

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARL T. MELUGIN,

Claimant,

v.

AG EXPRESS, INC.,

Employer,

and

NATIONAL INTERSTATE
INSURANCE COMPANY,

Surety,
Defendants.

IC 2012-015327

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

APRIL 28 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on April 29, 2013. Kevin E. Donohoe represented Claimant. Alan K. Hull represented Defendants Employer and Surety. The parties presented oral and documentary evidence. The parties took post-hearing depositions and later submitted briefs. The case came under advisement on January 6, 2014. This matter is now ready for decision.

ISSUES

The following issues are to be decided at this time:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether and to what extent Claimant is entitled to benefits for:
 - a) Temporary disability (TTD/TPD), and
 - b) Medical care.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that an industrial accident on June 4, 2012 aggravated, exacerbated, or accelerated his pre-existing cervical degenerative disc disease. He is entitled to medical care and treatment recommended by his treating physician, including surgery. He is also entitled to TTD benefits from September 13, 2012 through the present and until he reaches MMI.

Defendants contend Claimant failed to establish by a preponderance of the evidence that his ongoing treatment after the alleged injury was related to the accident in question. Claimant merely suffers from a natural progression of symptoms due to pre-existing degenerative disc disease which was not aggravated, exacerbated, or accelerated by the industrial accident. As such, Claimant is not entitled to any workers' compensation benefits.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Claimant's Oral testimony at hearing;
2. Joint exhibits 1 through 17, admitted at hearing; and
3. Posthearing deposition transcripts of Johnny Mike Urrutia, PA-C, and Vicken Garabedian, M.D.

All objections posed during the depositions are overruled. Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for review and adoption by the Commission.

FINDINGS OF FACT

June 4, 2012 Industrial Accident

1. On June 4, 2012, Claimant was employed full time by Employer. He worked in the mechanic shop. He and two co-workers were doing maintenance on a truck when a co-worker asked Claimant to inspect a suspension air bag which appeared to have a crack in it. The airbag was made of reinforced nylon material and inflated as needed to assist with the

truck's suspension. Claimant leaned over the front tire and reached with his right hand to wipe the dirt from the air bag. As he did so, the air bag suddenly blew out.

2. The explosion hit Claimant in the chest and lower neck area, knocking him backward and to the floor. He was dazed and his ears were ringing. He felt nauseated and could not walk. His head was hurting and spinning. His chest and right shoulder area hurt and his right forearm and hand went instantly numb. After a few minutes he regained his composure enough to contact his boss, Jason Carlson, and write a brief summary of what happened. He told Mr. Carlson about his numb hand and forearm, and the fact his neck and shoulder was hurting.

3. Claimant worked for weeks after the accident. He was still having pain issues in his upper extremities. When he told his boss about his continuing pain, he was told to "cowboy up." Later on June 19, 2012, Claimant went to see Anna Makovec-Fuller, NP, at Cassia Family Practice in Burley. Employer's safety director Rob Kelley accompanied him.

Low Back History

4. At the time of the hearing, Claimant was a 43 year-old married man with a significant history of low back, and more recently, neck issues. His low back problems began in October 1998 when he suffered an industrial accident resulting in a herniation at L5-S1. The injury caused Claimant considerable pain in his low back with pain, numbness, and tingling down legs and into his feet.

5. In approximately 1999, Eric Widell, M.D., a Sun Valley surgeon, performed a laminectomy on Claimant but the surgery did not alleviate his symptoms.

6. Claimant attempted work hardening through the Idaho Elks rehabilitation program. His pain continued.

7. Claimant testified he next sought a second opinion through Timothy Johans,

M.D., who was critical of Dr. Widell's surgery. Dr. Johans recommended a repeat laminectomy at L5-S1. No medical records for Dr. Johans were produced, but apparently this second surgery took place, as best Claimant can recall, shortly after the turn of the century.

8. While Claimant had what he termed a "decent" result from the second surgery, he continued to have pain in his low back pain and legs.

