried several different medications and Claimant improved. By August 27, 2012, he switched Claimant off Lidoderm patches to Synera, Morphine tablets, and Robaxin, and restarted Valium for break through muscle spasm. He prescribed a TENS unit to use for interrupting pain sensing. Dr. Radnovich found Claimant medically stable by September 24, 2012—less than 60 days after he commenced treating her. He testified that Claimant's symptoms and the care he provided her after August 6, 2012, were all related to her January 1, 2011 industrial accident.

50. On October 10, 2012, Dr. Radnovich rated Claimant's permanent impairment. He did not diagnose trigeminal neuralgia; however, he noted Claimant's condition of moderate to severe atypical facial pain that interfered with activities of daily living "most closely resembles trigeminal neuralgia." Claimant's Exhibit E, p. 156. Dr. Radnovich rated her permanent impairment at 4% of the whole person based upon her credible complaints of facial pain. To prevent aggravation of her facial pain symptoms, he permanently restricted Claimant from continual talking, performing the respiratory component of CPR, and lifting more than 10 pounds per arm or 20 pounds with both arms. He noted that Dr. Han had also restricted her to lifting no more than 10 pounds with either arm to prevent further injury. Dr. Radnovich testified that Claimant could work as a nurse within the restrictions he imposed. He opined Claimant would need ongoing medications. Dr. Radnovich saw Claimant periodically after

October 12, 2012, to monitor her symptoms and refill medications, including Synera, Morphine, Kadian, and Robaxin.

51. Weighing the medical opinions. Dr. Radnovich disagreed with Dr. McMartin's conclusion and had two significant objections to his report: first, Dr. McMartin reported Claimant had a high risk for addiction; and second, he reported she had psychological overlays. Dr. Radnovich testified the alleged risk of addiction was nowhere substantiated and he found no evidence to support such an assertion. Dr. Radnovich also observed that Claimant's MMPI-2 results were valid and all scales were within the normal range. Dr. McClay, after extensive psychological testing, had concluded Claimant's psychological profile was normal. Dr. Radnovich testified that regarding Dr. McClay's diagnosis of psychological conditions relating to chronic pain, most or all people with chronic pain have a legitimate psychological component. Dr. Radnovich had treated Claimant for a prior injury and had no concerns about Claimant's psychological status, or that she was at significant risk for substance abuse.

52. Dr. McMartin based his opinion in part upon the supposed lack of objective evidence of Claimant's reported facial pain. Significantly, he did not perform a palate examination. Dr. McMartin testified: "I did not conduct a palate examination, because I don't know how to interpret that finding. It's a subjective statement of sensation or not. So really the only abnormality of her clinical presentation was her stated perception or stated experience of soft-tissue tenderness to palpation." McMartin Deposition, p. 17, ll. 1-7.

53. Unlike Dr. McMartin, Dr. Bailey, an oral maxillofacial surgeon, examined Claimant's palate on October 11, 2011. In ruling out TMJ, Dr. Bailey poked Claimant with a needle in her palate. She testified:

He took a needle and actually poked the roof of my mouth on the left side through the hard pallet and back into the soft pallet and I just felt pressure, no pain

whatsoever, and he was very surprised with that, but I felt it on the right, so he said that it definitely is there, it's not in my head, but the numbness was definitely there.

Transcript, p. 143, l. 24 through p. 144, l. 5. Based on his evaluation and this objective finding, Dr. Bailey recommended "referral to a neurologist for assessment of the altered sensation of the soft palate and hard palate on the left. Also testing can be done for lack of sensation of the posterior oropharynx and hypopharynx." Exhibit N, p. 274. Dr. Bailey then referred Claimant to neurologist Dr. Han, who noted suggestions of trigeminal nerve involvement and referred Claimant to Dr. Radnovich for pain management.

54. Dr. Radnovich testified that the principal reason he treated Claimant was due to her industrial accident. Claimant improved substantially and was able to return to part-time work within 60 days of commencing treatment with Dr. Radnovich. Dr. McMartin's conclusions are refuted not only by Dr. Radnovich's opinion and experience, but also by Dr. McClay's opinion after extensive psychological evaluation. As Claimant's treating physician whose treatment substantially improved her condition, Dr. Radnovich's opinion is more persuasive than Dr. McMartin's opinion. Dr. Radnovich persuasively opined that Claimant's office visits to him commencing August 6, 2012, and the medications he prescribed, as itemized in Exhibit DD, were all related to her 2011 industrial injury and necessary for her to reach maximum medical improvement by September 24, 2012.

55. Under the totality of the circumstances presented, Dr. Radnovich's treatment constituted reasonable medical treatment required for Claimant to reach maximum medical improvement on September 24, 2012. Claimant has proven her entitlement to the medical treatment provided by Dr. Radnovich, including the medications he prescribed and periodic monitoring thereof.

56. **Temporary disability benefits.** The next issue is whether Claimant is entitled to temporary disability benefits after she quit her job on April 10, 2011.

57. Idaho Code § 72-102 (11) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical 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, 605 P.2d 939 (1980).

