

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

MELLISA LEWIS,

Claimant,

v.

CONAGRA FOOD LAMB WESTON, INC.,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Surety,

Defendants.

**IC 2012-007508**

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

May 1, 2015

Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a telephonic emergency hearing on February 4, 2015. Claimant, who participated from her home, was represented by Rick D. Kallas, who participated from his office in Boise. Employer (“ConAgra”) and Surety (collectively, “Defendants”) were represented by Eric S. Bailey, who attended from his office in Boise. Oral testimony and documentary evidence were admitted at the hearing. No post-hearing depositions were taken. Post-hearing legal briefs were filed, and the case was placed under advisement on April 13, 2015.

**ISSUES**

Pursuant to the parties’ stipulation at the hearing, the issues to be decided as a result of the hearing are summarized as:

1. Whether Defendants are liable for continuing medical benefits pursuant to Idaho Code § 72-432 in the form of the upper extremity elbow disarticulation prosthesis recommended by Claimant's board-certified team of prosthetists/orthotists; and
2. Whether, given the facts set forth in the exhibits attached to the December 16, 2014 Affidavit of Rick D. Kallas demonstrating repeated requests for authorization since February 18, 2014, Defendants are liable for:
  - a. Attorney fees pursuant to Idaho Code § 72-804 for unreasonable failure and/or refusal to authorize the recommended prosthesis; and/or
  - b. Sanctions pursuant to JRP Rule 16 amounting to \$163.71.

### **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant is entitled to a prosthetic device as a result of her March 25, 2012 industrial injury resulting in an above-the-elbow right arm amputation.

Claimant contends that she is entitled to a hybrid<sup>1</sup> right arm prosthetic because her treating physician has recommended it, Claimant wants it, and Defendants have produced no medical evidence to rebut that recommendation. She also seeks attorney fees pursuant to Idaho Code § 72-804 due to Defendants' unreasonable delay in adjusting her claim, in which she first sought approval on February 18, 2014, and due to Defendants' unreasonable denial in June, 2015 of her request for a hybrid prosthetic in favor of a fully body-powered device.

Defendants counter that Claimant's own prosthetist ultimately recommended a fully body-powered prosthetic, in addition to a hybrid, so approval of that device was reasonable. Further, Claimant's weakened right residual upper extremity requires

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<sup>1</sup> The hybrid device Claimant seeks is body-powered at the elbow, with an electronically-powered wrist/hand.

additional physical therapy before she will be able to utilize the hybrid prosthetic, so denial of her request for that prosthetic was also reasonable. Defendants dispute that attorney fees are due, arguing that Claimant's prosthetist initially, erroneously, recommended a fully electronic prosthetic, so Defendants' delay and ultimate failure to approve that recommendation was not unreasonable. Further, due to Claimant's ongoing upper right residual limb problems, their denial of a hybrid limb was not unreasonable and cannot form the basis for an award of attorney fees.

### **EVIDENCE CONSIDERED**

The record in this matter consists of:

1. The testimony of Claimant and Jerry Nelson, CPO, taken at the hearing.
2. The December 16, 2014 Affidavit of Rick D. Kallas and attached exhibits.
3. Claimant's Exhibits ("CE") 1 through 19, admitted at the hearing.
4. Defendants' Exhibits ("DE") 1 and 2, admitted at the hearing.

### **FINDINGS OF FACT**

After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for consideration by the Commission.

### ***CHRONOLOGY***

1. Preexisting conditions. When she was 19 years of age, Claimant contracted septic pneumonia, which resulted in the removal of the lower lobe of her left lung. She was also in a car accident which resulted in surgeries to fuse part of her lumbar spine and to repair her right knee.

2. Education and vocational experience. Claimant attended high school, but she did not graduate. She initiated testing to acquire her GED and, at one time, was one test away from achieving it. She has been employed since she was 17 years of age, at various unskilled and labor-intensive positions. At the time of her industrial injury, she was the primary breadwinner for her family and extended family, which included her unemployed husband and three young children, as well as her pregnant stepsister and her stepsister's boyfriend.

3. Industrial injury. On March 25, 2012, at age 25, Claimant was cleaning a conveyor at ConAgra when it was suddenly activated. Caught off-guard, her dominant (right) arm became lodged in the machinery, resulting in the immediate traumatic amputation above the elbow and degloving of her right upper arm.