9. In late May 2010, Claimant again injured his back in a boating accident. He came under the care of David Verst, M.D., an orthopedic spine surgeon, who ultimately performed an L4-5 laminectomy on July 12, 2010. This surgery was deemed successful by both Dr. Verst and Claimant, but it did not resolve Claimant's chronic low back pain and radiculopathy which continued unabated through the time of hearing.

Pre-Accident Neck History

10. In early 2006, Claimant began complaining of neck pain unrelated to any accident. An MRI taken on January 5, 2006, showed straightening of the normal cervical lordosis with mild annular bulging and osteophyte formation at C5-6, but no evidence of disc herniation or stenosis.

11. On February 9, 2006, Richard Hammond, M.D., a Twin Falls neurologist, conducted bilateral upper extremity EMG testing on Claimant, which came back normal. Claimant was then referred to Michael Hajjar, M.D., a Boise neurological surgeon for consultation for both cervical and low back complaints. Dr. Hajjar ruled out surgery with regard to Claimant's neck and recommended physical therapy with a possibility for a localized injection. Dr. Hajjar scheduled Claimant for a follow up visit in three months' time. Claimant did not follow through with therapy or the follow up visit with Dr. Hajjar.

12. The only medical record produced from 2006 is from Southern Idaho Pain Institute (the Pain Clinic) wherein Claimant complained of chronic low back pain. No mention

is made of any neck pain or limitations. The Pain Clinic's involvement in this matter is discussed in greater detail below.

13. On April 9, 2007, Claimant presented at his family doctor, Kenneth Harris, M.D., for a complete physical. Other than a small sebaceous cyst on Claimant's right anterior neck which was mildly tender, there is no mention of neck pain or limitations in the record for that visit.

Pain Clinic

14. At about the time Claimant treated with Dr. Johans in early 2000, he also became a patient at Southern Idaho Pain Institute, under the care of Clinton Dille, M.D., and John Urrutia, PA-C. PA Urrutia saw Claimant on the majority of visits to the clinic. Claimant continued to treat at the clinic until approximately the middle of June 2013, at which time he was discharged from further care due to presence of nonprescribed substances – Lorazepam and cocaine – found in his system during a routine drug screening.

15. During the decade plus that Claimant regularly (often monthly) treated at the Pain Clinic, he was prescribed a continuous flow of various opioid pain medications including Percocet, OxyContin, Oxycodone, Norco, and morphine after the industrial accident in question. In addition, at various times Claimant was given medications for several other maladies from asthma to depression. The record suggests that the chief function of the Pain Clinic was to monitor Claimant's complaints and dispense pain and other medication.

16. The Pain Clinic's records from 2006 forward do not mention neck complaints until November 5, 2008 when Claimant provided a history of falling on ice and injuring his neck and right shoulder a month previously. Claimant complained of radiating pain into his right thumb and first finger. He also could not turn his neck without it causing pain. PA Urrutia injected Claimant's right subacromial bursa and right trapezius and sent Claimant

to obtain a cervical MRI and x-ray.

17. Claimant's MRI of November 12, 2008 showed mild degenerative changes at C5-6, which had progressed from his previous cervical MRI of January 2006. It also showed mild bilateral neuroforaminal narrowing at that same level.

18. Claimant returned to the Pain Clinic on November 20, 2008 and was seen by Dr. Dille. Claimant's upper extremity symptoms were still present. Dr. Dille recommended a cervical steroid injection which Claimant refused due to fear of the procedure.

19. Claimant continued to complain of neck pain in addition to his chronic low back pain on his monthly visits to the Pain Clinic through August 2009. During this time he also had issues with anxiety, anger management, and depression. For the first time since October 2008, Claimant's September 10, 2009 visit to the clinic mentioned only low back pain. However, on his October 8, 2009 visit, Claimant again presented with neck pain. Thereafter, until Claimant's May 31, 2010 boating accident, Claimant mentioned neck pain on most, but not all of his monthly Pain Clinic visits. In spite of his complaints, Claimant continued to work during the fall of 2008 through May 2010.

