

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LEMAE COOKE,

Claimant,

v.

BONNER FOODS, INC., Employer, and
LIBERTY NORTHWEST INSURANCE CORP.,
Surety,

and

DOCKSIDE RESTAURANT, Employer, and
STATE INSURANCE FUND, Surety,

Defendants.

IC 2009-019578

IC 2013-008560

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

Filed 10/16/17

BACKGROUND

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned claim IC 2009-019578 to Referee Alan Taylor, who conducted a hearing in Coeur d'Alene, Idaho on February 2, 2012. On March 20, 2013, the Commission issued its decision concluding that Claimant suffered an industrial accident causing cervical and right upper extremity injuries while working for Bonner Foods on July 4, 2009.

Claimant subsequently filed claim IC 2013-008560 alleging an industrial accident and injury to her neck, right arm, and right shoulder on or about March 25, 2013, while working for Dockside Restaurant. Claims IC 2009-019578 and IC 2013-008560 were consolidated for hearing.

On June 10, 2015, the Referee conducted a hearing in Coeur d'Alene on the above-entitled consolidated cases. On April 6, 2016, the Commission issued its decision concluding that Claimant's March 25, 2013 accident caused worsening of her cervical condition resulting in the need for C5-6 surgery and also caused right glenohumeral joint dysfunction, right shoulder

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bursitis, inflammation of the acromioclavicular joint, and worsening of her right shoulder condition for which she was entitled to reasonable medical treatment including right shoulder MRI and likely right shoulder arthroscopy for subacromial decompression as recommended by Dr. Dunteman. The Commission further concluded Claimant was entitled to temporary disability benefits from Bonner Foods and Liberty Northwest Insurance from July 20, 2009, through March 24, 2013, and to total temporary disability benefits from Dockside Restaurant and the State Insurance Fund from August 2014 through the June 10, 2015 hearing and continuing until she reached medical stability.

On April 11, 2017, the Referee conducted another hearing on the above-entitled consolidated cases in Coeur d'Alene. Claimant, LeMae Cooke, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Bonner Foods, Inc. (Bonner), and Defendant Surety, Liberty Northwest Insurance Corp. (Liberty), were represented by Kent W. Day, of Boise. Defendant Dockside Restaurant (Dockside), and Defendant Surety, State Insurance Fund (Fund), were represented by H. James Magnuson, of Coeur d'Alene. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on June 28, 2017. The undersigned Commissioners have chosen not to adopt the Referee's recommendation because they disagree with the treatment of Claimant's medical stability and hereby issue their own findings of fact, conclusions of law and order.

ISSUE

The issue to be decided is whether, and to what extent, Claimant is entitled to temporary partial and/or temporary total disability benefits.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to total temporary disability benefits from Dockside and the Fund from December 14, 2016, through the date of the April 11, 2017 hearing and continuing until she reaches medical stability. Dockside and the Fund assert that Claimant was declared medically stable as of December 14, 2016, and is entitled to no temporary disability benefits. Bonner and Liberty assert no position on the question.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence considered in the Commission's April 6, 2016 decision;
2. The Industrial Commission legal file;
3. Claimant's Exhibits A through G and Defendant Dockside's Exhibits 27 through 32, admitted at the April 11, 2017 hearing;
4. Claimant's testimony taken at the April 11, 2017 hearing; and
5. The post-hearing deposition testimony of Roger Dunteman, M.D., taken by Defendants on May 22, 2017.

All pending objections are overruled and motions to strike are denied. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. The Commission's findings of fact from its March 20, 2013 and April 6, 2016 decisions are incorporated herein by this reference as if set forth in full.
2. On December 17, 2014, Dr. Dunteman examined Claimant and continued to diagnose right shoulder impingement syndrome. He recommended a new right shoulder MRI to

evaluate Claimant's rotator cuff, long head of the biceps tendon, and labrum. Dr. Dunteman opined that if a new MRI was similar to Claimant's April 2013 right shoulder MRI, he would recommend right shoulder arthroscopy with distal clavicle incision and subacromial decompression.

3. At the time of the June 10, 2015 hearing, Claimant continued to have cervical, right shoulder, and right arm pain. Additionally, she experienced right hand pain and numbness.

4. In October 2016, Dr. Dunteman recommended right shoulder arthroscopy and subacromial decompression. Claimant continued to be unable to work due to her cervical and right shoulder pain.