4. Initial treatment and claim adjustment. Claimant was flown by helicopter to the University of Utah Hospital, where she was taken to surgery for possible replantation of her amputated limb. Unfortunately, replantation was not an option due to the severity of her wound. Thereafter, Claimant received treatment to help her heal, rehabilitate, and control her pain from Mark Greenfield, M.D., and Weldon Richardson, P.A., under the supervision of Holly Zoe, M.D. Claimant soon developed conditions including but not limited to phantom limb pain, depression, anxiety, headaches, insomnia, stress, as well as paresthesias and weakness in her right upper extremity. These conditions were treated with medications including narcotic pain relievers.

5. Surety accepted the claim.

6. On May 31, 2012, after Claimant appeared at an emergency room seeking pain medications, Surety's third party adjustor ("Sedgwick") notified Claimant by letter

that she should direct all requests for medication refills to Mark Greenfield, M.D., and that she had been approved for an evaluation by Dr. Glogorovich regarding the psychological aspects of her injury.

7. On June 26, 2012, Sedgwick advised Claimant by letter that she could reschedule a missed appointment with Idaho Prosthetic and Orthotics to begin the fitting process.

8. On July 2, 2012, Sedgwick again wrote to Claimant because she had again gone to an emergency room to obtain pain medications. Claimant was informed that the emergency room visit would not be covered.

9. On July 23, 2012, Tracey McGee, medical secretary with University of Utah Healthcare, wrote a letter to Sedgwick, responding to a request for opinions from Eleazar Ley, M.D., who had previously treated Claimant for her amputation. Ms. McGee advised that Dr. Ley had left the practice and directed Sedgwick to his last chart note, dated June 8, 2012, in which he had prescribed a prosthesis fitting and follow up as needed.

10. On August 20, 2012, Claimant's attorney wrote to Sedgwick, advising that he represented Claimant and all correspondence must be directed to him, among other things.

11. On August 21, 2012, Sedgwick acknowledged, by letter, Claimant's attorney appearance and request for documents. A week later, Sedgwick provided Claimant with a mileage payment in anticipation of her upcoming Independent Medical Evaluation ("IME").

12. An IME was conducted by Brian Tallerico, M.D., on September 14, 2012 in which he:

- Deemed Claimant medically stable.

- Assessed permanent partial impairment of 57% of the whole person and restricted all use of Claimant's upper right extremity.
- Released Claimant to work at any job she can do that requires use of only her left upper extremity, which excludes production-type work.
- Recommended psychiatric treatment.
- Acknowledged that Claimant would need a prosthetic, but recommended delaying this procedure because Claimant reported she was not psychologically ready, and also because she was having trouble with blisters and scabs on her residual limb which would impede the use of a prosthetic.
- Strongly opined that the "astronomical dose of opioid medications including 90 milligrams of morphine a day and multiple Percocet" that Claimant was taking was unsustainable and that she should start weaning off of them.

13. Surety began paying Claimant a PPI benefit consistent with Dr. Tallerico's opinion on October 12, 2012, retroactive to September 14, 2012.

14. On November 15, 2012, Claimant's attorney wrote to Defendants' attorney, requesting preauthorization for treatment for her industrial injury-related depression at Davis Behavioral Health, as prescribed by Mr. Richardson and recommended by Dr. Tallerico. Defendants' attorney responded by letter dated November 19, 2012, in which he advised that her request for psychological care would probably be granted because "the employer/surety has for many months been attempting to get Ms. Lewis to accept the fact that an emotional/psychological evaluation and treatment would be appropriate for her. ...[but] [s]he has repeatedly indicated to us her reluctance to go down this road." CE-19001. He also advised that ConAgra had not denied any such care previously, and that Claimant's "ambivalence" towards care and whether she would stay in Idaho were key factors. "Thus, in the context of proceeding in this case the surety is going to run this through the Idaho fee schedule for any appropriate reductions on billings. This

is not previously denied medical care and we are not going to be proceeding under the assumption that full reimbursement for any billings run through your office.” CE-19001 (emphasis in original.) Defendants’ attorney closed with an inquiry as to whether Claimant intended to return to her employment at ConAgra because the employer needed to know her intentions. “I think it is fairly safe to assume that she is resigning her employment with ConAgra. I do not mean this in any bad way, we just need to know...” CE-19001-19002.