20. When Claimant's low back pain increased following his boating accident, his neck complaints vanished from the Pain Clinic's chart notes until his June 7, 2011 visit. At that time, he complained of right sided neck pain radiating into his right arm and hand with numbness in his right thumb. He also complained of right shoulder pain and numbness. During all but two of the next twelve visits through May 1, 2012, Claimant mentioned neck pain when presenting at the Pain Clinic.

Post-Accident Medical Treatment

21. While Claimant did not testify about it, the medical records show that he presented at the Pain Clinic on June 6, 2012 and was seen by Dr. Dille. While Dr. Dille's notes

regarding Claimant's visit are cryptic and for the most part boilerplate, there are two significant entries found therein. The first is in the patient's history wherein it states, "[Claimant] had an air bag go off in his face and has had some neck pain." Even more importantly, Dr. Dille added a new diagnosis for Claimant on that visit of brachial neuritis. The significance of this finding is discussed hereinafter.

22. As noted above, Claimant was directed to NP Makovec-Fuller, who diagnosed cervical strain, right shoulder pain, and right hand numbness. X-rays taken on June 19, 2012 showed mild uncontrovertebral osteophyte formation at C5-6. Claimant's right shoulder x-rays were read to be within normal limits. NP Makovec-Fuller recommended MRIs of the cervical spine and right shoulder and released Claimant to work with the restrictions of no use of his right arm and no head turning from side to side or looking up.

23. MRIs of Claimant's right shoulder and cervical spine were done on June 25, 2012. The right shoulder scan identified a type II superior labral tear and mild AC joint osteoarthropathy. The C-spine MRI showed minimal broad-based disc bulge with no stenosis and neuroforaminal narrowing at C3-4. At C4-5, it showed minimal broad-based disc bulge with uncovertebral joint hypertrophy causing mild bilateral neuroforaminal narrowing and more severe on the left. Claimant's findings at C5-6 included broad-based disc bulge with minimal central canal stenosis and mild uncovertebral joint hypertrophy. These conditions combined to cause severe right and moderate to severe left neuroforaminal narrowing. There were no findings to suggest an acute traumatic injury.

24. Makovec-Fuller, NP, referred Claimant to Dr. Verst, who examined Claimant on July 9, 2012. Dr. Verst read Claimant's most recent MRI as showing a herniated nucleus pulposus at C5-6. He recommended physical therapy and injections. Claimant was

allowed to work with the previously-imposed restrictions.

25. Claimant participated in physical therapy and injections, neither of which alleviated his symptoms. According to his medical records, Dr. Verst took Claimant off work as of August 31, 2012. Claimant testified that he thought he worked until about October.

26. Dr. Verst recommended cervical surgery and related the need for surgical intervention to the industrial accident. Multiple physicians determined, Claimant does not contest, that his labrum tear is unrelated to the industrial accident.

27. Claimant continued to visit the Pain Clinic on a regular basis after the industrial accident where he was seen on most visits by PC John Urrutia. His observations and opinions are discussed more fully below.

28. Vicken Garabedian, M.D., reviewed records at Defendants' request. She analyzed Claimant's MRIs from January 5, 2006, November 12, 2008, and June 25, 2012, as well as Claimant's June 19, 2012 X-ray. Dr. Garabedian concluded the scans showed Claimant suffers from progressive mild spondylitic changes in his cervical spine, and most recently, the development of retrolisthesis of C5 over C6. There has also been progressive narrowing of the C5-6 neural foramina over time with vertebral spurring developing between 2008 and 2012. Dr. Garabedian also concluded there was no evidence of discrete herniation or acute injury on Claimant's 2012 MRI.

29. After observing Claimant testify at hearing and comparing his statement to the other evidence in the record, the Referee finds Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS OF FACT

30. 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). However, a claimant must prove not only that he was injured, but also that the injury was 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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

31. 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).

