BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS C. MILLARD, Claimant, v. ABCO CONSTRUCTION, INC., Employer, and THE WORKER'S COMPENSATION FUND OF UTAH, Surety, Defendants.	**IC 2007-008413** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed 8/21/15

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Pocatello, Idaho, on October 24, 2014. Claimant was represented by James D. Ruchti, of Pocatello. R. Daniel Bowen, of Boise, represented Employer and Surety. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties submitted briefs. The matter came under advisement on May 5, 2015.

ISSUES

The issues at the time of hearing included:

1. Whether Defendants paid all medical benefits and corresponding travel expenses to which Claimant is entitled for disputed physical therapy and past spinal steroid injection treatments.

2. The extent of Surety's obligation to continue to pay for on-going and future anticipated spinal steroid treatments under the reasonable and necessary medical treatment standard in Idaho Code § 72-432.

3. Whether, and to what extent, payment of Claimant's past medical bills are subject to the *Neel* Doctrine.

4. Whether, and to what extent, Claimant is entitled to attorney fees under Idaho Code § 72-804.

By the time the matter came under advisement, Surety had paid all remaining physical therapy bills at the fee schedule rate; it remains an issue whether such bills should be paid at full invoiced price. Mileage for such treatment has been paid. Dr. Garg's treatments between October 2012 and October 2013 remain contested.

CONTENTIONS OF THE PARTIES

Claimant, a totally and permanently disabled individual, previously settled his worker's compensation claim against Defendants, but the agreement left open continuing medical care and related charges. Currently, there is an issue of compensability for previous epidural steroid injections (ESI)[1] given between October 2012, and October 2013. This claim includes travel expenses associated with these injections.

Claimant also seeks attorney fees for Surety's unreasonable delays in paying for certain physical therapy treatments and related travel expenses, as well as for delays in paying for prescription drugs. Lastly, Claimant argues he is entitled to reimbursement of all medical expenses at issue at full invoice rates, pursuant to the *Neel* Doctrine.

[1] The treating doctor distinguished between what he termed an epidural steroid injection (ESI), and a transforaminal epidural injection (TFE) based on the exact location of the injection relative to the mid point of the disc. When the term ESI is used herein, it describes any epidural spinal injection, including ESI and TFE.

Defendants deny compensability for ESI treatments given from October 2012 through October 2013. They also seek a determination that future ESI treatments are not reasonable and necessary, and thus not compensable. Defendants deny they owe attorney fees under Idaho Code § 72-804. They argue *Neel* is inapplicable to the current facts.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. The hearing testimony of witnesses Janet Harris, Trudi Beck, and Carole Carr;

3. Joint Exhibits (JE) 1through 59, (which includes Defendants' Additional Exhibits 55 through 59), admitted at hearing; and as detailed below, Claimant's Exhibits (CE) 60, 61, and 62;

4. The post-hearing deposition transcript of David Beckstead, M.D., taken on December 9, 2014;

5. The post-hearing deposition transcript of Vikas Garg, M.D., taken on December 11, 2014; and

6. The post-hearing deposition transcript of Paul Collins, M.D., taken on January 15, 2015.

All pending objections to questions or testimony, preserved during post-hearing depositions, are overruled. Defendants objected to the introduction of Claimant's proposed Exhibits 60 through 62, proffered during Dr. Garg's deposition. The objection is overruled and Claimant's Exhibits 60, 61, and 62 are admitted.

Having considered the evidence and written briefs 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, a resident of Preston, Idaho, was rendered totally and permanently disabled as the result of an industrial accident in October 2006, while working for Employer, a Utah construction firm. His injuries left him with constant back and left lower extremity pain to varying degrees of severity, neck and shoulder pain, and a traumatic brain injury. His bodily injuries left him limited in his daily activities. His brain injury affected his cognition, emotions, attention and memory, and social skills, including anger-management issues.

2. Surety Workers Compensation Fund of Utah originally handled Claimant's case as a Utah claim. After the case entered litigation, Surety eventually transferred it to third-party administer Pinnacle Risk Management Services in Boise, which has handled the claim thereafter to the present. Pinnacle and its adjuster are also listed herein as "Surety".

3. Claimant settled his litigation with a lump sum agreement. The settlement agreement left his medical charges "open." The "open meds" provision is at the root of this dispute. More particularly, the dispute herein at its core springs from the workings of Idaho Code § 72-432.

4. Claimant lives some distance from most of his medical providers. Originally he primarily treated with a physician in the Salt Lake City area; more recently he sought care from doctors in Logan, Utah, and his local physician for medication management.

