

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIE ANDERSON,

Claimant,

v.

NUTRAHEALTH, INC., Employer, and STATE
INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2004-503931

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

Filed March 3, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers who conducted a hearing in Boise on May 29, 2013. Claimant, Marie Anderson, was present and represented by her attorney, Hugh Mossman of Boise. Jon Bauman, also of Boise, represented Employer and its Surety. State of Idaho, Industrial Special Indemnity Fund was not represented at hearing. Oral and documentary evidence was presented. Post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on November 4, 2013.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant is entitled to additional medical treatment for her neck and shoulder; and

2. Whether Surety is liable for the medical treatment already provided by Dr. Manos.

CONTENTIONS OF THE PARTIES

Employer and Surety acknowledge that Claimant sustained an industrial accident when she slipped and fell at work on February 9, 2004. Claimant asserts she is entitled to additional medical treatment for her cervical and shoulder complaints as recommended by Dr. Manos, and to past medical treatment for her cervical and shoulder complaints already provided by Dr. Manos.

Surety has paid benefits for cervical and left shoulder injuries due to Claimant's fall. However, Surety asserts Claimant has not established that any present need for additional cervical or shoulder treatment is due to her industrial accident. Surety also maintains Claimant failed to request a change of physician and asserts Dr. Manos was not within the chain of referral. Surety denies liability for treatment provided or recommended by Dr. Manos.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, taken at the May 29, 2013 hearing;
3. Joint Exhibits 1-40 admitted at the hearing;
4. The post-hearing deposition of Vicken Garabedian, M.D., taken by Surety on June 27, 2013; and
5. Exhibit 41 offered by stipulation by Claimant and Employer/Surety on September 5, 2013, and admitted by order of the Referee on September 10, 2013.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

All objections made during the depositions are overruled. 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 1953 and was 59 years old at the time of the hearing.
2. In approximately 1980, Claimant fractured her left clavicle in a motorcycle accident. The fracture healed. In November 1986, she was involved in a multiple car collision and sustained cervical, lumbar, and left clavicular injuries. In March 1988, Claimant underwent left shoulder acromioplasty and rotator cuff repair. Her shoulder condition improved, however her cervical and left upper extremity symptoms did not.
3. In October 1990, Claimant was a passenger in a car which was rear-ended by another vehicle. She reported left arm, mid-thoracic, lumbar, and left leg pain. A cervical MRI taken in October 1990 revealed C6-7 disc herniation. In November 1990, Robert Fox, M.D., performed cervical discectomy and fusion at C6-7 utilizing allograft bone. By February 1992, Claimant was found medically stable.
4. Claimant's cervical symptoms returned and in May 1992, Michael Henbest, M.D., performed C4-5 discectomy and anterior fusion utilizing allograft bone. Her condition improved.
5. In approximately November 1997, Claimant tripped and fell on her outstretched left arm. Her cervical symptoms returned. Imaging studies in November 1997 revealed C5-6 pathology but no abnormality at C3-4. In November 1997, Claimant underwent C5-6 discectomy and fusion by R. Tyler Frizzell, M.D., using allograft bone and an anterior Orion plate. Thus, by 1998, Claimant's cervical spine was fused from C4 to

C7.

6. In December 2003, Claimant began working at Employer's facility, Stone Mill Bakery. Her bakery work was exertional. She frequently lifted pans filled with bread dough and baked several hundred loaves of bread per day.

7. On February 9, 2004, Claimant was carrying pans of dough at work when she slipped and fell. As she fell, she dropped the pans and attempted to catch herself on a nearby sink with her left hand. She yanked her left arm and landed hard on her left buttock and hip on the floor. Claimant felt immediate left shoulder, neck, and hip pain. Her greatest concern was neck pain near her esophagus by the site of her previous anterior cervical fusion. She sought medical attention on February 11, 2004, and was subsequently treated by several providers for cervical and left arm symptoms. Diagnostic imaging revealed loose hardware in her anterior cervical plate, including a C5 anterior vertebral body bone screw, displaced an estimated three millimeters, indenting the posterior wall of her hypopharynx. Exhibit 16, p. 7. A cervical CT myelogram taken March 15, 2004, documented C3-4 minimal posterior disc bulge and likely C5-6 pseudoarthrosis. Exhibit 16, p. 9.