5. On November 10, 2016, Dr. Dirks rated Claimant's cervical impairment at 13% of the whole person due to her industrial accident. As of the April 11, 2017 hearing, no benefit payments had been made in regard to this impairment rating.

6. In November 2016, the Fund approved right shoulder surgery as recommended by Dr. Dunteman. On December 14, 2016, during a pre-surgery consult Dr. Dunteman and Claimant agreed not to proceed with surgery at that time because of Claimant's poor state of emotional and physical health. Dr. Dunteman was concerned that in her poor state of health, Claimant may not recover well from surgery. Thus, on December 14, 2016, Dr. Dunteman indicated Claimant's condition was fixed and stable and she could return to work with permanent restrictions. Dr. Dunteman rated Claimant's right upper extremity impairment at 8% of the upper extremity and restricted her to lifting no more than five pounds with her right upper extremity and no repetitive work at or above shoulder level with her right arm. As of the April 11, 2017 hearing, no benefit payments had been made in regard to this impairment rating.

Dr. Dunteman discussed with Claimant a referral for pain management treatment, but apparently did not record such in his December 14, 2016 note.

7. On December 21, 2016, the Fund terminated Claimant's temporary disability benefits.

8. On January 5, 2017, Claimant called Dr. Dunteman's office and he produced an addendum to his December 14, 2016 note indicating his referral of Claimant to Dr. Whiting for pain management treatment. Claimant contacted Dr. Whiting's office and learned he was not accepting new pain management patients. She then contacted Dr. Dunteman who referred her to Dr. Jameson for pain management treatment. Claimant subsequently learned that Dr. Jameson was not accepting new pain management patients. Dr. Dunteman then referred Claimant to Scott Magnuson, M.D. The Fund authorized pain management treatment by Dr. Magnuson based upon Dr. Dunteman's referral, but refused to reinstate Claimant's temporary disability benefits.

9. On April 3, 2017, Claimant commenced treatment by Dr. Magnuson who found significant regional myofascial pain syndrome and opined Claimant was overwhelmed by the pain.

10. **Condition at the time of hearing.** At the time of the 2017 hearing, Claimant had extreme daily pain in her right dominant shoulder which caused difficulty sleeping, limited her activities, and forced her to take frequent breaks. Her pain extended from her neck down her right shoulder, into her upper back on the right, and down her right arm into her hand. Activity increased her pain.

11. Claimant was approved for Social Security disability benefits in approximately 2015; however, she has received only a total of \$205.00 from Social Security who then declined further payments because Claimant was receiving workers' compensation temporary disability

benefits. Her last temporary disability benefit payment from the Fund was December 20, 2016. Claimant has received no permanent impairment benefits from either surety in spite of permanent impairment ratings by Dr. Dirks and Dr. Dunteman.

12. Since the cessation of temporary disability benefits in December 2016, Claimant has relied on extended family members for financial survival. She has been unable to work and has had no income or funds to pay rent. Her family can no longer assist. Her youngest son, who is in high school, resides with her. Claimant is five feet ten inches tall. She had lost weight from the 2015 hearing and at the time of the 2017 hearing weighed 119 pounds.

13. **Credibility.** Having observed Claimant at the 2012, 2015, and 2017 hearings, and compared her testimony with other evidence in the record, the Referee reaffirmed his prior findings that Claimant is a credible witness. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

14. 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).

15. **Temporary disability.** The sole issue is Claimant's entitlement to temporary disability benefits. 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).

16. In the present case, Claimant seeks temporary total disability benefits from December 14, 2016, through the date of the April 11, 2017 hearing and continuing until she reaches medical stability.

17. Claimant testified she cannot work at present, is still receiving pain management treatment, and thus is entitled to temporary disability benefits. The Fund asserts that this is not curative treatment, but only palliative medication management for pain control. The Fund contends that Claimant has reached maximum medical improvement and thus no further temporary disability benefits are appropriate.

18. On February 23, 2017, the Fund’s adjustor wrote Dr. Dunteman asking whether Dr. Dunteman’s December 14, 2016 report authorized “ongoing pain medication management or

further curative treatment.” Dr. Dunteman responded that the referral was for “ongoing pain medication management.” Claimant’s Exhibit E, p. 67-E.