DISCUSSION AND FURTHER FINDINGS

5. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical care and treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. If the employer fails to provide such care and treatment, the injured employee may obtain such at the expense of the employer. However, a claimant is not allowed to seek medical care on his own *unless* the employer fails to provide the same. Should a claimant wish to seek care from a physician other than the one(s) provided by an employer, Idaho Code § 72-432(4) provides a procedure for a claimant to seek such change of physician. Idaho Code § 72-432(5) makes it clear that if a claimant seeks care apart from the physician(s) provided by the employer, and without authorization of employer or its surety, or order of the Commission, claimant shall not be reimbursed for the cost of such care.

Dr. Garg's Treatment from October 2012 to October 2013

6. From October 2012 until October 2013, Claimant sought care from Vikas Garg, M.D. of Logan, Utah without prior authorization of Surety. Thereafter, Surety authorized continuing treatment with Dr. Garg.[2] Defendants' position is clear and straight forward – Dr. Garg was not an authorized treater during the 2012 – 2013 time frame, and thus under Idaho Code § 72-432(5), such treatment is not reimbursable. Claimant argues that Surety's failure to provide reasonable treatment, or even respond in a meaningful way to Claimant's request for change of physician, allowed him to seek treatment with Dr. Garg at Surety's expense.

[2] Dr. Garg's last treatment during the time contested was in October 2013. However, from the exhibits provided, it appears Dr. Garg was not approved as a provider until November 2013. This fact is not important for the ruling herein, but Defendants at several places in their briefing state that Dr. Garg was approved by Surety in mid-October 2013, which does not appear to be accurate.

7. Claimant incorrectly argues that he first requested a change of physician on May 25, 2012, with a renewal of that request on May 30. The letters cited by Claimant were written as part of settlement negotiations, and only mentioned Claimant's desire, as part of settlement, to "meet with a physician who will perform a comprehensive evaluation of his condition." JE 22, p. 897. In that same letter, Claimant reiterated that he "is not asking for additional diagnostic tests or other studies," he simply wanted "an appropriate physician to review those tests and studies, review the appropriate medical records, perform a physical examination on him, and give [Claimant] an opportunity to discuss his physical/medical complaints." *Id.* Later in that settlement proposal letter, Claimant noted that once this doctor prepared his report on the comprehensive exam, the parties could "decide where to go from there" to meet Claimant's future medical needs. *Id* at 898. This May 25 letter suggested an examination more in line with an IME than a change of physician. However, Claimant did make it clear in this and subsequent letters that he was dissatisfied and had lost confidence in his Surety-appointed treating physician.

8. Again on May 30, 2012, Claimant sent Defendants a letter regarding the proposed examination. It simply changed recommended doctors from the previously suggested physician in Pocatello to one in Logan, Utah. This could not be construed as a change of physician request.

9. In a letter dated June 4, 2012, designated as a follow up to tie up loose ends, Claimant listed several enumerated "loose ends" to settlement which needed addressing. Item 2 stated "[p]lease let me know whether the surety agrees to allow Dr. Michael Clegg… to perform a comprehensive medical evaluation…and to provide ongoing medical treatment moving forward." JE 24, p. 901. This is the first instance where Claimant sought

continuing care from a doctor other than his then-current treating physician. This exact request was reiterated in correspondence dated June 14 and June 25, 2012.

10. None of these letters constitute a request for change of physician. Even the letters in June 2012 which mention medical treatment moving forward, when taken in the context of the settlement negotiations and the letter of May 25, 2012, contemplate nothing more than a potential for future care depending on the outcome of the comprehensive exam.

11. Trudi Beck, an employee of Claimant's counsel, testified that she spoke with Pinnacle adjuster Carole Carr on August 1, 2012 regarding a request for change of physician. Surety appeared to deny the request during the conversation, and informed Ms. Beck a decision letter from Surety's counsel would be forthcoming. No letter was sent.

12. In a letter dated December 21, 2012, Claimant clearly and directly requested a change of physician from the current treater to either Dr. Garg or a Dr. Clegg, both of whom practiced in Logan, Utah, which was considerably closer to Claimant's Preston, ID residence than his then-treating physician, who was located in the Salt Lake City area.

13. Claimant's written request for change of physician was denied four and a half months later, on May 2, 2013.

14. On June 25, 2013, Claimant filed a Petition for Change of Venue, asking for Dr. Clegg to assume the role as Claimant's treating physician. Surety agreed to allow the change in its Response to Petition.

