

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT E. MEAD,

Claimant,

v.

SWIFT TRANSPORTATION,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Surety,
Defendants.

IC 2013-028008

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

Filed August 12, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on October 16, 2015. Claimant, Robert E. Mead, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Swift Transportation (Swift), and Defendant Surety, Ace American Insurance Company, were represented by Emma Wilson, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 25, 2016.

ISSUES

The issues to be decided by the Commission are:

1. Claimant's entitlement to medical care.
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident or whether Claimant's condition is due in whole or in part to a pre-existing condition.

3. Whether Claimant is medically stable and, if so, the date thereof.
4. Claimant's entitlement to temporary disability benefits.
5. Claimant's entitlement to permanent partial impairment benefits.
6. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an accident on August 21, 2013, while working at Swift when he turned a 47-foot plank and sustained C5-6 and C6-7 disc herniations for which he subsequently underwent cervical surgery. He requests additional medical, temporary disability, and permanent partial impairment benefits. Claimant also requests attorney fees for Defendants' unreasonable denial of benefits.

Defendants acknowledge Claimant's industrial accident at Swift, but assert it caused only a rhomboid strain from which he recovered without impairment or permanent restrictions. Defendants note that Claimant's cervical condition preexisted his industrial accident and maintain that his need for cervical surgery was unrelated to his accident. They argue that Claimant initially denied an industrial accident, thus further justifying their refusal to pay benefits. Defendants assert they have paid all temporary disability and medical benefits owed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, and his wife Pamela Mead, taken at the hearing;
3. Claimant's Exhibits A through Y and Defendants' Exhibits 1 through 25, admitted at the hearing;

4. The post-hearing deposition testimony of Bret Dirks, M.D., taken by Claimant on December 10, 2015; and
5. The post-hearing deposition testimony of Jeffrey Larson, M.D., taken by Defendants on January 13, 2016.

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 conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1974. He was 40 years old and resided in Lewiston at the time of the hearing. He is right-handed.

2. **Background.** Claimant has worked all his life. At nine years of age he began working for a farmer every night and on weekends. During high school he worked as a logger with his father. Claimant left high school during his senior year to work full-time at a lumber mill. He later obtained his GED.

3. On April 22, 1996, Claimant began working for Swift as a mechanic. His duties included welding and all aspects of trailer repair and maintenance. Claimant transferred to Texas where he worked for one year as a service manager for Swift. However, his sister's ill health prompted him to move back to Lewiston to assist her. Upon his return, Swift put Claimant in charge of all of the trailer mechanics in Swift's Lewiston shop. Claimant was then responsible for establishing weekly goals for the trailer mechanics and was accountable for the attainment of these goals.

4. **Pre-existing health conditions.** In February 2008, Claimant was lifting weights and experienced sudden neck pain while performing shoulder shrugs with approximately 200

pounds. Thereafter he noted persisting neck pain and pain in his left arm and left triceps. He underwent a cervical MRI which revealed small left-sided C6-7 disc herniation. EMG testing on April 2, 2008, showed abnormal left arm denervation. Claimant received medical treatment, including three cervical epidural steroid injections in May and June 2008. His neck and arm symptoms improved significantly after the injections and he sought no further treatment at that time.

5. On June 9, 2008, Claimant injured his back lifting a 130-pound spring while working at Swift. He was found to have an L5-S1 herniated disc. This injury is the subject of a separate worker's compensation claim against Swift.¹ Claimant noted progressive back and leg pain. On October 10, 2008, neurosurgeon Bret Dirks, M.D., performed left-sided L5-S1 microdiscectomy and laminotomy. On December 2, 2008, at Claimant's request, Dr. Dirks released Claimant to return to work at Swift without restrictions.

6. In July 2010, Claimant strained his neck while loading a friend's four-wheeler into a pickup. He noted neck and left arm pain, received prescription medications, and his pain resolved. He missed no time from work. By August 2010, he reported "resolution of recent neck/upper back strain, and is feeling back to his usual as far as back pain goes." Defendants' Exhibit 5, p. 54.