15. Claimant’s relocation to Utah and new care provider. By December 2012, Claimant was separated from her husband (they soon divorced), and had moved to Layton, Utah, where she established care with Gigi Whaley, DNP, FNP, at Utah Pain and Rehabilitation. Claimant was having ongoing problems with depression (including a suicide attempt), phantom pain, shoulder pain, joint pain and stiffness, cervical spine tenderness, and opioid dependence, among other things. Ms. Whaley continued to treat Claimant for these and similar symptoms with medications, including opioid pain relievers. She saw Claimant in treatment once or twice per month until May 6, 2013. Ms. Whaley apparently did not see Claimant again until after Claimant met with Jerry Nelson, CPO, prosthetist/orthotist working through the Hanger Clinic, in early 2014.

16. By January 6, 2014, Claimant’s strength had improved with physical therapy and she had scheduled a prosthesis fitting.

17. Claimant initially consulted with Mr. Nelson on January 9, 2014. Mr. Nelson interviewed Claimant and they discussed Claimant’s functional needs. Claimant explained that she still did not have a prosthesis, nearly two years after her amputation, because of confusion over her vocational retraining. She was “delighted” to be

starting the process of obtaining a prosthesis and “anxious” to get back to work. CE-12004.

18. Following his meeting with Claimant, Mr. Nelson met with Phil Stevens, M.Ed., CPO, FAAOP,<sup>2</sup> a specialist in upper extremity prosthetic management. Mr. Nelson’s plan was to utilize Mr. Stevens’ knowledge, in addition to the knowledge of the upper extremity specialists working within the Hanger Clinic system, to formulate the best possible prosthetic plan for Claimant. Along those lines, he planned to engage this team of specialists once Claimant was preauthorized for prosthetic care “to assure Melissa’s [*sic*] most successful scenario.” CE-12004.

19. On February 6, 2014, Claimant again met with Mr. Nelson. This time, they had a detailed discussion regarding the types of prostheses available.

This follow up appointment was to further discuss mechanical or body powered prostheses versus microprocessor controlled limbs. We reviewed advantages and disadvantages of each. After considering both, Melissa [*sic*] felt like, and I concurred, that for her vocational retraining she needed to have the most options available and open to her and the microprocessor controlled prosthesis, or a combination of conventional or body powered with microprocessor controlled components would be best for her. The upper extremity team suggested all microprocessor controlled (MPC) componentry and a prescription would be developed for the purpose of obtaining authorization to move forward with a prosthesis from the workers compensation insurance carrier (Sedgwick).

CE-12005.

20. Initial evaluation and request for prosthesis approval. On February 18, 2014, after consulting with Mr. Nelson and Mr. Stevens, Ms. Whaley signed the Confirmation of Order for a fully electronic prosthesis. The price for the prosthesis was \$181,946.80.

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<sup>2</sup> Master of Education, Certified Prosthetist Orthotist, Fellow of the American Academy of Orthotists and Prosthetists.



21. Mr. Nelson faxed the order to Sedgwick on the same day. When he did not receive any response, Mr. Nelson contacted Sedgwick on February 26, 2014 and refaxed the authorization request. Thereafter, Mr. Nelson and/or the Hanger Clinic followed up with Sedgwick and/or MSC Medical Claims Management on a number of occasions, as follows:

- March 6, 2014 (left voice mail at Sedgwick) – Katie Pillar called back, advising the request was “still in review, sent to litigation.”
- March 13, 2014 (received call from MSC) – Hanger Clinic refaxed the claim because caller said it could not be found.
- March 25, 2014 (received call from MSC) – Responded by sending another copy of authorization request plus detailed prescription and prices.
- April 2, 2014 (received call from MSC) – Responded by filling out and returning by fax a 7-page form provided by MSC seeking information already provided to Sedgwick, MSC, or both.
- April 11, 2014 (called Sedgwick re status) – Sedgwick advised that there was no request on file; followed up by calling Eric Porter and leaving a voice message and by mailing the claim to Sedgwick in Lexington, Kentucky.
- April 14, 2014 (called Katie Pillar and Eric Porter at Sedgwick) – Left voice message for each requesting status update.
- April 14, 2014 (called Claimant) – Claimant advised she would notify her attorney of difficulties with claim.
- June 2, 3, 4, 2014 (left voice messages for Katie Pillar seeking status report) – No response.
- June 4, 2014 (emailed Katie Pillar seeking status report) – Response indicates that the claim “remains in litigation” and that the “bionic” prosthetic has been denied. CE-12003.
- June 15, 2014 – Mr. Nelson authored a letter to Mr. Kallas, Claimant’s attorney, regarding the denial and associated claim adjustment process.