15. Claimant was turned away when he attempted to see Dr. Clegg. The doctor would not treat him due to the fact Claimant was represented by an attorney.

16. On August 8, 2013, Claimant asked Surety to substitute Dr. Garg for Dr. Clegg. On September 11, 2013, Claimant again asked for Surety approval to see Dr. Garg.

17. On September 20, 2013, Surety responded that it just recently spoken with, and received medical records from, Dr. Garg. The records and conversation brought to light a history of on-going treatment by Dr. Garg administering epidural steroid injections to Claimant. Dr. Garg also had expressed an idea that perhaps a spinal stimulator could assist Claimant. Surety was reluctant to authorize Dr. Garg if he intended to treat Claimant with the implanted stimulator, as Surety was concerned over the stimulator expense and a perceived low to non-existent success rate. Surety suggested a different physician to treat Claimant.

18. As noted, Claimant had been seeing Dr. Garg since October 2012. Claimant had been going to the VA for care since he lost confidence in his treating doctor. He was referred to Dr. Garg from the VA on a voucher when the VA doctor was unavailable. Dr. Garg had been billing the VA and Medicare. Dr. Garg had not been sending Surety written medical reports for each treatment session, contrary to IDAPA 17.02.04.322.02(a). He had not billed Surety for his services.

19. When Surety rejected Dr. Garg, Claimant filed another Petition for Change of Physician on October 30, 2013.

20. On November 11, 2013, Surety suggested a compromise, in part based on a telephone conversation its counsel had with Dr. Garg. Claimant would retain a "treating" doctor to manage prescription medications, and Dr. Garg would perform steroid injections every three to four months. Claimant did not want to undergo the psychological testing needed for a stimulator implant, so that procedure was taken off the table. Apparently, Dr. Garg informed Surety the injections would run in the neighborhood of $800 per injection, which Surety took to mean per session or office visit.

21. On November 21, 2013, Surety reiterated the above arrangement in its Response to Petition for Change of Physician.

22. Claimant argues Surety denied treatment in 2012, by not agreeing to a change of physician, while knowing Claimant had not been seeing his Surety-approved treating physician since 2011. Claimant relies on Idaho Code § 72-432(1), which provides that a claimant can independently obtain medical services at the expense of employer when employer fails to provide the same. Claimant supports this argument with the holding in *Overall v. Walgreen,* 2007 IC 0245, April 24, 2007.

23. Defendants counter with the fact it did not know Dr. Garg was treating Claimant during this time frame, as the doctor did not send his reports or billings to Surety. Dr. Garg was not authorized to treat Claimant. Treatments obtained by Claimant without Surety's knowledge or authority are not compensable. Defendants rely on *Marshall v. RGIS Inventory Specialists*, 1990 IC 0190, March 15, 1990, to bolster their argument.

24. Neither case cited by the parties is controlling. The cited comments in *Overall* were made in the context of an attorney fee claim, and the question was whether the surety was reasonable in delaying payment for medical charges. The bills had been paid by the time of hearing. In *Marshall* the Claimant chose to see her chiropractor *while continuing treatment with the surety-authorized physician*. Claimant Marshall never mentioned such treatment, and did not seek a change of physician. Her chiropractor compounded the problem by failing to submit records and bills to the surety. In the present case, Claimant had ceased treatment with his then-treating physician long before beginning treatment with Dr. Garg. Claimant, through his attorney, had made it known he had lost confidence in his treater. While Dr. Garg's name

may not have specifically surfaced until August, 2013, Surety should have known, in light of Claimant's continuing pain management issues, he would have been seeking treatment from someone other than the authorized treater.

25. After Surety discovered Claimant had gone to Dr. Garg for treatment, had obtained his billings, and had the chance to review the nature of his past treatment, namely steroid injections, it had the after-the-fact opportunity to meet its obligation to pay Claimant's previous, but reasonably-incurred medical expenses. *See, e.g., Seward v. Pacific Hide & Fur Depot*, *et al,* 138 Idaho 509, 512, 65 P.3d 531, 534 (2003). The fact Surety subsequently authorized the same treatment previously rendered by Dr. Garg, (ESI), is an indication Surety, at least at that time, felt the treatment was not unreasonable.

26. Claimant had a right to obtain medical treatment, and the weight of the evidence supports the proposition that Surety hampered his ability to get such treatment by delaying decisions on change of physician, while aware of the fact Claimant needed on-going medical treatment which was not being provided by Surety's approved physician.