7. Claimant left Swift and worked for one year as a forklift driver at Clearwater Paper. He left Swift because of continuing low back pain which was not relieved by his first low back surgery. He hoped the different duties at Clearwater Paper would be less stressful on his back. However, he continued to have back pain as a forklift driver. His prior work and assigned

¹ The Commission's decision in that case is included in the record of the present case by agreement of the parties as Claimant's Exhibit Q.

hours at Swift were more enjoyable so he determined to return to Swift. Swift readily rehired him. In September 2011, Claimant returned to work as a trailer mechanic at Swift in Lewiston.

8. Claimant's low back symptoms worsened and he accepted an offer of surgery by Jeffrey Larson, M.D. On April 12, 2012, Dr. Larson performed L5-S1 fusion. At hearing Claimant testified that he has had ongoing back pain ever since his lumbar surgery by Dr. Larson.

9. On October 29, 2012, Claimant presented to Charla Willis, M.D., for chronic low back pain continuing in spite of his lumbar fusion. Dr. Willis recorded that Claimant's neck was supple.

10. On December 18, 2012, Claimant sought a follow-up appointment and Dr. Larson advised Claimant that his persisting low back pain was not because of the lumbar fusion Dr. Larson had performed. Claimant was frustrated with Dr. Larson and his ongoing low back pain but he continued to work and take prescription medication.

11. Claimant began noticing increasing neck symptoms at work when he had to maintain an awkward neck position for a sustained period—as required while welding underneath a trailer. He sought treatment from Lyndal Stoutin, M.D., who noted that Claimant's neck pain was similar to that of several years prior when it was quite severe and he had received epidural steroid injections. She also recorded Claimant's report of left arm pain and left hand weakness. Dr. Stoutin reviewed Claimant's 2008 cervical MRI and concluded it showed disc herniations at C5-6 and C6-7. She noted that Claimant had been taking six hydrocodone per day for the prior four years because of his low back and leg pain, but now continued to take hydrocodone because of his neck pain. Defendants' Exhibit 7, p. 16.

12. Claimant received cervical epidural steroid injections on January 14 and 29, 2013, and his neck and left arm pain improved. Claimant testified his neck pain “pretty well subsided” and no third injection was ever scheduled. Transcript, p. 44, l. 14. He missed no time from work.

13. On March 12, 2013, Claimant presented to Beth Blankenship, PA-C, reporting his neck symptoms had been doing well but had recently increased after he used an air gun at work two weeks earlier. Ms. Blankenship found neck spasms and decreased cervical range of motion. Claimant considered scheduling a cervical epidural steroid injection; however, his neck symptoms improved so he did not. Defendants’ Exhibit 7, p. 26.

14. On June 10, 2013, Claimant presented to Gary Haas, D.O., for low back and leg pain. Claimant reported no neck or arm complaints.

15. For five months, from March 13, 2013, until August 21, 2013, Claimant sought no medical care for his neck and continued performing his usual rigorous duties as a trailer mechanic at Swift.

16. **Industrial accident and treatment.** On Wednesday, August 21, 2013, Claimant was working for Swift replacing flooring in a drive-in trailer. He was preparing a 47-foot plank, 13 inches wide and one inch thick to use as new flooring for the trailer. The plank weighed approximately 220 pounds and Claimant had positioned it on the trailer floor. On his hands and knees, Claimant ran a skill saw the length of the plank to narrow it slightly and then used a router stretched out in front of him to cut a groove the length of the plank. As he used the router, he noted pain in the back of his neck. He stretched his neck and completed the groove with the router. He then got out of the trailer to turn the plank over. Claimant stood outside at the rear of the trailer and lifted one end of the plank. Because of its extreme length, the plank bowed such

that most of its length remained on the trailer floor. Claimant then forcibly twisted the end of the plank with his hands to turn it over. He noted immediate shoulder tightness, bilateral shoulder and arm pain, neck pain, and particularly excruciating left triceps pain. Transcript, p. 51. He continued working. Claimant reported the incident to his supervisor shortly thereafter and completed his shift.