22. In the meantime, Claimant's psychologist, Adam Schwebach, Ph.D., wrote to Sedgwick (Ms. Pillar) on May 7, 2014, seeking a response to his multiple prior attempts to obtain treatment authorization from Sedgwick:

I met with Ms. Lewis on March 4, 2014, for an initial mental health and diagnostic interview. We have attempted multiple times to contact Ms. Pillar on March 10<sup>th</sup>, March 17<sup>th</sup>, March 19<sup>th</sup>, and March 28<sup>th</sup>, to secure authorization for additional mental health services, including psychological diagnostic testing and mental health therapy. We also attempted to contact Katie's supervisor, Eric, on March 19<sup>th</sup> and March 28<sup>th</sup>. We have never received any correspondence back, including any phone call messages returned or written correspondence.

CE-18014.

23. Claimant returned to Ms. Whaley for follow-up care on May 21, 2014. Claimant sought a pain medication refill for chronic pain in her shoulders and left hand. She was also experiencing some residual numbness in her right arm. Ms. Whaley noted Claimant was still stressed about her family, changing living arrangements (she and her three children were living with her father), and child custody issues. Claimant's muscle mass was improved, but she still had phantom pain.

24. On June 17, 2014, Mr. Kallas wrote a letter to Mr. Bailey, Surety's attorney, setting forth objections to the claims adjustment process to date, seeking authorization for the recommended prosthesis and psychological evaluation, testing, and counseling, and advising that Claimant would seek attorney fees pursuant to Idaho Code § 72-804 if she were required to file a complaint.

25. On June 18, 2014, Ms. Whaley noted that Claimant should continue physical therapy to strengthen her neck, shoulder, and injury area in preparation to receive a prosthetic device. She noted that a fitting was scheduled for February 5, 2014, which is

odd, since this date is in the past. Also, Ms. Whaley had already signed off on the prosthesis order (in February 2014).

26. On July 15, 2014, Tiffany Robertson, R.N., nurse case manager, was advised by Defendants' counsel that ConAgra was exploring less costly alternatives to the recommended prosthesis, as well as ways to get Claimant weaned off her narcotic medications.

27. On July 21, 2014, Sedgwick advised Claimant's attorney that they had retained Genex Services, LLC – more specifically, Ms. Robertson – to act as a nurse case manager, and sought his approval. “My role is to facilitate services and communications among the professionals involved in Mellisa Lewis's treatment. Monthly progress reports will be submitted to SFC – Sedgwick Claims Mgmt Services.” CE-17002. A corresponding internal Sedgwick record expands upon the purpose for Ms. Robertson's involvement. “This file has been referred to GENEX Services for full case management to coordinate treatment and care plan to obtain maximum medical improvement (“MMI”); ensure that the patients [sic] medical care is medically necessary, appropriate, and consistent with standard medical practices; and provide case management to include a clinically driven, proactive process for both inpatient and outpatient treatment.” CE-17004. That record also states August 25, 2014 as the anticipated date by which Claimant would “receive a prosthetic that is appropriate to her needs,” among other things. *Id.*

28. Claimant was again evaluated by Ms. Whaley on August 13, 2014. She had recently had her gall bladder removed, and she was pregnant. Her chronic shoulder and left hand pain were worse because she was weaning off her narcotic pain medications due to her pregnancy. Ms. Whaley noted Claimant was still waiting for her prosthesis, and that

she should continue physical therapy to strengthen her neck, shoulder, and back to support her residual limb, in anticipation of receiving her prosthesis. Ms. Whaley prescribed more narcotic pain medications, noting that Claimant was weaning down.

29. Claimant filed her Complaint seeking, among other things, medical benefits for a prosthesis and attorney fees for unreasonable delay/denial on August 15, 2014.

30. On September 10, 2014, Claimant's chronic shoulder and left hand pain had worsened, and she had pain with numbness in her residual right arm. Claimant attributed the worsening of her symptoms to the reduction in her pain medication, and she was taking extra Neurontin and Tylenol to compensate. She was now five months pregnant. Ms. Whaley prescribed medications, again noting Claimant was weaning down. Claimant was still strengthening, in anticipation of receiving a prosthesis.

31. Second evaluation for prosthesis. On September 23, 2014, Ryan French from One Call Care followed up on a conversation with someone at Hanger Clinic by faxing a request to have Claimant reevaluated for a prosthesis.