8. On April 20, 2004, Timothy Floyd, M.D, surgically removed Claimant's old anterior cervical plate, performed C5-6 fusion utilizing allograft bone, installed a new anterior plate, and a posterior cable. Dr. Floyd's operative notes record: "this patient had an obvious pseudoarthrosis. The plate was loose. The locking screw was fractured and this allowed the superior two screws to loosen." Exhibit 16, p. 15. Refusion and installation of a new plate by Dr. Floyd did not entirely relieve Claimant's neck pain. She also continued to have left shoulder pain. On August 31, 2004, Claimant underwent a

cervical CT scan. On September 1, 2004, Dr. Floyd declared Claimant medically stable with 10% permanent partial impairment. Surety paid Claimant medical and permanent partial impairment benefits.

9. In January 2005, Claimant presented to Dr. Frizzell with radiating cervical pain complaints. He noted Claimant suffered pseudoarthrosis at C5-6. Dr. Frizzell recorded that Claimant “had a work injury on 02/09/04 and had disruption of a previous cervical fusion at that level.” Exhibit 8, p. 14. On April 6, 2005, Dr. Frizzell performed C5-6 cervical fusion surgery with allograft bone and installed a new anterior cervical plate bridging C5, C6, and C7. Claimant’s cervical condition improved but did not entirely resolve. Surety paid for the surgery.

10. On September 1, 2006, Claimant presented to William Lindner, M.D., with left shoulder complaints. MRI testing confirmed a SLAP, or labral, tear in her left shoulder.

11. Claimant’s cervical pain continued and in December 2006, neurosurgeon Michael Hajjar, M.D., surgically removed a cerclage wire from Claimant’s neck. Surety paid for the surgery. Her neck pain improved and she was able to rotate her head more freely. She continued to suffer left shoulder pain.

12. On September 12, 2007, Claimant presented to Jeffrey Hessing, M.D., for ongoing left shoulder pain. On October 30, 2007, Dr. Hessing surgically repaired Claimant’s left SLAP tear. Her shoulder improved. Dr. Hessing found Claimant’s left shoulder medically stable on March 12, 2008, and rated her permanent partial impairment at 7%. Surety paid medical and permanent impairment benefits.

13. Claimant developed lumbar radiculopathy and sought surgical treatment

therefore. The Commission determined that her lumbar pathology was not related to her 2004 industrial accident. In 2009, Dr. Hajjar performed L4-5 laminectomy and fusion. Medicaid paid for the surgery. Dr. Hajjar anticipated that Claimant would require further lumbar surgery within a few years.

14. On February 23, 2011, Dr. Hajjar examined Claimant and recommended extending her fusion to C3 for adjacent segment disease. Exhibit 31, p. 10. Claimant declined further cervical surgery at that time.

15. Claimant's lumbar symptoms persisted and she sought further lumbar surgery from Dr. Hajjar. He declined to assist Claimant in completing necessary Medicaid paperwork for additional lumbar surgery. In the fall of 2011, Kristin Christensen, P.A., the assistant to Claimant's family physician, Steven Ollie, M.D., referred Claimant to orthopedic surgeon Richard Manos, M.D.

16. On October 3, 2011, Claimant wrote to Dr. Manos, seeking treatment for her lumbar symptoms. In November 2011, Claimant presented to Dr. Manos requesting lumbar surgery. On December 30, 2011, Dr. Manos performed L3-4 decompression and L5-S1 microdiscectomy. On May 24, 2012, Dr. Manos performed hardware removal at L4-5 and fusion at L3-L4, L4-L5 and L5-S1. Medicaid paid for the surgeries. Claimant's lumbar symptoms improved; however, her cervical symptoms persisted.