17. At home that evening Claimant's pain continued under his shoulder blades, in his neck, and on both sides of his arms. His neck, shoulder, and arm pain prevented him from sleeping. His wife observed that he did not move his neck and was visibly pale, which she attributed to his extreme pain.

18. Claimant worked the next day; however, the day after he attempted to work his assigned shift but only lasted a few hours. On Saturday he reported to work, but was largely unable to work due to pain and went home. On Sunday, August 25, 2013, Claimant presented to the emergency room with neck and bilateral shoulder pain. Claimant was treated by Glenn Jefferson, M.D., and received medications. Dr. Jefferson ordered a cervical MRI. Claimant underwent a cervical MRI on September 5, 2013. The radiologist read the MRI as showing bones spurs arising from the uncinat processes at C5-6 and C6-7, but no cervical disc herniations. Dr. Jefferson referred Claimant to Dr. Dirks.

19. On October 3, 2013, Dr. Dirks examined Claimant and recorded severe neck spasms and bilateral arm pain and spasm. Dr. Dirks read the cervical MRI as showing disc herniations at C5-6 and C6-7 "with severe encroachment of the neural foramen bilaterally at both of these levels." Claimant's Exhibit H, p. 114. He recommended physical therapy and epidural steroid injections, although he was not confident Claimant could avoid surgery. When Claimant's symptoms did not improve, Dr. Dirks recommended cervical surgery.

20. On October 28, 2013, Dr. Dirks performed anterior cervical discectomy and C5-C7 fusion. On January 9, 2014, Dr. Dirks noted that Claimant was progressing and showed increased neck motion with decreased pain.

21. On January 14, 2014, Defendants sent Claimant to Dr. Larson for evaluation. Dr. Larson evaluated Claimant again on February 28, 2014, and reported that there was no disc herniation, Claimant needed no surgery, and could return to full-duty work. The examination was also attended by nurse consultant Brenda Elliff, R.N. Dr. Larson opined Claimant's symptoms were due to a rhomboid strain which had resolved.

22. On February 4, 2014, Claimant was examined by Kurt Bailey, DC, NP-C, who recorded: "His neck and arm pain is much better and has returned to almost normal." Defendants' Exhibit 7, p. 31.

23. Defendants continued to pay Claimant temporary disability benefits after Dr. Larson's February 28, 2014 report until July 2014, then ceased temporary disability benefits.

24. Claimant was unable to return to his full duties at Swift. By letter dated September 18, 2014, Swift notified Claimant he was discharged effective August 26, 2014.

25. On December 8, 2014, Dr. Dirks operated on Claimant's lumbar spine for his continuing back pain. By January 8, 2015, Dr. Dirks found that Claimant's neck was doing very nicely.

26. **Credibility.** Having observed Claimant and Mrs. Mead at hearing, and carefully compared their testimony with other evidence in the record, the Referee finds that both are credible witnesses.

DISCUSSION AND FURTHER FINDINGS

27. 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).

28. **Medical care and causation.** The first issue is whether Claimant is entitled to further medical care for his industrial accident. Implicit in this issue is the question of causation. Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Thus, Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. The treating physician decides whether a given treatment is required. The Commission determines whether the treatment is reasonable. "The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach." Chavez v. Stokes, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015). Of course, even though the injured employee's treating physician may require the treatment, an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). 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). Thus an injured worker’s request for medical benefits must be supported by medical evidence establishing causation.

29. Claimant herein asserts that he required further medical treatment due to his industrial accident, specifically, cervical surgery performed by Dr. Dirks. Defendants acknowledge Claimant sustained an industrial accident on August 21, 2013, but dispute that his accident caused his need for cervical surgery. Several medical experts have evaluated Claimant’s need for additional medical treatment arising from his industrial accident.