32. The existence of and facts surrounding the industrial accident are not in dispute. The issue is whether Claimant has proven by a preponderance of the evidence that his current cervical condition, and the undisputed need for surgery, is causally connected to his industrial accident.

33. Dr. Verst testified in his deposition and in correspondence to Surety that in his opinion, on a more-probable-than-not basis, the industrial accident in question “ignited” or aggravated Claimant’s painful pre-existing and underlying cervical degenerative condition, so that surgery is necessary and reasonable. Put another way, the accident “destabilized” Claimant’s pre-existing chronic cervical condition, and it then became “acute.” Dr. Verst acknowledged Claimant had pre-existing neck pain and radiculopathy due to his degenerative condition. He further acknowledged there is no direct evidence of any specific physical injury to any part of Claimant’s cervical spine from the industrial accident. Before the accident, Claimant was able with the use of pain medication to work full time, function on a daily basis, and maintain his baseline quality of life which Dr. Verst labeled as a stable condition. Dr. Verst testified the impact of the explosion would cause a severe hyperextension and recoil flexion which aggravated or destabilized Claimant’s neck condition to the point where Claimant could no longer work, maintain his baseline quality of life, or do many of the daily activities that he could do pre-accident. Therefore, although a comparison of the 2008 and 2012 MRI studies might not suggest anything but the natural progression of Claimant's cervical spine condition, the fact that he experienced a worsening of symptoms after the accident nevertheless

supports the conclusion that the accident did cause additional injury.

34. Dr. Verst opined that surgery will provide the best opportunity for Claimant to return to employment and his baseline pain level and perhaps even eliminate his cervical pain and radiculopathy. Dr. Verst was concerned that without surgery, Claimant's right arm would continue to atrophy. Additionally, conservative care did not work.

35. Defendants' expert witness, Dr. Garabedian, acknowledged he is not qualified to make a determination as to whether Claimant's accident aggravated his underlying degenerative cervical condition. Also, Dr. Garabedian could not disagree with Dr. Verst's opinion that the accident destabilized or ignited the underlying condition to become more inflamed and irritated thus creating more pain and dysfunction in Claimant's right arm.

36. Defendants first argue Dr. Verst's opinion lacks sufficient foundation to be considered when determining if Claimant met his burden of proof on causation. They relied on the fact that all the physicians in this case agree there is no objective evidence of trauma on Claimant's post-accident MRI. When that is coupled with the reality that Claimant has a long-standing and progressive degenerative condition in his neck, they claim Dr. Verst's opinion is overwhelmed by contrary evidence.

37. The lack of discernible proof of injury on an MRI, standing alone, is not always fatal to a claim. As noted in the Commission's Order Granting Reconsideration in *Davis v. US Silver-Idaho, Inc.*, 2013 IIC 0048-031273, July 3, 2013,

[I]t is always important to correlate [MRI] studies with clinical findings on exam, and the patient's history. Here we have accepted, as true, Claimant's testimony that he experienced a sudden and significant worsening of his pain following the subject accident. Under facts similar to those at bar, the Commission has, in the past, found that a compensable injury has occurred, even in light of pre-and post-injury radiology studies which show no interval change in an injured worker's condition. In such cases, we have been persuaded by medical testimony

tending to establish that an injury has occurred, notwithstanding negative radiology studies.

2013 IIC 0048.5.

38. Immediately after the accident, Claimant described his forearm and hand as going dead, with tremendous pain in his right shoulder, upper arm, and neck. He testified he informed his boss of this fact for several days after the event, but his claims were dismissed. His co-workers noticed Claimant could not perform his tasks properly and convinced him to press the matter with Employer, who eventually took him for medical attention.