19. On March 28, 2017, Claimant’s counsel wrote Dr. Dunteman seeking clarification of the intent of his referral. On April 3, 2017, Dr. Dunteman responded indicating Claimant’s moderate to severe right side pain was caused by the exacerbation of her pre-existing impingement and AC inflammation of her right shoulder caused by her 2013 industrial accident. In a “YES” check the box response, Dr. Dunteman affirmed his referral of Claimant for pain management control was “based upon a medically reasonable anticipation that treatment provided by Dr. Scott Magnuson will help her to function better and with less pain.” Claimant’s Exhibit C, p. 67-B.

20. At his post-hearing deposition, Dr. Dunteman testified that when he last examined Claimant on December 14, 2016, she was at “maximum medical improvement without surgery.” Dunteman Deposition, p. 5, l. 19 (emphasis supplied). Explaining this statement, he testified:

Q. Okay. And what do you mean without surgery?

A. We’ve discussed surgery in the past, and it was an option at one time. We decided not to do it. So at the time of 12-14-2016, we considered her to be at maximal medical improvement.

Dunteman Depo., p. 5/20-24.

On December 14, 2016, Dr. Dunteman gave Claimant an impairment rating of 8% upper extremity and permanent restrictions. Dr. Dunteman never saw Claimant again, but in a January 5, 2017 addendum to his December 14, 2016 note, he referred Claimant for pain management. Dr. Dunteman testified that he actually made the referral for pain management on the occasion of the December 14, 2016 visit. Dunteman Depo., p. 6/19-7/14.

As of December 14, 2016, Dr. Dunteman did not believe that Claimant was a good surgical candidate. Accordingly, he pronounced her stable, and made the referral for pain management, reasoning that achieving pain relief would improve Claimant's ability to do things:

Q. And when we talk about functioning better with less pain, what does that mean?

A. So let me clarify, because you asked that question earlier, function versus symptoms. I would say that if you had less pain, you might be able to do more in activities of daily life. I don't know if that's going to get her to change the restrictions, you know, what she's capable of performing on a daily basis. Does that make sense? So functioning is a broad term. It's very vague. So functioning could be getting up for the day, taking care of your house, you know, making dinner, things like that. But functioning with, you know, a work environment is a totally different situation. So I don't know if it would help that or not. We don't know.

Dunteman Depo., p. 9/10-23.

He did not discount the possibility that Claimant might be a surgical candidate in the future.

Q. Right. But if she needed surgery from a structural shoulder dynamic prespective, from an orthopedic perspective, would it be more likely something that you would endorse?

A. Oh, okay. I don't understand the question. So the question is: If she went to pain management and that did not give her all the relief that she desired and then wanted surgery, could she get an improved outcome? Is that what you're asking?

Q. If she had functional improvement, but not as good as she could be perhaps with surgery.

A. Yes. I still think surgery's a very valid option for her here.

Dunteman Depo., p. 11/16-12/3.

However, he never recanted his opinion that Claimant is, at present, stable.

21. Claimant asserts the Commission decision in Avalos v. Whitehead, 2014 WL 2750023 (Idaho Ind. Com. 2014), is instructive. Avalos sustained an industrial accident resulting in lower extremity fractures and a severe case of compartment syndrome which the Commission

found resulted in CRPS. The Commission determined that Avalos was entitled to pain management as reasonable treatment for his industrially caused condition, stating:

Claimant has proven that further treatment for his right lower extremity pain, including but not limited to a spinal cord stimulator trial and counseling to assist with chronic pain management, is reasonable.

Maximum medical improvement (MMI). Dr. Poulter posits that Claimant's condition may significantly improve with treatment. If so, his disability is likely to decrease. Defendants cite the AMA Guides, Sixth Edition to define MMI. That tome states at pages 25 and 26, “[MMI] refers to a status where patients are as good as they are going to be from the medical and surgical treatment available to them ... MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment.”

Claimant cannot be deemed at MMI until he receives the reasonable medical treatment recommended by Dr. Poulter. At present, he is not medically stable.

Avalos v. Whitehead, 2014 WL 2750023, at 30 (Idaho Ind. Com. 2014).