27. Certainly, it would have been better if Dr. Garg had provided billing and reports to Surety in a timely fashion. It would have helped if Claimant had informed his counsel he was seeing Dr. Garg. Claimant complicated the issue when he utilized his VA benefits and Medicare to pay for treatment related to this industrial accident. However, none of those things exonerate Surety from performing its obligation under Idaho Code § 72-432(1) in the unique circumstances of this case.

28. Surety is obligated to pay for Dr. Garg's treatment from October 2012 through the time he became an authorized provider in November 2013.

29. Surety is obligated to pay mileage and associated travel expenses, pursuant to Idaho Code § 72-432(13), for Claimant's visits with Dr. Garg from October 2012 through the time he became an authorized provider in November 2013.

Continuing Epidural Steroid Injections

30. In November 2013, Surety approved a change of physician to Dr. Garg with the understanding he would continue to provide ESI on a periodic basis for an unspecified period of time into the future. This decision was based in large part on representations made by Dr. Garg regarding the cost and efficacy of the injections. Defendants now question the reasonableness of continued injections.

31. During his deposition on December 11, 2014, Dr. Garg testified to twelve ESI treatments he had performed on Claimant. The pain relief obtained by the injections, according to Claimant's purely subjective representations as noted in the doctor's medical records, ranged from zero to seventy percent, and the duration of substantial pain relief ranged from none to two months.

32. Defendants argue against ESI as a continuing treatment modality for the following reasons;

- The cost, which ranges from $2200 to $4500 per treatment session, is unreasonable given the uncertain, incomplete, and temporary benefits;
- Risks associated with the injections, including infection, bleeding, nerve damage, spinal cord damage, and even paralysis or coma, outweigh the benefits;
- Lack of scientific study on efficacy of ESI as a long term pain relief regimen;
- Benefit of treatment is totally subjective, and how Claimant feels on any given day is affected by other factors, including the weather; perceived benefits might not even be from ESI;

- The steroid Kenelog used by Dr. Garg should not be used for ESI, and even states on the vials "not for epidural space".

33. In the recent case *Chavez v. Stokes*, 2015 WL 4086935 (July 7, 2015), the Idaho Supreme Court affirmed the rule of *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989), that it is for the physician, not the Commission, to decide whether a particular treatment is "required". The only review the Commission is entitled to make of the physician's decision is whether that treatment was "reasonable". However, in *Chavez*, the Court made it clear that the so-called three-factor test of reasonableness referenced in *Sprague*, should not be universally applied, and to that extent, overruled *Sprague*. *Chavez* establishes that the reasonableness of the medical care required by the claimant's physician is a question of fact to be supported by substantial and competent evidence. The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach.

34. Based on the peculiar facts of this case, the following considerations are relevant to determining whether the care required by Dr. Garg is "reasonable".

Cost/Benefit Ratio

35. Dr. Garg's ESI sessions are expensive. On a subjective basis, they often, but not always, provide significant, albeit transient, pain relief. While cost alone can not dictate whether a certain treatment is reasonable, it can be a factor in making that determination. However, the cost must be juxtaposed against the benefits provided. A costly treatment which provides only minimal benefits could be unreasonable, whereas as an equally costly treatment which provides substantial benefits may well be reasonable. Spending thousands for very little benefit is a form of economic waste. Economic waste is

per se unreasonable. On the present facts, it is not clear that the costs involved outweigh the benefits provided, or vice versa.

Benefit Variability

36. Dove-tailing into the cost/benefit analysis is how consistently or inconsistently the proposed treatment provides the desired benefit. If an expensive palliative treatment is undertaken, it should provide the desired benefit on a consistent basis. For ESI, Dr. Garg testified the target goal is 50% pain reduction. He later revised his expectations down to 30% pain reduction, but that figure seems low given the costs and risks involved. For the purpose of determining reasonableness, Dr. Garg's 50% pain reduction figure is more appropriate. Using that criteria, Claimant hit the target benefit two or three times in twelve sessions, although he came close, at 40% pain reduction, one or two other times.[3] Using the more relaxed 30% pain reduction goal, Claimant still met that mark less than half the time.[4] The variability of benefits is substantial.

Frequency of Treatment

37. The frequency of the proposed treatment is another subset of the cost/benefit analysis which must be considered. After all, a one-time expense to "cure" a condition is much more likely to be considered reasonable, even if very expensive, than an expensive repetitious treatment designed to maintain the status quo. In the present case, the ESI treatment is palliative in nature. Palliative care can be compensable, if reasonable, and Defendants do not suggest Claimant is not entitled to reasonable palliative care. Given the frequency of the ESI treatments (every 2 to 3 months), coupled with their costs and

[3] The equivocating stems from the fact Dr. Garg listed one injection session as producing 40 to 50 percent pain reduction.