32. Claimant's symptoms were still worsening as of October 2, 2014, the date she next saw Ms. Whaley. Claimant was having trouble sleeping, and her medications weren't working as well for her as they had before. "Patient reports her nausea, muscle spasms, anxiety, neck and shoulder pain, and phantom pain continue, but all now worsening as patient has been trying to wean down several of her medications as she is now almost 6 months pregnant and is unable to continue with the current medication plan." CE-11048. (This sentence appears in other chart notes, as well.) Ms. Whaley continued Claimant's weaning process.

33. On October 9, 2014, Claimant was again evaluated by Mr. Nelson and Mr. Stevens.

34. On October 31, 2014, following consultation with Mr. Nelson and Hanger's nationwide consultation services, Mr. Stevens submitted evaluation notes and a quote for a hybrid prosthesis to One Call Care. The recommended device was quoted at \$87,175.82. This time, a hybrid device was selected because a more detailed evaluation was conducted, and it was determined that a body-powered elbow component would be preferable to the previously recommended myoelectronic component. Ms. Whaley's prescription was apparently provided later, as she signed it on November 18, 2014, appending the handwritten note, "Pt will continue with need for prosthesis due to traumatic amputation 25 March 2012[.] Patient had dominant arm violently removed injuring her shoulder and neck. Prosthesis will help meet her daily needs as well as make her better able to care for her young children." DE-25.

35. On November 5, 2014, Claimant again reported worsening pain due to the reduction in her medication, but "she is willing and desiring to follow a pregnancy plan to decrease risk of medications to her fetus." CE-11053. Ms. Whaley continued Claimant's opioid medication at the October 2 level.

36. Also on November 5, 2014, One Call Care acknowledged receipt of Mr. Stevens' claim submission. Hanger followed up on November 17 via telephone, and was met with no answer plus an error message at that number. On November 20, the submission was refaxed at Mr. French's request. Mr. French followed up on November 25 with a telephone call to obtain more information regarding the iLimb hand recommended. Hanger verified that the "Revolution" model was recommended.

37. On December 1, 2014, Claimant's attorney emailed Defendants' attorney, again requesting authorization for her prosthesis. He attached a prior email from Mr. Nelson (to Claimant's attorney) describing more delays by Surety. The date of that email is not provided. Mr. Nelson states that he believed the prosthesis had finally been approved, "so we did a more complete evaluation with our regional upper extremity team and discovered that some of the more expensive options we thought would work will not serve Melissa [sic] as well as some other options." CE-18018. This is consistent with the plan he stated in February 2014.

38. On December 3, 2014, Claimant was again evaluated by Ms. Whaley, who again continued Claimant's opioid medication at the October 2 level.

39. On December 5, 2014, Mr. Nelson emailed Mr. Kallas about the problems he was experiencing with the adjustment of Claimant's claim. "Melissa [sic] is concerned because she would like the arm prior to the birth of her child (February) and have an opportunity to learn to use it in caring for her new baby." CE-12007. Also on this day, Mr. French called to advise Hanger Clinic that One Call Care was waiting on ConAgra to review the iLimb request, and nothing had yet been approved.

40. On December 11, 2014, Mr. French emailed Hanger Clinic a request regarding the level of Claimant's amputation, and for a quote for a fully body-powered prosthetic. On that same day, Steven Perez from Priority Care Solutions requested L-codes and a request for authorization, which were provided.

41. On December 12, 2014, Mr. Nelson and Mr. Stevens authored an open letter to One Call Care advising that Claimant's amputation was above-the-elbow and strongly advising against a fully body-powered prosthesis for the following reasons:

· Gross body motion is required to actuate both an elbow and a hand/hook. In the likelihood of her employment and potential of employment it will be more limiting in what she actually will qualify for in the work environment.

· Melissa [*sic*] reports a history of regular migraines secondary to neck and a history of back surgeries. Additional requirements of harnessing both hand/hook and elbow movement will likely aggravate these injuries and conditions.

· Harnessing puts increased stress across the neck and upper back, as well as on the sound side axilla, which exacerbates joint pain in the sound side.

· A majority of the actuation (movement of the hand and elbow) occurs at the hand/hook rather than the elbow. By eliminating the need for harness/cable (which provide the actuation of the elbow, hand/hook) forces to open and close the hand/hook than the requirement of energy we're placing on her sound side goes down appreciably.

CE-12010.