17. On August 15, 2012, an MRI of Claimant's cervical spine disclosed C3-4 central disc protrusion resulting in mild to moderate central canal stenosis and C7-T1 moderate central canal stenosis. On August 21, 2012, Dr. Manos examined Claimant and her MRI. He noted C3-4 disc osteophyte complex and diastasis at the left trapezius muscle. Dr. Manos recommended a C4 injection, possible C3-4 surgery, and possible

plastic surgery referral because two-thirds of Claimant's left trapezial fascia had pulled away from her spinous process.

18. On October 3, 2012, Stephanie Dalton, P.A.-C., noted that Claimant's ongoing cervical pain was related to her industrial accident.

19. Claimant has smoked from time to time before and since her industrial accident. At the time of hearing, Claimant smoked a pack-and-a-half of cigarettes per day. For pain control she used fentanyl patches and occasional Oxycodone, as prescribed by Dr. Manos.

DISCUSSION AND FURTHER FINDINGS

20. **Additional medical treatment.** The first issue is Claimant's entitlement to additional medical treatment. Claimant alleges that she continues to suffer cervical and left shoulder pain due to her industrial accident.

21. Idaho Code § 72-432(1) mandates that an employer shall provide for 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.

22. An employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Thus, a claimant must prove not only that she suffers an injury, but also that the injury is the result of an accident arising out of and in the course of employment. Seamans

v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

23. In the present case, Claimant requests additional medical benefits including treatment of her C3-4 disc herniation, treatment of her left trapezius muscle diastasis, and further diagnostic testing as recommended by Dr. Manos. Each concern is addressed below.

24. C3-4 disc herniation. Claimant requests additional medical treatment for C3-4 disc herniation, which may include surgery. Claimant and Surety dispute the causation of her C3-4 condition. Claimant asserts that her 2004 industrial accident caused her C3-4 disc herniation. She relies upon the opinion of Dr. Manos. Employer and Surety assert that the 2004 accident did not cause Claimant’s C3-4 pathology; rather it is the product of adjacent segment disorder and the progression of her pre-existing C3-4 disc degeneration. They rely primarily upon the opinion of Dr. Garabedian. The physicians’ opinions are examined below.

25. *Dr. Garabedian*. Vicken Garabedian, M.D., is a board certified radiologist with a subspecialty certification in neuroradiology. He reviewed Claimant’s medical records and all of her cervical imaging studies at Defendants’ request. At his post-hearing deposition, Dr. Garabedian opined that Claimant’s C3-4 disc condition was not related to

her February 2004 industrial accident.

26. Dr. Garabedian acknowledged that Claimant's November 1997 cervical imaging study showed no abnormality at C3-4, while her March 2004 imaging study—taken one month after her industrial accident—revealed C3-4 disc herniation. Comparing Claimant's March 2004 cervical CT myelogram scan with her August 2004 cervical CT scan, Dr. Garabedian opined that the later study showed a more pronounced C3-4 disc protrusion, which he concluded documented a progression of degeneration. He testified that a disc protrusion caused by trauma does not usually increase in size thereafter. Dr. Garabedian explained: “when you have a herniated disc related to a trauma, you almost always have it right then. And then over time it decreases in size.” Garabedian Deposition, p. 30, ll. 20-23.

27. Dr. Garabedian opined that Claimant's March and August 2004 cervical imaging studies showed progressive C3-4 disc space narrowing and progressive spurring of the vertebrae, indicating adjacent segment disorder. Garabedian Deposition, p. 11, ll. 13-15. He explained the phenomena of adjacent segment disorder as follows:

What happens in those instances is that when there is surgery and fusion in the neck, in the cervical spine, there is additional strain at the levels that aren't fused because the movement that normally occurs at the fused segment can no longer occur there, and there is a lever arm, a multiplier of force, at the adjacent levels.

So there's a natural progression that once you have fusion, and particularly more than one level in the cervical spine, it results in acceleration of degeneration and arthritis at adjacent levels.

Garabedian Deposition, p. 10, l. 17 through p. 11, l. 2. Dr. Garabedian affirmed the likelihood that Claimant suffers adjacent segment disorder at C3-4:

Q. (by Mr. Mossman) And part of my question is related back to the imaging studies we have that I gave you in 1997, which did not show a disk

protrusion at the C3-4 level. And so we're looking at a time from November '97 to March of 2004 for that to have changed. Is that reasonable in your mind?