[4] These figures are based upon Dr. Garg's testimony; interestingly there is an entry in the acupuncturist's records dated May 24, 2013 which states that out of six ESI treatments from Dr. Garg, only one time did Claimant feel any better (JE 55, p. 7).

the extent and variability of benefits provided, the ESI treatment regimen as currently set up with Dr. Garg starts to appear less reasonable.

Increased Functionality

38. While Claimant, when asked at hearing about how the ESI helped him, focused on the fact he had less pain for up to two months or more, Dr. Garg's records indicate Claimant could walk better, had less morning pain, and a better appetite when the ESI was working. It appears Claimant did experience increased functionality for up to two months as a result of the treatments.

Objective Validation

39. One way to determine the effectiveness of a treatment, and thus assist in determining its usefulness, is by objectively validating the results. Purely subjective responses to treatment are by nature less reliable, and more subject to a wide variety of factors. As noted in this case, Claimant's pain waxes and wanes, sometimes independently of treatment, and can be affected by such things as the weather. Dr. Garg agreed that at least some of Claimant's subjective reports of decreased pain levels post-treatments could be related to factors other than the injections. Lack of an objective way to measure the effectiveness of ESI treatments is a consideration, but Claimant's subjective claims must not be dismissed or discounted simply because his claims can not be objectively confirmed.

Alternative Treatment

40. Claimant testified that in addition to ESI treatments and a pain medication regimen, he obtained relief from chiropractic treatment, acupuncture, and physical therapy

provided by one particular therapist.[5] The fact there are other treatments which provide Claimant pain relief is significant.

Effectiveness of Alternative Treatment

41. While Claimant testified to effective treatment alternatives to ESI, no attempt was made to quantify the effectiveness of chiropractic care, acupuncture, and physical therapy. Claimant testified he attends acupuncture sessions every two weeks. He did not testify to his current chiropractic schedule. The question is whether some combination of these treatments can provide an acceptable level of pain reduction even without the periodic injections. Currently that is an unanswered question.

Treatment Acceptance

42. Experimental or unorthodox treatments are less likely viewed as reasonable compared to those which are generally accepted within the medical community. While epidural steroid injections are accepted as an alternative to back surgery (when successful), Defendants' expert, Paul Collins, M.D.[6] testified the use of EPI as a continuing form of palliative pain management is not supported by scientific evidence or studies. Even Dr. Garg admitted his use of the steroid Kenelog is contrary to the drug manufacturer's warnings. He did believe the use was permitted by the FDA, based on the fact Medicare paid for the procedures. The three medical journal articles submitted by Dr. Garg were in

[5] Claimant has been paying for acupuncture himself, and Medicare pays for his chiropractic visits. Unfortunately, the therapist currently does not treat Claimant.

[6] Claimant objects to consideration of Dr. Collins' opinions, in part due to his belief that the doctor has a conflict of interest in this matter. This concern stems from Dr. Collins' deposition testimony which could be read to suggest he is a "consultant" for the Commission on the issue of ESI. Such is not his role. He is a member of the Industrial Commission's Advisory Committee, along with worker's compensation attorneys from both sides, insurance representatives, labor representatives, medical people, and others, who meet periodically to discuss, debate and give suggestions on a wide range of topics germane to the worker's compensation system and statutes. While their work is important, they do not hold any exalted status with the Commission, and in fact many are attorneys who handle workers' compensation cases on a daily basis with the Commission. Dr. Collins holds no special sway with the Commission because of his participation on the Advisory Committee. His testimony does not present any type of conflict of interest.

no way supportive of his treatments, as they dealt with steroid injections as alternative to surgery, not on-going palliative treatment. The fact Dr. Garg could identify no other medical authority supporting his method of palliative steroid injection usage leads to further suspicion that his treatment is not widely accepted in the medical community. When accepted treatment options exist, the use of experimental or "off label" treatment is more difficult to justify as being reasonable.

Treatment Risks

43. The risk of harm must be considered when determining if a given treatment option is reasonable. While one might argue that if the risk is acceptable to the patient and the provider, a surety or the Commission has no right to consider that risk in their decision making. However, risk is a very important consideration, since the party who bears the financial burden of treatment going wrong and leading to increased physical harm is the surety who will have to pay the medical costs of such harm. In determining reasonableness, the risk/benefit ratio may be even more important than the cost/benefit ratio. As risk of serious harm increases, the reasonableness of the treatment decreases. Some procedures are just too risky to be reasonable for anything but life-saving benefit. As the anticipated benefit decreases, the risk of the procedure becomes more of a consideration. A high risk, low benefit procedure is unlikely to be reasonable.