42. Mr. French renewed his request for a bid for a fully body-powered device, and Hanger did not respond. He renewed it again on December 17, 2014, via fax, noting, "I do understand that you and your advisory panel do not recommend a body-powered prosthetic for this patient; however, the carrier and employer are requesting one as an additional quote." CE-12016.

43. On December 30, 2014, Claimant, nine months pregnant, was evaluated by Ms. Whaley for the last time prior to the hearing. Ms. Whaley again continued Claimant's opioid medication at the October 2 level. As with several prior chart notes, Ms. Whaley repeated that Claimant was continuing strength exercises in anticipation of receiving a prosthesis, which she had been unable to obtain to date. Also on December 30, Mr. Nelson faxed a bid for a fully body-powered prosthetic to Mr. French. It amounted to \$18,411.85. Along with the bid, Mr. Nelson enclosed another copy of the reasons he and Mr. Stevens

opined that this type of device was inappropriate for Claimant, along with another pointed objection. “It would be a great disservice to her to provide this arm because ultimately, she would find it too difficult and cumbersome to use and not be to her advantage in learning to use it.” CE-12012.

44. On December 31, 2014, Claimant’s attorney wrote to Ms. Robertson, affirming his denial of her request to communicate directly with Claimant before the recommended prosthesis, as well as psychological testing, are approved.

45. On January 16, 2015, Surety attempted to advise Hanger Clinic by telephone that the fully body-powered prosthetic had been approved. Hanger Clinic learned of the approval on January 19.

46. On January 22, 2015, Mr. Nelson and Mr. Stevens authored a letter to Surety objecting to the effective denial of the hybrid prosthesis they recommended. A paragraph from that letter encapsulates one of Claimant’s arguments for attorney fees:

It appears that the insurance carrier and employer have made the clinical decisions to provide what they deem appropriate for this patient and have disregarded the clinical judgment of two board certified prosthetists with over 45 years of combined clinical practice experience, a national panel of upper-extremity prosthetic specialists, endorsed by the patient’s medical doctor, who is licensed and credentialed to prescribe, by law, such medical devices. I would note, that the device that the insurance company has authorized, is not legally prescribed by Ms. Lewis’ medical doctor.

CE-12017 (emphasis in original).

### ***VOCATIONAL REHABILITATION***

47. Claimant worked with the Industrial Commission Rehabilitation Division briefly in 2012 and 2013. Her case was officially closed in March 2013 because she had moved to Utah. Claimant applied for vocational assistance from the Utah State Office of Rehabilitation in or around September 2013. Claimant was accepted into a vocational



rehabilitation assistance program. However, as of January 15, 2015, she still did not have a plan in place to obtain employment. The reasons for Claimant's failure to progress with her vocational rehabilitation include, among other things, her mental condition associated with her injury, her family situation including three young children and another on the way, her failure to appear for several appointments, attrition of counselors assigned to her, gall bladder surgery in August 2014, and her inability to obtain a prosthesis.

48. In October 2013, Claimant's rehabilitation counselor, Ute Holmgren, urged Claimant to obtain a prosthesis. Ms. Holmgren referred her to a physical therapist at Wasatch Physical Therapy, who recommended shoulder muscle strengthening in preparation to receive the prosthesis.

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

49. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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).

#### ***MEDICAL CARE***

50. Claimant seeks an order requiring Defendants to pay for a hybrid prosthetic right arm with two terminal devices – one for heavy-duty work, and one for finer motor tasks – as recommended by her primary care provider, Ms. Whaley, and her prosthetics

team including Mr. Nelson and Mr. Stevens. Claimant asserts that Defendants are required to provide such care under Idaho Code § 72-432. That section provides, in pertinent part:

- (1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, 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.

As noted in the Commission's decision in *Oliveros v. Rule Steel Tanks, Inc.*, 2012 IIC 0094, an employer is statutorily obligated to provide "reasonable" medical treatment to an injured worker when it constitutes: 1) care required by an employee's physician, and 2) care needed immediately following an injury, and for a reasonable time thereafter. (*See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989); *Richan v. Arlo G. Lott Trucking, Inc.*, 2011 IIC 0008 (2011)).

Defendants do not challenge Claimant's assertion that Ms. Whaley is the "employee's physician" for purposes of Idaho Code § 72-432(1).