30. Dr. Larson. Neurosurgeon Jeffrey Larson, M.D., examined Claimant at Defendants’ request on January 14 and February 28, 2014. Dr. Larson opined the industrial accident caused only a rhomboid strain and did not cause any cervical disc herniations. He did not believe the accident exacerbated Claimant’s cervical problem. Dr. Larson reviewed the MRI studies and agreed with the radiologist’s interpretation. He agreed that the 2013 MRI showed that the C6-7 disc herniation documented by the 2008 MRI, had resolved. He did not explain the documented difference in Claimant’s upper extremity strength before and after the industrial accident nor the appearance of bilateral upper extremity pain after the accident as contrasted with only left upper extremity pain prior to the accident. Dr. Larson concluded: “The described incident, the medical records, and the imaging provided do not support neck injury. They support a rhomboid (interscapular muscle) strain.” Claimant’s Exhibit J, p. 165.

31. Significantly, Dr. Larson’s opinion in Claimant’s other claim against Swift was found to be not credible. In its September 11, 2015 decision in Mead v. Swift Transportation, 2015 WL 6125455 (Idaho Ind. Com. 2015), relating to Claimant’s back injury, the Commission emphatically stated:

Dr. Larson’s opinions appear to be predicated upon a position of advocacy, conscious or unconscious, for Defendants. His testimony regarding Claimant’s “acrobatics” during the January 2014 examination is rebutted by Claimant’s and Ms. Elliff’s testimony, as well as the inference to be drawn from his omission of any mention of these particular observations in his prior reports, chart notes, or letter to Surety, and it is not credible.

Mead, 2015 WL 6125455 at 15 (Claimant’s Exhibit Q, p. 308) (emphasis in original). The January 2014 examination referenced above, during which Dr. Larson later asserted Claimant performed “acrobatics”, is one of the two examinations Dr. Larson performed and upon which he based his conclusions regarding the causation of Claimant’s neck condition. Dr. Larson’s position of advocacy identified by the Commission in Claimant’s back injury case as manifest in Dr. Larson’s description of the January 2014 examination renders Dr. Larson’s opinion similarly suspect in the present case.

32. Additionally, Claimant testified in his deposition that Dr. Larson rated his permanent back impairment from his fusion surgery unbeknownst to Claimant and thereafter Surety’s adjustor “mailed me a copy of Dr. Larson’s—I guess it would be chart notes—saying that he had given me a zero percentage impairment rating and that I was better now than before and that I agreed with everything. And that never took place.” Defendants’ Exhibit 22, p. 15 (emphasis supplied). Dr. Larson’s objectivity being again called into question, his causation opinion herein is unpersuasive.

33. Dr. Dirks. When Dr. Dirks first examined Claimant after the accident, he recorded that Claimant suffered bilateral shoulder pain. Claimant’s Exhibit H, p. 113. On

October 3, 2013, Dr. Dirks recorded Claimant's "pain in his neck and down into his shoulders and arms. REFLEXES—Diminished in both biceps and triceps, left more so than the right side." Defendants' Exhibit 10, p. 3. Dr. Dirks' impression was C5-6 and C6-7 herniated disks with motor deficit and "weakness in both arms." Defendants' Exhibit 10, p. 3 (emphasis supplied). In his post-hearing deposition Dr. Dirks reaffirmed that Claimant showed bilateral arm weakness when he examined him on October 3, 2013.

34. Dr. Dirks testified that he read Claimant's September 5, 2013 cervical MRI films himself because he is the one who must decide regarding surgery. He noted that in 10-20% of the cases, his reading of MRI studies differs from the radiologist's reading. Dr. Dirks identified herniated disks at C5-6 and C6-7 with severe bilateral encroachment of the neural foramen. He acknowledged that the radiologist interpreted the MRI as showing:

mostly bone spurring. But I can tell you there is disk herniation at that particular level as well. And if you go in and you do the surgery, he clearly had disk protrusions or disk material at the neural foramina and so I had the advantage of being able to look at it at the time of surgery.