44. ESI contains very real, and potentially very serious risks. Those risks were acknowledged by Dr. Garg, although he seemed to brush off the chance of an adverse risk occurring. Dr. Collins, on the other hand, feels the risks clearly outweigh the benefits of ESI. Dr. Collins testified that he had reviewed data for 153 ESI patients and found approximately ten percent of them had some adverse affects, up to and including one case

of paraplegia. This finding is not necessarily representative of the statistical nationwide average, nor was Dr. Collins' data review a scientific study. However, it does confirm that real risks are associated with the procedure, and can happen.

45. Claimant is content with the risk level, in large part due to the fact his pain can be severe and unrelenting. As his pain increases, so does his willingness to endure the risk to obtain relief. That is very understandable. Unfortunately, Claimant repeatedly faces those risks each time he submits for treatment, and the more treatments he receives, the greater the opportunity for complications. That fact must be weighed in the analysis.

Factor Analysis Conclusion

46. Considering all of the above factors, and considering the totality of the circumstances, on balance the evidence weighs against continued quarterly ESI treatments. Dr. Collins testified a standing order for quarterly ESI treatments into the indefinite future was not reasonable; Dr. Garg testified to the contrary. More weight is given to Dr. Collins' testimony on this issue, for the reasons stated above. A standing order for quarterly ESI treatments into the indefinite future is not currently reasonable within the meaning of Idaho Code § 72-432(1).

Application of* Neel *to Payment of Medical Costs

47. Claimant urges that all medical costs, including prescriptions, which remained unpaid until the matter was put at issue by the hearing notice, should be paid at full invoice cost. In making this argument, Claimant acknowledges Surety has paid all disputed prescription amounts (perhaps at full invoice), paid disputed physical therapy charges (at fee schedule rate), and has not paid Dr. Garg's charges for the disputed time frame as discussed above.

48. Defendants argue all medical bills have been paid, except those associated with Dr. Garg's unauthorized treatment from October 2012, through October 2013. As such *Neel* does not apply.

49. The trigger for payment of medical bills at full invoice amount under the *Neel* Doctrine (*Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009)), and IIC decisions discussing *Neel,* is a Commission determination that the unpaid bills at issue are compensable after Defendants have denied the claim. Here, while there were several instances of "eleventh hour reversals" the fact remains when medical bills are paid prior to a Commission decision of compensability, the *Neel* Doctrine is inapplicable. This applies to the physical therapy charges, and prescriptions, which were paid prior to this decision.

50. Charges associated with Dr. Garg's treatments from October 2012 through October 2013 are subject to *Neel*, and are subject to payment at full invoice price. This includes hospital and physician charges.

Witness Credibility

51. Claimant's testimony was predictably less than focused. It was sometimes difficult to track when and whether he was describing an event which occurred before his settlement, or thereafter. Many of his answers were not responsive to the question posed. While there was never a time it appeared Claimant was fabricating an answer, nevertheless his lack of focus made it difficult to know whether his testimony was accurate as to the question asked, the relevant time frame in question, or the correct sequence of events. As such, his testimony is afforded less weight than otherwise it might have been given.

52. Claimant's sister likewise tended to ramble in her answers; often not responding to questions asked. It was apparent she had an emotional stake in the proceedings; as a sister who clearly has great love and concern for her brother, her emotion was understandable. Since much of it dealt with secondhand information from Claimant, her testimony was subject to the accuracy of what she was told, coupled with a strong need to have her say in the proceedings. While the Referee is empathetic toward her plight, her testimony is not afforded significant weight.

53. Witness Trudi Beck was well prepared, largely unrebutted, and credible. Her testimony will be highlighted in the next section.

54. Witness Carole Carr likewise was forthright in her testimony, and her testimony was credible.

Attorney Fees

55. Claimant argues Surety's consistent pattern of delay, ignore, and dispute warrants the application of attorney fees in this case. Claimant listed the exact amount of fees sought based upon an hourly rate in his briefing.

56. Defendants challenge the methodology Claimant's counsel used to calculate attorney fees, and further argue Claimant is not entitled to fees, regardless of how they are calculated. Defendants point out that most of the disputed medical charges have been paid, and delays in those payments were due to Claimant's behavior, and that of his providers.