51. Having found that the care was required by Claimant's physician, the only issue left to resolve is whether the prospective care that has been recommended by Ms. Whaley, in reliance upon Mr. Nelson and Mr. Stevens, is "reasonable." This determination is solely within the province of the Commission. According to the Court in *Sprague*, the following facts supported the conclusion that the previously administered care in question was reasonable: (1) the treatment was required by claimant's treating physician; (2) claimant made gradual improvement from the treatment that he received; (3) the treatment which had been provided was within the physician's standard of practice, the charges for which were fair, reasonable and similar to the charges in the same profession. Since the care at issue in this case is entirely prospective in nature, whether the care

recommended by Ms. Whaley, Mr. Nelson, and Mr. Stevens is “reasonable” must be judged by other factors, such as whether the proposed care is likely to be efficacious, and is of a type that finds support and acceptance in the medical community. *See, Richan v. Arlo G. Lott Trucking, Inc., supra.*

52. Here, there is no dispute that Claimant is entitled to a right arm above-elbow prosthesis. The only question is whether the hybrid device with two interchangeable terminal devices, as recommended by Claimant’s physician and prosthetists, is reasonable, given that Defendants would prefer to provide a fully body-powered device.

53. Defendants argue that a hybrid device is not appropriate, from a vocational perspective, because Claimant has yet to develop sufficient “white collar” skills to require a myoelectric hand. They do, however, concede that such a prosthesis may become appropriate in the future. Defendants base their argument on the supposition that Claimant’s work experience excludes jobs that depend upon fine motor skills. Claimant, however, relies upon Ms. Whaley, who pointed out in her prescription that the recommended hybrid device would help her with managing her young children, and upon her prosthetists, who concluded that Claimant needs as much functionality as possible to keep from reducing her vocational options.

54. Mr. Nelson’s and Mr. Stevens’ opinions are supported by Claimant’s vocational rehabilitation records which establish that she must receive a prosthesis, and become trained on it, before her full functionality and, thus, her eligibility for all retraining opportunities, can be properly assessed. Defendants suggest that it would be better to start Claimant off with a prosthesis that would allow her to return to a time-of-injury-type job and then, if her vocational opportunities develop to include jobs that require fine motor

abilities, a myoelectric hand may become reasonable. However, the purpose of medical care is to restore function with a view towards returning an injured worker to gainful activity. To do as Defendants urge would be to restrict Claimant's vocational opportunities by limiting her to a narrow segment of the labor market, a restriction she was not subject to prior to the accident. Further, Claimant cannot reasonably be expected to return to work and retrain at the same time. Moreover, Defendants fail to provide any expert opinion to rebut the well-considered recommendation by Claimant's physician and prosthetists.

55. In light of the evidence in the record of the opinions and qualifications of Claimant's physician and prosthetists, and the lack of any conflicting expert opinion in the record, the Referee finds Claimant is entitled to the hybrid prosthesis with two alternate terminal devices as recommended by Ms. Whaley, Mr. Nelson, and Mr. Stevens.

#### ***ATTORNEY FEES***

56. The next issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Defendants approved a fully body-powered prosthesis for Claimant on or around January 16, 2015, effectively denying the recommendation of her physician and prosthetists. Claimant asserts that Surety's delay in the adjustment of her claim for a prosthesis and its ultimate denial of benefits for the hybrid device were unreasonable, entitling her to an award of attorney fees.

57. 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.

58. 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).

59. Prosthesis recommendation. Following Mr. Nelson's February 18, 2014 recommendation, Surety had a duty to conduct a timely investigation of the claim and either accept or deny it within a reasonable period. Given the specialized nature of Mr. Nelson's recommendation, if Surety was not going to approve the device, then it needed to obtain a timely qualified medical and/or prosthetic expert opinion rebutting it. Instead, Surety delayed investigating Claimant's entitlement to the device for nearly six months, responding to status inquiries with repeated excuses ("we did not receive the claim") and inaccurate information ("the claim is in litigation"). When Surety did take action to look into the claim, aside from just asking Claimant's prosthetists to repeat information already provided, it was to obtain cost information on a device that was not recommended by any physician or prosthetist and would be information that was readily apparent from Claimant's March 25, 2012 and subsequent medical records. The Referee agrees that Surety's adjustment of this claim was unreasonably delayed. As well, the ultimate denial of the hybrid device was unreasonable, as it was done in direct opposition to the recommendations of Claimant's physician and prosthetists, with no supporting medical or prosthetic opinion to support its position.