39. Contrary to Defendants' repeated assertions that Claimant failed to discuss his industrial injuries with Dr. Dille when Claimant was in his office two days post-accident, the record made during his June 6, 2012 appointment shows otherwise. Most importantly, Dr. Dille diagnosed Claimant with brachial neuritis on that day. Later records do not maintain this diagnosis. Regardless whether this diagnosis was accurate, it represents Dr. Dille's attempt to define new symptoms and a new condition. It supports a finding that Claimant was complaining of pain, weakness, and numbness in his right arm and hand two days post-accident.

40. In addition to increased pain, Claimant also experienced new or increased symptoms after the accident. Before the accident, Claimant complained of occasional numbness in two of his digits on his right hand; after the accident the numbness affected his entire hand. Claimant also complained of right upper extremity weakness post-accident. PA Urrutia confirmed during his deposition the fact that Claimant's complaints greatly increased post-accident and new symptoms appeared. He testified he had to increase Claimant's opioid therapy in reaction to Claimant's increased pain.

41. The Referee finds the Claimant experienced a sudden, immediate worsening of his neck, right shoulder, and right arm as a result of the industrial accident in question.

42. Defendants' final argument is that due to Claimant's long history of opioid use, he can no longer distinguish real pain from brain-generated pain. This argument is not well taken. To start, Dr. Garabedian testified the condition he saw in Claimant's cervical spine was sufficient to cause Claimant pain. More importantly, Claimant's symptoms of weakness, numbness, and loss of grip strength are consistent with his neck condition. Claimant's history of pain medication usage does not invalidate his workers' compensation claim.

43. While Defendants argue the increased symptomology is explained by the progressive nature of Claimant's degenerative condition, given the totality of the evidence, the Referee finds Dr. Verst's opinion on causation supports a claim for compensation to a reasonable degree of medical probability. Claimant has proven by a preponderance of the evidence that the industrial accident of June 4, 2012 exacerbated his pain and accelerated his condition to the point of needing cervical surgery. Claimant is entitled to continuing reasonable and necessary medical care, including surgery as recommended by Dr. Verst. This care does not include the pain and other medications which Claimant is currently prescribed. Claimant testified under oath he was not seeking payment for such medication.

44. Claimant was laid off from his position with Employer due to his industrial injuries. He is still in a period of recovery. Claimant is entitled to temporary disability benefits from the date he was unable to work until such time as he no longer qualifies for them.

CONCLUSIONS

1. Claimant is entitled to reasonable and necessary medical benefits pursuant to Idaho Code § 72-432, including those charges associated with the recommended cervical surgery, and for a reasonable time thereafter, but excluding such pain medication and other medications as are currently prescribed for Claimant.

2. Claimant is entitled to temporary total disability benefits (TTD) from the date he was unable to work due to his industrial accident until such time as Claimant no longer qualifies for them.

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 16TH day of April, 2014.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 28TH day of APRIL, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

KEVIN E. DONOHOE
13 WEST BULLION STREET
HAILEY, ID 83333

ALAN K. HULL
P.O. BOX 7426
BOISE, ID 83707

dkb

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CARL T. MELUGIN,

Claimant,

v.

AG EXPRESS, INC.,

Employer,

and

NATIONAL INTERSTATE
INSURANCE COMPANY,

Surety,
Defendants.

IC 2012-015327

ORDER

APRIL 28 2014

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

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

1. Claimant is entitled to reasonable and necessary medical benefits pursuant to Idaho Code § 72-432, including those charges associated with the recommended cervical surgery, and for a reasonable time thereafter, but excluding such pain medication and other medications as are currently prescribed for Claimant.

2. Claimant is entitled to temporary total disability benefits (TTD) from the date he was unable to work due to his industrial accident until such time as Claimant no longer qualifies for them.

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

DATED this 28TH day of APRIL, 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 28TH day of APRIL, 2014, a true and correct copy of **ORDER** were served by regular United States Mail upon each of the following:

KEVIN E. DONOHOE
13 WEST BULLION STREET
HAILEY, ID 83333

ALAN K. HULL
P.O. BOX 7426
BOISE, ID 83707

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/S/ _____