57. Idaho Code § 72-804 provides in relevant part:

> If the commission … determines that the … surety contested a claim for compensation made by an injured employee … without reasonable ground, or that … surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee … the compensation provided by law, or without reasonable grounds discontinued payment of

> compensation as provided by law justly due and owing to the employee … [surety] 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).

58. While prescription payments were not an issue by the time of hearing, Claimant provided testimony on the subject for the purpose of awarding attorney fees. Trudi Beck's unrebutted testimony was that it took one and a half years and seven letters from Claimant's counsel to Surety to get unpaid prescription issues resolved.

59. Certain unpaid physical therapy and corresponding mileage payments were at issue at the time of hearing, although subsequently Surety paid these charges. While three periods of physical therapy were contested at various times, it is the first block of twenty four sessions, from August 31, 2011 through December 23, 2011, which provide the most controversy.[7]

60. The visits in question were not paid until after the October 24, 2014 hearing due to Surety's belief they were not authorized. This belief sprang in part from Surety's failure to locate the prescription the treating physician wrote for the sessions. Carole Carr testified she did not see the prescription until her September, 2014 deposition. She did acknowledge, however, that Claimant's counsel sent her a copy of it no later than February,

[7] The physical therapy visits from March 9, 2012 through May 8, 2012, and two visits in mid-December, 2012, in April, 2013, were paid prior to hearing and are not substantial in determining the attorney fee question herein.

2014, as part of a set of documentation. It is not clear if Surety received a copy of the prescription from the treater at the time he wrote the prescription.

61. Trudi Beck called Surety in August 2012 to discuss the unpaid therapy bills and the fact Claimant had a prescription for the sessions. She suggested Surety check with the treater to confirm the prescription. In October, 2012, the therapy office sent billings and supporting documents to Surety for payment. Surety claimed it needed to speak with its attorney before moving forward with the claim. The provider continued to attempt contact with Surety over the next six months; finally Surety denied the claim.

62. On December 21, 2012, Trudi Beck sent Surety a letter and supporting therapy documents, but, similar to the provider, received no response.[8] On August 9, 2013, Claimant's counsel re-visited the outstanding therapy bills in a letter to Defendants' attorney. There was no response. On February 21, 2014, Claimant's attorney sent Defendants' counsel a document package and letter, which discussed outstanding therapy bills, and supplied copies of related documents, including the prescription. On February 28, 2014, Defendants responded by stating they were unaware Claimant had been receiving physical therapy during this time frame. More than eight months later, Surety finally paid the physical therapy bills from late 2011.

63. Claimant also seeks attorney fees for the denial of ESI treatments, as discussed earlier.

64. Numerous examples of Surety's delay in responding to requests, ignoring requests, and "buck passing" were presented at hearing. Surety's rebuttal was not

[8] It is not clear if the documents provided by the physical therapy office in October and/or Trudi Beck in December, 2012 contained the prescription authorizing additional therapy treatment. However, given the other contacts spanning a two-year time frame, this fact is not pivotal.

persuasive. For example, Surety attempted to excuse its failure to respond to Claimant's requests and inquires by noting many of them were sent to its attorney, not to it directly. Also the adjuster testified to the fact that the case was originally a Utah claim, and the Utah Surety's computer system was not available to her, which made her job more difficult.

65. At hearing, Trudi Beck provided a detailed time line of interaction between the parties. Too often, that time line was expressed in periods of months, if not years, to get a substantive, although often incorrect, response from Surety.

66. The Referee was present at hearing to listen to and observe witnesses, has examined the exhibits, and has considered the parties' briefing. After this review and consideration, it is his perception that this case adjusting can be characterized as one of "passive negligence." Repeatedly, Carol Carr's testimony was one of waiting for bills to come to her, and paying them[9], which may be acceptable in a perfect case. Unfortunately, this is a very far from the perfect case. The Claimant is brain damaged; he fails to act consistently, patiently, and persistently. He has a low tolerance for "foot dragging." When Surety delayed payments, he ran them through Medicare. Like Pavlov's dog, he was trained over time to go around Surety, to the point where he would turn to alternate payment sources quickly, rather than persisting in insisting Surety make the payments. Claimant behaves impulsively at times, which makes keeping up with his medical treatment more difficult. However, that is no excuse to ignore or neglect his case. To the contrary, such a person requires more diligence, more oversight, and more communication. Surety instead failed to communicate, failed to be proactive, failed to inquire when things did not

[9] She testified she is "not in the habit of chasing down bills that I don't know exist or reports that I don't know exist. When we owe people money, they come to me." Tr. p. 197, ll. 19-22.

"add up" (such as a prolonged period of time when Claimant was not treating with the authorized treating physician, which should have raised Surety's curiosity).