Dirks Deposition, p. 7, ll. 10-15.

35. Dr. Dirks explained the rationale for his opinion:

I can tell you on a more probable than not basis based on what I read in my notes here, and know what I saw at the time of surgery, I would say yes, he had bone spurs. But yes, he had herniated disk material that was also compressing on to the nerve root.

....

So did he develop bone spurring between August 2013 and October 3, 2013? Probably not. So certainly there is a preexisting condition. ... However ... on a more probable than not basis I believe that the injury—and I have reviewed the injury—you and I reviewed that injury in detail in the past time we spent together and I agree that that injury did create the problem that ultimately culminated in his surgery on 10/28/13.

Dirks Deposition, p. 8, l. 5 through p. 9, l. 2.

36. Dr. Dirks readily acknowledged Claimant's preexisting cervical issues, but testified that Claimant sustained a definite change in his upper extremity strength—being normal in December 2012, but clearly weak in October 2013. Dr. Dirks testified: "I can tell you that with the strength that he had when I saw him in October 2013, and knowing the board that he had to lift at the time of the injury, he could not have done that. The way he was in October of 2013 he could not have done this work." Dirks Deposition, p. 10, ll. 11-16. Dr. Dirks observed that Claimant's account of an injury on August 21, 2013, explains the difference between Dr. Stoutin's examination in December 2012 which showed Claimant had full upper extremity strength, and the weakness Claimant demonstrated when examined by Dr. Dirks in October 2013.

37. Defendants assert Dr. Dirks did not review Claimant's pre-accident medical records. However, the record establishes otherwise. Dr. Dirks testified: "Mr. Mead clearly had [a] preexisting condition. He is not trying to hide that. He notes that he had had trouble with his neck in the past. It's very clear in the medical records." Dirks Deposition, p. 12, ll. 20-24.

38. When asked to respond to Dr. Larson's conclusion that Claimant suffered no disk herniation, Dr. Dirks explained: "I have the advantage over Dr. Larson in this case because I did the surgery. I know what I saw at the time of surgery. So to me what Dr. Larson was reporting really doesn't matter to me because he wasn't there." Dirks Deposition, p. 14, ll. 11-21. Dr. Dirks testified that he observed and resolved the nerve root compression at C5-6 and C6-7 at the time of the operation. His operative notes record that he removed the disc. By January 9, 2014, Dr. Dirks recorded that Claimant was making significant progress with his neck, including increased mobility and decreased pain. Dr. Dirks' causation conclusion is well explained, supported by the record, and persuasive.

39. Dr. McNulty. John McNulty, M.D., reviewed Claimant's medical records including his March 2008 MRI, through Dr. Stoutin's 2012 examination notes, and continuing to Dr. Dirk's January 2015 notes. Dr. McNulty examined Claimant on July 20, 2015, concluded he had sustained a permanent aggravation of his cervical condition, and explained his rationale:

Mr. Mead sustained a work-related injury on 8/21/2013. The mechanism of injury of flipping the board as described in Mr. Mead's February of 2014 deposition is consistent with worsening of his pre-existing cervical spine condition. After reviewing the medical records, Dr. Stoutin's evaluation in December of 2012 does not report any upper extremity weakness. When Mr. Mead was evaluated by Dr. Dirks in October of 2013, he had significant motor deficit. This would indicate significant change in his pre-existing cervical spine condition. On a more probable than not basis, Mr. Mead had a permanent aggravation of his pre-existing cervical spine condition resulting in the necessity for the cervical spine surgery on 10/28/2013.

Claimant's Exhibit I, p. 154.

40. Dr. McNulty's conclusion is well explained, supported by the record, and persuasive. Dr. McNulty's explanation and conclusion parallel and corroborate that of Dr. Dirks.