A. It's very likely that it progressed over that period of time, yes.

Q. And how can you be sure or why do you say "likely"?

A. Because we see patients all the time in our practice who have multilevel fusions, and we watch them over a number of years. To answer your question, outside of the study, in my experience, there is a progression usually over a number of years, but certainly, well within this range that we have from 1997 to 2004, we're talking about seven years or six-and-a-half years.

Garabedian Deposition, p. 36, l. 23 to p. 37, l. 15.

28. Dr. Garabedian observed that studies of single level cervical fusions at C6-7 document a 25% rate of adjacent segment disorder at C5-6. He also noted that "the more you have—more segments are fused, the higher the likelihood of adjacent segment failure." Garabedian Deposition, p. 33, ll. 19-21. Dr. Garabedian observed that Claimant's cervical spine is fused from C4 through C7 and opined that this multiplies the strain on the unfused segments. He testified:

In the neck, most of the movement is forward and back, and you have C2-3, 3-4, 4-5, 5-6, 6-7, five joints. If you take away three of the five joints, then the rest of—the only movement you have in that plane, then, are two joints. And the one that experiences the greatest stress is the one right next to the fused segments, and in this case, that's C3-4.

Garabedian Deposition, p. 18, ll. 12-18.

29. *Dr. Manos.* Richard Manos, M.D., is a practicing orthopedic surgeon and is Claimant's treating lumbar surgeon. He has examined Claimant on numerous occasions, reviewed her extensive medical records, and performed two lumbar surgeries on her. Dr. Manos opined that Claimant's 2004 industrial accident caused her C3-4 disc herniation.

30. *Weighing the medical opinions.* Dr. Garabedian declined to relate

Claimant's C3-4 condition to her industrial accident, rather he attributed it to adjacent segment disorder. Dr. Garabedian's opinion presumes that Claimant's C3-4 disc herniation increased in size between March and August 2004, and that the multiplier effect of Claimant's prior cervical fusions accelerated the degeneration of her C3-4 disc.

31. Dr. Garabedian's opinion rests in part on his differentiation between Claimant's March and August 2004 imaging studies. Each study employed a slightly different technique. The March 2004 study is a CT myelogram. The August 2004 study is a CT scan. The radiologist reading the August 2004 scan, John Jackson, M.D., practiced with Dr. Garabedian at Intermountain Medical Imaging at that time. Dr. Jackson compared Claimant's August 2004 cervical CT scan to her March 2004 cervical CT myelogram and recorded: "At C3-4, there is a small central disk extrusion which abuts and mildly contorts the ventral cord surface. There is CSF remaining dorsal to the cord. This is unchanged to also possibly slightly more prominent than the previous examination (it appears slightly more prominent likely due to technical factors)." Exhibit 16, p. 41 (emphasis supplied). Dr. Jackson concluded that the imaged disc abnormalities in the August 2004 CT scan "ARE NOT SIGNIFICANTLY CHANGED ACCOUNTING FOR DIFFERENCES IN TECHNIQUE." Exhibit 16, p. 42. Thus Dr. Garabedian's conclusion that Claimant's C3-4 disc herniation increased from March to August 2004, is subject to question when differences in imaging techniques are considered.

32. Additionally, Claimant's C3-4 disc herniation apparently remained unchanged throughout the ensuing two years. Claimant's CT study of January 31, 2005, showed her C3-4 "central disk protrusion, unchanged" as compared to her August 31, 2004 study. Exhibit 12, p. 27. Her cervical CT scan of July 11, 2005, showed no significant