22. One of the issues before the Commission in Avalos was whether Claimant was entitled to the pain management treatment that had been offered by Claimant's physicians. The Commission also had before it the related question of whether Claimant was at the point of maximum medical improvement. Although not stated in the Opinion, it seems likely that the Commission conflated the two issues, reasoning that in order to afford Claimant the pain management he required, it necessarily followed that the Commission must find that Claimant had not yet reached medical stability. In other words, medical stability is inconsistent with the provision of palliative care which might provide Claimant with pain relief and restore function. This linkage was rejected in the recent Supreme Court case of *Rish v. Home Depot, Inc.*, 161 Idaho 702, 390 P.3rd 428 (2017). *Rish* makes it clear that employer's obligation to provide palliative care in no wise turns on whether or not the employee is still medically unstable. Care intended to reduce pain is a benefit to which an injured worker is entitled regardless of whether

or not he is medically stable. Indeed, if an injured worker could not be pronounced medically stable if still suffering from pain related to his injury, then it is quite possible that such a worker might never reach medical stability if one of the permanent effects of the work injury is pain which requires palliative management. *Rish* makes it clear that an injured worker can be declared medically stable even though future treatment is contemplated for management of intractable pain. In order to receive TTD benefits, Claimant must establish that she is not medically stable, i.e. that the pain management treatment recommended by Claimant's treating physician, and approved by surety, is a curative, rather than palliative.

23. Medical stability, or maximum medical improvement (MMI), "essentially means that a worker has achieved the fullest reasonably expected recovery with respect to a work-related injury." *Perkins v. Jayco*, 905 N.E.2d 1085, 1088-1089 (Ind. App. 2009). A claimant attains MMI on the "date after which further recovery from, or lasting improvement to, an injury can no longer reasonably be anticipated, based upon reasonable medical probability." *Lemmer v. Urban Electrical, Inc.*, 947 So.2d 1196, 1198 (Fla. App. 2007). "A finding of MMI is precluded where treatment is being provided with a reasonable expectation that it will bring about some degree of recovery, even if treatment ultimately proves ineffective." *Id.* In determining whether a claimant has reached MMI, the Commission may consider such factors as a return to work, the extent of the injury, and, most importantly, whether medical evidence or testimony shows that the injury has actually stabilized. *See Westin Hotel v. Industrial Comm'n of Illinois*, 865 N.E.2d 342, 356 (Ill. App. 2007). A claimant's condition may fluctuate, meaning that a claimant may have multiple periods of stability and instability, depending on the facts of the case. As noted by the Idaho Supreme Court, "... a person can be medically stable and still have symptoms and pain from her injury as long as no further material improvement is expected with time or treatment."

Shubert v. Macy's West, Inc, 158 Idaho 92, 102; 343 P.3d 1099, 1109 (2015), *overruled on other grounds by Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015).

24. Here, Dr. Dunteman has opined several times that Claimant is medically stable even with the referral to pain management treatment by Dr. Magnuson.

The patient is fixed and stable and can return to work with PERMANENT restrictions of no repetitive activity at or above shoulder level and no lifting greater than 5 pounds with the right upper extremity. The patient has a permanent partial impairment rating of 8% of the upper extremity (3% for loss of flexion, 3% for loss of abduction, 2% for abduction weakness) for which none is pre-existing. The rating is based upon the Guides to the evaluation of Permanent Impairment, 5th edition, AMA press. Patient will follow up in prn.

(CE C, p. 56).

Had Dr. Dunteman testified that Claimant required certain pain management therapies preparatory to a shoulder surgery he intended to perform, then the result in this case would be different. However, Dr. Dunteman's testimony is not to this effect. If Dr. Dunteman determines, at some future time, that Claimant is again a surgical candidate, then nothing in this decision is inconsistent with the reinstatement of TTD benefits at that time. Although Dr. Dunteman did provide a check-in-the-box answer to a question from Claimant's counsel suggesting that Claimant is medically unstable, this conflicts with Dr. Dunteman's deposition testimony, and is less persuasive. The Commission is persuaded that Claimant is medically stable.

25. The Commission is sympathetic to the consequences of this result to Claimant. The parties bifurcated the hearing, seeking only to resolve the issue of Claimant's entitlement to TTDs. Defendants insist that Claimant is at medical stability and therefore, not entitled to TTDs. However, for reasons unknown to the Commission, Defendants have not initiated payment of PPI or disability to Claimant, even though *Dickinson v. Adams County*, 2017 IIC 0007, establishes an employer's obligation to pay "impairment as disability" after the claimant reaches

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-2288

_____/s/_____