Additionally:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

58. In the present case, Claimant has proven that she was still in a period of recovery and needed additional medical treatment by Dr. Radnovich through September 24, 2012. Dr. Radnovich opined Claimant was restricted from work from April 10, 2011, through September 24, 2012, during which time a full diagnosis and adequate treatment were lacking and without which, working would have increased her risk of further anatomic injury. Exhibit E, p. 157. Under Malueg, Claimant is entitled to temporary disability benefits during her period of recovery

unless and until Defendants show Complex Care offered her suitable employment or suitable work was available in the general labor market.

59. Defendants assert they offered Claimant appropriate light-duty employment but that Claimant quit her job in March 2011, thus her temporary disability was due to her decision to quit her job rather than to her industrial injuries and her claim for temporary disability benefits must fail.

60. Claimant's time of injury job required lifting 20 pounds frequently and up to at least 50 pounds occasionally. Her duties also required frequent reaching. After her February 19, 2011 industrial accident, she was restricted to lifting no more than 10 pounds with either arm or 20 pounds with both arms. At hearing on direct examination, Claimant testified regarding her assigned work duties thereafter:

Q. ...did the employer, Complex Care, provide you work within those restrictions?

A. No, they did not.

Q. Were they aware of the restrictions?

A. I assume they were.

Q. Did you have any discussions with anybody at your employer saying, you know, I'm being given work to do here that's outside my restrictions?

A. Yes, I did. I talked to Nancy Ralston, she was the supervisor, day shift supervisor, where I worked and she said, well, you'll have the same patient load and actually give you more because you aren't going to be doing as much, but you have to find somebody to come help you to do your turning and your lifting and your pushing and your pulling.

Q. Did you attempt to do that?

A. I did, but everybody was over—understaffed and overworked already, so I found a very reluctancy [sic] to come and help me on every occasion, which is quite frequently when your five to six patients are all overweight.

Transcript, p. 123, ll. 1-22. On cross-examination she reaffirmed:

Q. Okay. I want to go back to March, March 27<sup>th</sup> of 2011, you made the choice that you were going to give up your job, they weren't pushing you out the door?

A. Well, it was very strenuous working there trying to get people to help me with people grumbling and complaining that I wasn't pulling my share of the load and I was getting a lot of not kind words to me from my fellow employees, where before I had always had a really good relationship with them. They began to grumble that they had to work under me or with me, so it became more of a hostile working environment for me.

Q. I guess my point is that you didn't tell Aaron that, though?

A. I told that to Nancy.

Transcript, p. 196, l. 15 through p. 197, l. 4.

61. Thus Claimant credibly testified that after February 19, 2011, Complex Care offered her work beyond her medical restrictions and also tasked her with the additional duty of finding help to accomplish those aspects of her assigned work which exceeded her restrictions. In the face of overburdened reluctant co-workers, and absent a showing of active supervisory support, this effectively left Claimant with work duties beyond her medical restrictions. There is no evidence challenging Claimant's testimony in this regard. Defendants have not proven that they offered suitable employment within Claimant's restrictions after April 11, 2011.

62. After leaving Complex Care in April 2011, Claimant attempted to find other employment. She applied at St. Alphonsus to be a lead RN, she interviewed for a staff RN position at Liberty Dialysis, she applied for a supervisor position at St. Alphonsus, she applied at West Valley for a patient access manager position, and she also applied unsuccessfully at Primary Health, Lifecare Center, and Mountain Star. In spite of these efforts, Claimant was unsuccessful in obtaining employment between April 11, 2011, and September 24, 2012. Claimant eventually found work one day per week for a school district in October 2012.

63. The record does not establish that there was employment available in the general labor market between April 11 2011, and September 24, 2012, consistent with the terms of Claimant's light-duty restrictions and which she had a reasonable opportunity of securing. Claimant has proven her entitlement to temporary disability benefits from April 11, 2011, through September 24, 2012.

64. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

65. In the present case, Claimant asserts entitlement to attorney fees for Defendants' failure to authorize referrals to specialists for further treatment and for Dr. Heiner's alleged mismanagement of Claimant's treatment.

66. Dr. Heiner's notes as early as April 7, 2011, indicate he recommended a referral to a neurologist. However, Dr. Heiner also concluded: "the etiology of the symptoms is

uncertain but I feel that her current symptoms are unlikely to be directly related to the work injury.” Claimant’s Exhibit A, p. 4. Thus Dr. Heiner did not consider the need for such referral related to Claimant’s industrial accident. He also recorded his willingness to refer Claimant to Dr. Radnovich, although reiterating that he did not consider such referral related to her industrial accident.

67. On June 28, 2011, Dr. McClay recommended a neurological consultation. On September 22, 2011, Dr. Tallerico diagnosed myofascial strain injury to the anterior cervical strap muscles and maxillofacial muscles, related to the industrial accident, prior open reduction internal fixation of the mandible unrelated and not aggravated by the industrial accident, and prior temporomandibular joint dysfunction that may contribute to her complaints. He recommended “evaluation by an otolaryngologist and perhaps even a neurologist to determine what the etiology of her complaints may be.” Exhibit L, p. 263.