41. Weighing the medical opinions. Defendants discount Dr. Dirks' causation opinion by asserting he was not aware of Claimant's preexisting cervical radicular symptoms. Nevertheless, Defendants accurately assert that prior to his industrial accident Claimant had talked to Drs. Dirks and Larson about cervical surgery. Significantly, although Claimant had documented preexisting cervical disk herniations at C5-6 and C6-7, he was functional in a very demanding job at Swift for years until his August 21, 2013 industrial accident. The records of Beth Blankenship P.A., establish that on March 12, 2013, Claimant's neck pain and radicular symptoms had been doing fairly well since his last two cervical epidural steroid injections in January 2013. He did not seek a third cervical epidural steroid injection. When next examined on June 10, 2013, by Gary Haas, D.O., (Exhibit F, p. 391), Claimant had no complaints of neck pain, only low back and leg pain. During this entire time, Claimant continued working at Swift.

Claimant's August 21, 2013 accident produced immediate cervical and arm pain which progressed to the point of being intolerable and precluded him from working. He remained unable to work until Dr. Dirks performed corrective cervical surgery. Every medical provider who examined Claimant after his 2013 accident except Dr. Larson concluded that the accident caused Claimant cervical symptoms.

42. Claimant has proven his entitlement to reasonable medical treatment including but not limited to cervical surgery and physical therapy due to his industrial accident.

43. **Medical stability and temporary disability.** The next issues concern Claimant's date of medical stability and his entitlement to temporary disability benefits due to his industrial accident. 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).

44. In the present case, Claimant has proven that he is entitled to cervical surgery for his industrial accident and thus has proven his entitlement to temporary disability resulting therefrom. Claimant asserts he was within a period of recovery until August 5, 2014. Defendants assert that Claimant's neck condition was medically stable by June 10, 2014.

45. Dr. Jefferson took Claimant off work on August 26, 2013. He underwent cervical surgery due to his industrial accident on October 28, 2013. Dr. Dirks examined Claimant on January 9, 2014, noting that he was making significant progress with increased neck mobility and upper extremity strength and decreased neck pain. Dr. Dirks' next progress note is dated June 10, 2014, and addresses solely Claimant's lumbar condition. Dr. Dirks' records thereafter address Claimant's lumbar condition. Dr. Dirks' August 5, 2014 note indicates Claimant's neck was doing adequately, but does not alter the pattern of focus on Claimant's lumbar condition that is evident commencing with the June 10, 2014 progress note.

46. Claimant has proven he is entitled to temporary disability benefits from August 26, 2013 until June 10, 2014. Defendants ultimately paid Claimant temporary disability benefits through July 1, 2014. Claimant reached medically stability from his industrial accident by June 10, 2014. He has not proven his entitlement to additional temporary disability benefits.

47. **Permanent partial impairment.** The next issue is the extent of Claimant's permanent impairment due to his industrial accident. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's

personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

48. In the present case, Dr. McNulty rated Claimant's permanent cervical impairment at 6% of the whole person, with 3% attributable to his pre-existing cervical condition and 3% attributable to the permanent aggravation of his cervical condition due to his August 21, 2013 industrial accident. Claimant has proven his entitlement to permanent impairment benefits of 3% of the whole person due to his industrial accident.

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

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

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

50. In the present case, Claimant asserts entitlement to attorney fees for Defendants' unreasonable denial of benefits. Claimant notes that Defendants authorized a cervical MRI—but then refused to pay for it, and also authorized referral to Dr. Dirks—but then refused to pay for any visits to or treatment prescribed by Dr. Dirks. Claimant also observes that Defendants delayed in investigating the medical causation of Claimant's cervical condition.

51. Defendants respond that Claimant initially denied an industrial accident to medical providers and proceeded with cervical surgery before providing Surety a release to obtain his medical records. Defendants assert that upon learning of Claimant's preexisting cervical condition, the adjuster promptly informed Claimant that his claim was under investigation and she would obtain his prior medical records and would schedule an IME.