change in the C3-4 disc protrusion. Exhibit 12, p. 53. The conclusion of Claimant's cervical CT scan of March 29, 2006, reported: "CHANGES ON TODAY'S DATE ARE IDENTICAL TO A STUDY OF JULY 11, 2005. THERE IS MODERATE FOCAL CENTRAL DISK PROTRUSION AT C3-4 WITH MILD VENTRAL CORD COMPRESSION." Exhibit 12, p. 68. Comparing CT scan results, Dr. Frizzell noted that Claimant's March 29, 2006 CT scan showed: "At C3-4 she has a central disc protrusion which is unchanged from the one on 1/31/05." Exhibit 12, p. 70. On July 24, 2006, Claimant underwent another cervical CT scan. Dr. Frizzell's notes of July 25, 2006, indicate Claimant's "C3-4 disc looks similar to her previous CT in March 2006." Exhibit 12, p. 84. Defendants emphasize that degenerative changes, "such as those caused by adjacent segment disorder, increase over time." Defendants' Post-Hearing Brief, p. 15. Dr. Garabedian's conclusion that next segment degeneration increased Claimant's C3-4 disc herniation during the five months from March to August 2004, seems inconsistent with the apparent lack of progression of Claimant's C3-4 disc herniation from August 2004 to July 2006.

33. Significantly, Dr. Garabedian testified extensively about the multiplier effect of fused cervical segments and the resulting force upon Claimant's C3-4 disc leading to degeneration. He readily acknowledged that trauma can cause cervical disc herniation and that an individual with pre-existing cervical fusions would be more susceptible to cervical injury from trauma:

Q. (by Mr. Mossman) And what I think you're saying , or I'm trying to ask you, is that certainly somebody that has had the history that Ms. Anderson has had or fusions in the C4 to C7 levels would be more susceptible to injury at the C3-4 level if she had any trauma?

A. (by Dr. Garabedian) Yes, that is correct.

Garabedian Deposition, p. 31, l. 24 to p. 32, l. 4. It follows that the multiplier effect of fused segments would also produce increased stress on Claimant's C3-4 disc in the event of trauma.

34. Defendants take issue with Dr. Manos' apparent belief that Dr. Hajjar considered Claimant's C3-4 disc herniation related to her industrial accident. In February 2011, when recommending surgical treatment of Claimant's C3-4 disc herniation, Dr. Hajjar described the pathology as "consistent with next segment degenerative changes at the C3-4 level." Exhibit 24, p. 34. Claimant declined C3-4 surgery at that time, however, Dr. Hajjar reported his surgical recommendation to Mark Harris, M.D., of Idaho Physical Medicine and Rehabilitation. Dr. Harris was the physiatrist recognized and paid by Surety to manage the treatment of Claimant's injuries from her industrial accident. Thus, whether Dr. Hajjar considered Claimant's need for C3-4 surgery related to her industrial accident seven years earlier is not entirely clear from the present record. Regardless of Dr. Hajjar's causation opinion or lack thereof, Dr. Manos examined Claimant, personally reviewed all of her cervical imaging studies and medical records, and opined Claimant's C3-4 disc herniation is due to her industrial accident.

35. The details of Claimant's 2004 industrial accident are significant in determining the cause of her C3-4 disc herniation. On February 9, 2004, when Claimant fell at work, she tried to catch herself by grabbing onto a nearby sink with her left hand. The fall yanked her left arm with such force that it caused a left shoulder SLAP tear that later required surgical repair. Moreover, Claimant felt immediate cervical pain, including pain near her esophagus. During surgery on April 20, 2004, Dr. Floyd found Claimant had obvious pseudoarthrosis at C5-6 and that two screws affixing her anterior cervical plate

were loose, and the locking screw of the plate was fractured. One loose screw was displaced an estimated three millimeters and indented the wall of her hypopharynx. On April 6, 2005, Dr. Frizzell observed Claimant's continuing pseudoarthrosis at C5-6 and noted that Claimant's work injury had disrupted her previous cervical fusion at that level.¹ These facts establish that the trauma of Claimant's accident was substantial. As Dr. Garabedian observed, in light of her pre-existing C4-C7 fusions, her next most vulnerable cervical disc was C3-4. Not surprisingly, Dr. Manos opined: "It is inconceivable for me to think that the trauma did not at least create the C3-C4 disk herniation that is present on her post-injury CT myelogram." Exhibit 31, p. 27.

36. The Referee finds Dr. Manos' opinion regarding the cause of Claimant's C3-4 disc herniation well founded and more persuasive than that of Dr. Garabedian. Claimant has proven that her February 9, 2004 industrial accident caused her C3-4 disc herniation.