68. On October 6, 2011, Dr. Heiner again examined Claimant, noted her ongoing complaints, and agreed that referral to an oral-maxillofacial specialist would be reasonable. Claimant asserts that Defendants unreasonably failed to honor Dr. Heiner’s recommendation that Claimant be evaluated by an oral-maxillofacial specialist. However, Dr. Heiner expressly recorded: “The etiology remains uncertain. In my opinion, it is unlikely that her current symptoms are directly related to the lifting injury at work 10 months ago.” Claimant’s Exhibit A, pp. 1-2. With continuing uncertainty as to causation, Defendants were not unreasonable in declining to authorize the referral. Referee Michael Powers aptly stated in the November 9, 2011 Order Conditionally Denying Petition for Change of Physician: “every physician who has examined Claimant and attempted to treat her had serious questions about exactly from what

condition Claimant was suffering (TMJ-related symptoms) and how to treat her.” Exhibit UU, p. 533.

69. Although Defendants did not then authorize evaluation by an oral-maxillofacial specialist, after Claimant’s Petition for Change of Physician, Defendants arranged and paid for Claimant’s December 1, 2011 evaluation by Dr. Han, a neurologist, and her January 3, 2012 evaluation by Dr. Spencer, a craniofacial specialist.

70. Claimant asserts Defendants were unreasonable in failing to refer Claimant to Dr. Radnovich after recommended by both Dr. Han and Dr. Spencer. Instead, Defendants scheduled Claimant’s examination with Dr. McMartin. After examining Claimant on May 15, 2012, Dr. McMartin opined she had suffered an acute strain of the facial and jaw muscles but she was then “dealing with a chronic condition that was unrelated to the industrial injury.” McMartin Deposition, p. 13, ll. 22-24. Dr. McMartin noted pain amplification behaviors with psychological overlays. He considered Claimant’s prior multiple TMJ surgeries and multiple facial surgeries, including LeFort I sagittal split osteotomy and LeFort I osteotomy and mandibular sagittal split osteotomy with subsequent infection requiring hardware removal, and repeat LeFort I osteotomy and mandibular split sagittal split osteotomy with later hardware removal due to temperature sensitivity. Dr. McMartin’s opinion was not unfounded.

71. The reasonableness of Defendants’ conduct must be evaluated in light of the causation dispute that existed even as late as the time of hearing. Although the conclusions of Dr. Heiner and Dr. McMartin have been found unpersuasive herein, Defendants reasonably relied upon these physicians in disputing Claimant’s need for additional medical care due to her industrial accident.

72. Claimant has not proven her entitlement to attorney fees.

## CONCLUSIONS OF LAW

1. Claimant has proven her entitlement to additional medical care as provided by Dr. Radnovich.
2. Claimant has proven her entitlement to temporary disability benefits from April 11, 2011, through September 24, 2012.
3. Claimant has not proven her entitlement to attorney fees.

## RECOMMENDATION

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

DATED this 23rd day of December, 2015.

INDUSTRIAL COMMISSION

\_ /s/ \_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

\_ /s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of January, 2016, 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:

WM BRECK SEINIGER  
942 W MYRTLE ST  
BOISE ID 83702

KENT W DAY  
PO BOX 6358  
BOISE ID 83707-6358

\_\_\_\_\_/s/\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CATHRINE HULAC,

Claimant,

v.

LIFECARE MANAGEMENT SERVICES, LLC,

Employer,

and

LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

Surety,  
Defendants.

**IC 2011-000696**  
**IC 2011-005134**

**ORDER**

Filed January 8, 2016

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Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and 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:

DATED this 8th day of January, 2016.

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 8th day of January, 2016 , a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

WM BRECK SEINIGER  
942 W MYRTLE ST  
BOISE ID 83702

KENT W DAY  
PO BOX 6358  
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sc

/s/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CATHRINE HULAC,

Claimant,

v.

LIFECARE MANAGEMENT SERVICES, LLC,

Employer,

and

LIBERTY MUTUAL FIRE INSURANCE  
COMPANY,

Surety,  
Defendants.

**IC 2011-000696**

**IC 2011-005134**

**ERRATUM TO ORDER**

Filed January 14, 2016

On January 8, 2016, the Idaho Industrial Commission (“Commission”) filed its Findings of Fact, Conclusions of Law, Recommendation and Order in the above-captioned matter. The Order as filed lacked the requisite Conclusions of Law necessary to make the Recommendation a final Order under Idaho Code § 72-506. The January 8, 2016 Order is hereby amended as follows:

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and 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 is entitled to additional medical care as provided by Dr. Radnovich.

2. Claimant is entitled to temporary disability benefits from April 11, 2011, through September 24, 2012.

3. Claimant has not proven her entitlement to attorney fees.

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

**IT IS SO ORDERED.**

DATED this 14th day of January, 2016.

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 14th day of January, 2016, a true and correct copy of the foregoing **ERRATUM TO ORDER** was served by regular United States mail upon each of the following:

W BRECK SEINIGER JR  
942 MYRTLE STREET  
BOISE ID 83702

KENT W DAY  
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BOISE ID 83707-6358

sc

\_\_\_\_\_/s/\_\_\_\_\_