52. The medical records indeed document Claimant's initial denial of a work accident. On Sunday, August 25, 2013, Claimant presented to the emergency room with neck and bilateral shoulder pain. Triage nurse Paula Tetrick, R.N., recorded: "PATIENT C/O NECK PAIN THAT RADIATES DOWN LEFT ARM, PATIENT INJURED NECK ABOUT 5 YEARS AGO, BUT NO INJURY NOTED WHEN THIS PAIN STARTED." Defendants' Exhibit 3, p. 24. Similarly, on August 25, 2013, Victoria Ozeran, P.A., recorded:

The patient is a 38 year-old who states that he has "three herniated disks" in his neck. He states he injured his neck about five to six years ago while lifting weights. He states surgery has been recommended to him in the past, but he has never followed through for financial reasons. He has been going to the Pain Clinic and has received two epidural steroid injections. His last one was in 03/2013. The patient states that he does a lot of drilling while on his hands and knees. He did so Wednesday of last week, four days ago, for seven hours straight. The next morning he woke with pain in the neck that radiated down the left arm. He went to work again, but was only able to work a partial day that day due to the pain.

Defendants' Exhibit 3, p. 30. This may explain Defendants' initial delay in processing the claim. However, Surety's adjuster MaryAnn Treanor took a recorded statement from Claimant on

August 30, 2013, wherein he described his work accident installing flooring in a trailer and his immediate pain when he flipped the flooring over. Defendants' Exhibit 21, p. 5. Claimant's supervisor, though not a witness to the accident, testified he had no reason to dispute Claimant's account.

53. The record establishes that Dr. Jefferson ordered a cervical MRI which Defendants' adjuster authorized. Claimant underwent the cervical MRI on September 5, 2013. However, Defendants never paid for the MRI. Claimant's private healthcare provider, Regence, paid for the MRI. Furthermore, the record establishes that Dr. Jefferson referred Claimant to Dr. Dirks. On September 19, 2013, Surety's adjuster notified Claimant she had authorized the referral for consultation with Dr. Dirks; however, Surety failed to pay for Claimant's October 3, 2013 visit with Dr. Dirks. Claimant's personal insurance, Regence, paid for the appointment. The Commission has previously determined that such conduct by a surety is objectionable and unreasonable. See Cooke v. Bonner Foods, 2013 WL 1697877, 2013 IIC 023 (Idaho Ind. Com. 2013).

54. Defendants assert Claimant's preexisting cervical condition and the need to review his prior medical records justified their delay in processing his claim. Defendants attribute at least part of their delay to Claimant's decision to proceed with surgery before providing a release for Defendants to obtain Claimant's medical records.

55. While the record does not indicate precisely when Claimant provided Defendants a medical release form, it does not establish he delayed in doing so. Claimant unequivocally informed Defendants of his August 21, 2013 accident and his preexisting cervical condition no later than August 30, 2013 in his recorded statement to Surety's adjuster. However, Defendants did not even request a medical release form or medical history from Claimant until

October 1, 2013. Thus Surety delayed more than 30 days before mailing Claimant a medical release form.

56. Idaho Code § 72-402, cited in Claimant's briefing, provides in part:

(1) An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for work exceeding two (2) weeks, income benefits shall be allowed from the date of disability and be paid no later than four (4) weeks from date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient.

57. More than 60 days after the accident, by Notice of Claim Status of October 22, 2013, Surety's adjustor indicated:

Your Worker's Compensation claim remains under investigation. We have accepted the acute neck injury dated 08/21/2013. We are in the process of obtaining your medical history to determine responsibility regarding your upcoming neck surgery. In the meantime, we will pay TTD benefits starting 08/22/2013 as you have not worked since the date of loss. Your TTD check will arrive under separate cover. Your first TTD check is for dates 08/22-10/22/2013 in the amount of \$4909.24 and will continue every 2 weeks until further notice.