37. Trapezius diastasis. Claimant alleges, and no party disputes, that her left trapezius muscle diastasis is also related to her industrial accident. Dr. Manos concluded that Claimant's left trapezius diastasis resulted from her December 19, 2006 cervical surgery in which Dr. Hajjar removed the posterior cable or wire that Dr. Floyd placed during the 2004 cervical surgery following Claimant's accident. Dr. Garabedian did not dispute Dr. Manos' conclusion. Claimant has proven that her left trapezius diastasis is related to her industrial accident.

38. Diagnostic testing. Claimant requests additional medical testing recommended by Dr. Manos to determine Claimant's cervical and left shoulder pain

¹ Dr. Frizzell recorded: "Apparently she had fallen at work on February 9, 2004, where she works as a baker. She appeared to have broken the old fusion and certainly she did require the revision surgery." Exhibit 12, p. 22 (emphasis supplied).

generators, which likely include left trapezius muscle diastasis and C3-4 disc herniation. Dr. Garabedian agreed that the diagnostic testing recommended by Dr. Manos is very reasonable. Garabedian Deposition, pp. 39-40. At the time of hearing, Surety observed that Claimant had not taken steps to obtain some of the diagnostic testing recommended by Dr. Manos, including receiving a diagnostic injection. The fact that Claimant has not yet obtained all testing recommended by Dr. Manos may be in part explained by Surety's denial of responsibility to pay therefore, and does not render her ineligible to receive it hereafter.

39. Surety asserts that Claimant is not a good surgical candidate due to her tobacco and alcohol use. Claimant has previously undergone successful lumbar and cervical surgeries. Whether, and under what criteria, Claimant may be a suitable candidate for future surgery is a decision to be made after diagnostic testing as recommended by Dr. Manos and concurred in by Dr. Garabedian, and is not necessarily precluded by Claimant's present tobacco or alcohol use.

40. Claimant has proven she is entitled to further reasonable medical treatment for her industrial accident, including diagnostic testing, and potentially C3-4 disc surgery and/or trapezius muscle diastasis repair.

41. **Treatment provided by Dr. Manos.** The next issue is whether Surety is responsible for past treatment provided by Dr. Manos. Claimant asserts that Surety is responsible for her cervical and left shoulder treatment provided by Dr. Manos through the time of hearing. Surety maintains that Dr. Manos is outside of the chain of referral.

42. Idaho Code § 72-432(4)(a) provides:

The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee

must give written notice to the employer or surety of the employee's request for a change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer.

43. The record establishes that by October 3, 2011, Kristen Christensen, P.A., of Dr. Ollie's office, referred Claimant to Dr. Manos for treatment of her lumbar spine. Neither Dr. Ollie nor Ms. Christensen were then recognized as Claimant's attending physician for her industrial accident. Thus Ms. Christensen's referral of Claimant to Dr. Manos does not constitute a statutorily authorized referral by an attending physician that is effective "without permission of the employer." Idaho Code § 72-432(4)(a).

44. Claimant testified that she sought treatment from Dr. Manos because Dr. Hajjar refused to assist her in completing paperwork required by Medicaid for further treatment of her nonindustrial lumbar spine condition. It was for this reason that Claimant sought and obtained a referral to Dr. Manos. Although the Commission previously determined that Claimant's lumbar spine condition was not work related, there was no such finding with respect to Claimant's cervical spine condition. Indeed, Surety accepted responsibility for treatment of Claimant's cervical spine through the date of her last treatment by Dr. Hajjar. Even Claimant acknowledges her understanding that the Industrial Commission Decision which found her lumbar spine condition not compensable related only to her lumbar spine condition.

45. As developed above, Dr. Manos initially provided treatment to Claimant for her lumbar spine condition. Commencing in approximately August of 2012, Dr. Manos turned his attention to Claimant's cervical spine, which was becoming more symptomatic. Because Dr. Manos was not in the chain of referral, the only means available to Claimant to hold Defendants responsible for the care recommended by Dr. Manos is to demonstrate that

reasonable grounds exist for a change of physician. Claimant may pursue a change of physician as outlined in JRP 20, which provides an expedited means to process petitions for change of physician. It is also notable that under JRP 20(i), the injured worker is also authorized to pursue change of physician as an issue at hearing.