60. Defendants argue that an attorney fee award based on the February 18, 2014 recommendation is unwarranted because Mr. Nelson admitted that the fully-electronic device he recommended on that date was ultimately not the best choice for Claimant. However, Mr. Nelson persuasively testified that this recommendation and request for preauthorization were only intended to initiate the fitting process, and that the superiority of a body-powered elbow prosthesis over the bigger, heavier, myoelectric alternative, would have been quickly apparent in the fitting process following preauthorization. Therefore, Mr. Nelson testified, it was Surety's failure to provide preauthorization that delayed the discovery that a hybrid prosthesis is the best choice. Indeed, when Mr. Nelson reevaluated Claimant at Surety's request, believing he had preauthorization, he (in consultation with Mr. Stevens and other Hanger prosthetists) conducted a more rigorous evaluation and fitting which led to the recommendation for a hybrid device. In any event, Surety's failure to investigate the claim and provide Claimant with a timely decision cannot be excused by a retrospective attack on the quality of Mr. Nelson's recommendation. Moreover, Mr. Nelson's decision to recommend a hybrid device has no bearing on the belated justification for Defendants' delay, since even if Mr. Nelson had originally recommended the less expensive prosthesis, Defendants would still have refused to authorize anything but a body-powered prosthesis.

61. Defendants also argue that Claimant's time-of-hearing pain condition would prevent her from being able to use any prosthetic, so its delay and denial are warranted. This position is inconsistent with Surety's authorization of a body-powered prosthesis in January 2015 because the record fails to support the requisite contention that a body-powered prosthesis would be more compatible with Claimant's pain level than a hybrid

device. Also, Claimant's pain increase is temporary because it is due to her pregnancy. Prior to her pregnancy, Claimant's medical records indicate her pain was under control, so there is inadequate evidence from which it could be found that Claimant would not be able to begin training on a prosthesis once her pregnancy resolves (as it should by the time this decision is issued).

62. Claimant has proven that she is entitled to attorney fees pursuant to Idaho Code § 72-804 for the unreasonable delay and unreasonable denial in adjusting her claim for a prosthesis.

### ***SANCTIONS***

63. Pursuant to J.R.P. Rule 16, Claimant seeks sanctions in the amount of \$163.71 for copy charges incurred in preparing her hearing exhibits. Rule 16 requires a violation or abuse of a rule or procedure of the Commission, and Claimant has not cited any Commission rule or procedure that was violated or abused. Therefore, Claimant's request for sanctions is denied.

### **CONCLUSIONS OF LAW**

1. Claimant has proven that she is entitled to additional reasonable medical care as a result of her March 25, 2012 right arm amputation in the form of a hybrid above-elbow prosthesis with two terminal devices, as recommended by her physician and prosthetists.

2. Claimant has proven that she is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable delay in approving her claim for the recommended prosthesis, and its unreasonable denial of the same, from February 18, 2014 through the time of the hearing.

3. Claimant has not proven entitlement to sanctions pursuant to J.R.P. Rule 16.

**RECOMMENDATION**

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

DATED this 20 day of April, 2015.

INDUSTRIAL COMMISSION

/s/  
LaDawn Marsters, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of May, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICK D KALLAS  
ELLSWORTH KALLAS & DEFRANCO  
1031 E PARK BLVD  
BOISE ID 83712

ERIC S BAILEY  
BOWEN & BAILEY  
PO BOX 1007  
BOISE ID 83701-1007

sjw

/s/



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

MELLISA LEWIS,

Claimant,

v.

CONAGRA FOOD LAMB WESTON, INC.,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Surety,

Defendants.

**IC 2012-007508**

**ORDER**

May 1, 2015

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

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

1. Claimant has proven that she is entitled to additional reasonable medical care as a result of her March 25, 2012 right arm amputation in the form of a hybrid above-elbow prosthesis with two terminal devices, as recommended by her physician and prosthetists.

2. Claimant has proven that she is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable delay in approving her claim for the

recommended prosthesis, and its unreasonable denial of the same, from February 18, 2014 through the time of the hearing.

3. Claimant has not proven entitlement to sanctions pursuant to J.R.P. Rule 16.

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

Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court *Hogaboom v. Economy Mattress*, [107 Idaho 13, 684 P.2d 990 \(1984\)](#). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

DATED this 1<sup>st</sup> day of May, 2015.

INDUSTRIAL COMMISSION

/s/  
R.D. Maynard, Chairman

/s/  
Thomas E. Limbaugh, Commissioner

/s/  
Thomas P. Baskin Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of May, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICK D KALLAS  
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