Defendants' Exhibit 17, p. 1. Thus Defendants delayed two months before sending Claimant his first temporary disability check. Claimant had been injured, notified his Employer, and cooperated with the Surety's requests and investigation. The adjustor had advised him she could pay no benefits until the investigation was complete but had provided no estimated date of completion. Claimant had been disabled from work and without any temporary disability benefits for two months. He deserves no fault for scheduling corrective surgery as recommended by Dr. Dirks without further delay.

58. Claimant underwent cervical fusion on October 28, 2013. Defendants ceased paying temporary disability benefits on December 3, 2013. From the record, it does not appear that on that date any medical expert disputed Dr. Dirks' causation analysis or opined that

Claimant had reached maximum medical improvement. By Notice of Claim Status dated December 30, 2013, Surety's adjustor wrote:

Your benefit payments will be Reinstated during claim investigation:

Reason: Your worker's compensation claim remains under investigation. We have not accepted nor denied your claim for benefits and medical treatment including but not limited to cervical surgery. We will continue your Temporary Total Disability benefits during this discovery process. A review of your payment history shows you were last paid through 12/03/13, we are reinstating your benefits accordingly. A TTD check for 12/04/13-12/31/13 = 4 weeks @\$554.27 = \$2,217.08 has been issued & will follow under separate cover.

Defendants' Exhibit 17, p. 2. While the reinstatement of temporary disability benefits retroactive to December 4, 2013 is noteworthy, adequate justification for halting payment of such benefits from December 4 until December 30, 2013, is not apparent. What is apparent is that Claimant retained counsel and filed his Complaint herein on December 20, 2013.

59. It is noteworthy that Defendants promptly advised Claimant his claim was under investigation and that he would be scheduled for an IME. However, this does not excuse delay in actually conducting the investigation—including a delay of more than 30 days in providing Claimant a medical release form or a delay of more than 135 days in arranging for an IME. There is no apparent justification for the delay from approximately August 30, 2013 until Dr. Larson first examined Claimant on January 14, 2014. On July 26, 2014, Defendants finally denied Claimant's claim in reliance upon Dr. Larson's report.

60. Defendant's overall handling of Claimant's temporary disability benefits was adequate; however, the delay in commencing payment and the temporary interruption of payments in December 2013 were unsupported. Defendants' failure to pay for the MRI and the medical referral they authorized was unreasonable. Defendants' denial of medical treatment recommended and provided by Dr. Dirks was without reasonable basis at the time of the denial.

61. Claimant has proven Defendants' liability for attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven his entitlement to reasonable medical treatment including but not limited to physical therapy, epidural steroid injections, and cervical surgery due to his industrial accident.

2. Claimant reached medical stability from his industrial accident by June 10, 2014. He has not proven his entitlement to additional temporary disability benefits.

3. Claimant has proven his entitlement to permanent partial impairment benefits of 3% of the whole person due to his industrial accident.

4. Claimant has proven Defendants' liability for attorney fees.

RECOMMENDATION

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

DATED this 1st day of August, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

EMMA R WILSON
1703 W HILL RD
BOISE ID 83702

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT E. MEAD,

Claimant,

v.

SWIFT TRANSPORTATION,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Surety,
Defendants.

IC 2013-028008

ORDER

Filed August 12, 2016

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

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

1. Claimant has proven his entitlement to reasonable medical treatment including but not limited to physical therapy, epidural steroid injections, and cervical surgery due to his industrial accident. Pursuant to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), Claimant is entitled to recover 100% of the invoiced amounts of these medical bills incurred between the date of Defendants' denial and the date of this decision.
2. Claimant reached medical stability from his industrial accident by June 10, 2014. He has not proven his entitlement to additional temporary disability benefits.

3. Claimant has proven his entitlement to permanent partial impairment benefits of 3% of the whole person due to his industrial accident.
4. Claimant has proven Defendants' liability for attorney fees. 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.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 12th day of August, 2016.

INDUSTRIAL COMMISSION

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

_____/s/_____
Thomas E. Limbaugh, Commissioner

_____/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STARR KELSO
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EMMA R WILSON
1703 W HILL RD
BOISE ID 83702

sc

_____/s/_____