46. However, a prerequisite to pursuing a change of physician is written notice to the employer, notifying employer that the injured worker wishes to change physicians. Here, the record fails to affirmatively establish when or if the written notice required by the statute was given to Surety. Probably, Surety was notified at some point after October 19, 2012 but before early November of 2012. In his letter of October 19, 2012, Dr. Manos, responding to questions posed to him by Claimant's counsel, expressed his opinion that Claimant's need for cervical spine treatment is related to the industrial accident. It is likely that Claimant's counsel forwarded Dr. Manos' responses to Surety along with a request that the care be authorized, since in November of 2012 Defendants engaged Dr. Garabedian to test the proposition that Claimant's need for treatment is causally related to the subject accident. It is not important to know exactly when Claimant notified Defendants of her request for the care proposed by Dr. Manos, since Claimant did not see Dr. Manos between October 19, 2012 and February 13, 2013. Claimant can only pursue a petition for change of physician for care rendered subsequent to the date of notification. Here, that includes that care rendered by Dr. Manos from February 13, 2013 to the date of the hearing. Claimant can obtain reimbursement for expenses she incurred subsequent to the date of written notification only upon a showing that "reasonable grounds" exist supporting a change of physician. We conclude that Claimant has not made such a showing. Claimant's cervical spine condition was an accepted condition, one for which she received authorized care from Dr. Hajjar. Although Dr. Hajjar declined to assist Claimant in further treatment of her

lumbar spine condition, there is no evidence of record that he refused to see her for further cervical spine problems. Although Claimant may have been upset with Dr. Hajjar about his disinclination to process Medicaid paperwork, we deem this insufficient to constitute reasonable grounds for a change of physician for her cervical spine condition. *Reese v. V-1 Oil Co.*, 141 Idaho 630, 115 P.3d 721 (2005), cited by Claimant in support of her argument that she is entitled to payment for care rendered by Dr. Manos prior to hearing is inapposite. In *Reese, supra*, surety declined to provide recommended care and claimant eventually obtained it from another physician without notice to surety. The Industrial Commission ruled that absent notice to surety of his intentions, claimant was not entitled to the care he received from the other provider. On appeal, the court reversed, ruling that where surety was no longer providing adequate care for claimant, there was no need for claimant to first seek permission from surety before obtaining treatment from another provider. Here, there is simply no evidence that Surety denied responsibility for providing medical treatment for Claimant's cervical spine.

47. Claimant is not entitled to reimbursement for medical care provided by Dr. Manos prior to late October of 2012 because the written notice required under Idaho Code § 72-432(4) was not given. She is not entitled to recover expenses of treatment incurred subsequent to late October of 2012 and to the date of hearing because she has failed to demonstrate reasonable grounds for a change of physician.

CONCLUSIONS OF LAW

1. Claimant has proven that she is entitled to additional reasonable medical treatment for her industrial accident, including diagnostic testing, and potentially C3-4 disc surgery and/or trapezius muscle diastasis repair.

2. Claimant has not proven that Employer and Surety are responsible for the

costs of Dr. Manos' treatment of Claimant prior to the date of the hearing.

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 19th day of February, 2014.

INDUSTRIAL COMMISSION

/s/ _____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2014, 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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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIE ANDERSON,
Claimant,

v.

NUTRAHEALTH, INC., Employer, and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2004-503931

ORDER

Filed March 3, 2014

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has proven that she is entitled to additional reasonable medical treatment for her industrial accident, including diagnostic testing, and potentially C3-4 disc surgery and/or trapezius muscle diastasis repair.
2. Claimant has not proven that Employer and Surety are responsible for the costs of Dr. Manos' treatment of Claimant prior to the date of the hearing.

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

DATED this __3rd__ day of __March__, 2014.

INDUSTRIAL COMMISSION

/s/
Thomas P. Baskin, Chairman

/s/
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __3rd__ day of __March__ 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

JON BAUMAN
PO BOX 1539
BOISE ID 83701

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680-0857

ge

/s/