67. When addressing entitlement to attorney fees, Surety argues the attorney was not officially "representing" Claimant during much of the dispute, and thus not entitled to many of his claimed fees. However, Surety then argues it could not effectively communicate with Claimant because he was, for the time in question, represented by an attorney. Surety's excuse that its lack of communication was justified because this case "was in litigation" is frustrating, to say the least. Claimant's counsel is very communicative.

68. The adjuster admitted she did not keep meticulous records in this matter. She kept track of the case by jotting Claimant's name on her calendar quarterly to jog her memory to check his file. She acknowledged there was a time when she routinely kept log notes manually, yet she did not do so in this case. She argued that because she could not access the Utah computer system it made her job more difficult. On that note, it is hard not to agree. This is a difficult case to keep on top of; the nearly 1400 of pages of exhibits for this hearing alone attest to that. This matter has been ongoing since 2006. It has to be an adjuster's nightmare. Although human nature is to avoid those things we like the least, that behavior is counterproductive in dealing with this claim. This is not a case where the adjuster can sit back and wait for things to happen. Otherwise, the Surety may think, for example, it has the prescription matter "taken care of" when in reality it does not. Surety's misunderstandings and misbelief led to many of the problems in this case. Surety had a chance to work with Claimant's counsel to promptly resolve issues as they came up, but instead too often ignored his requests, phone calls, and correspondence.

69. It is clear the Claimant had no choice but to hire counsel to help him deal with Surety, which exhibited a habit of unreasonable delays in making payments, authorizing treatment, or arranging for proper medical care. While it is true it has made payments recently, and cleared up most of the issues on terms favorable to Claimant, that does not exonerate Surety from the workings of Idaho Code § 72-804. The standard for an award of attorney fees therein is "unreasonable" denial or delay in payments to which Claimant is entitled. This case is highlighted by unreasonable delay when it came to paying medical bills, authorizing treatment, and considering care providers.

70. The below-cited language of *Overall v. Walgreen,* 2007 IC 0245, April 24, 2007, is appropriate for this case, and is adopted herein, with one exception, as noted below;

> [W]here Defendants' unreasonableness in adjusting this claim was so pervasive, Claimant should be awarded attorney fees fully, without reduction for the brief flashes of reasonableness by Defendants. Claimant was forced to take this matter to hearing by Defendants' unreasonableness. Eleventh hour reversals of position by Defendants do not eliminate, ameliorate, or mitigate prior unreasonableness. *** Thus, Claimant should be awarded attorney fees for his time and efforts in preparing and trying this matter to the fullest extent allowed by Idaho Workers' Compensation Law.

2007 IIC 0245.8.

71. Claimant has proven, pursuant to Idaho Code § 72-804, a right to attorney fees for efforts connected with obtaining past benefits to which he was entitled, but which were unreasonably denied or delayed; including;

- Surety's unreasonable denial of treatment with Dr. Garg from October 2013 through October 2014;
- Unreasonably delaying payment of Claimant's prescription drugs, physical therapy treatments, and transportation charges;
- Unreasonably delaying responding to or approving Claimant's change of physician requests.

72. Claimant is not entitled to any attorney fees generated in connection with regard to the issue of ESI treatments going forward. Surety timely and properly raised the issue, and in this instance acted reasonably in seeking to be proactive in managing the claim.

73. 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, and an affidavit in support thereof, with appropriate elaboration on *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 the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven, pursuant to Idaho Code § 72-432(1), he is entitled to reimbursement of all medical charges for Dr. Garg's treatment from October 2012 through the time he became an authorized provider in November 2013.

2. Claimant has proven he is entitled to reimbursement at the full invoiced amount of all medical charges, pursuant to *Neel v. Western Construction, Inc.*, for Dr. Garg's treatment from October 2012 through the time he became an authorized provider in November 2013.

3. Claimant has proven, pursuant to Idaho Code § 72-432(13), he is entitled to mileage and associated travel expenses for Claimant's treatment with Dr. Garg from October 2012 through the time he became an authorized provider in November 2013.

4. Claimant has failed to prove he is entitled to continuing quarterly epidural steroid injections for the present time.

5. Claimant has failed to prove that he is entitled to reimbursement for the full invoiced amounts of his past prescription and physical therapy charges.

6. Claimant has proven that he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial of treatment with Dr. Garg from October 2013 through October 2014.

7. Claimant has proven that he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable delay in approving his claim for prescription drugs, transportation charges, physical therapy treatments, and change of physician request.

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 13th day of August, 2015.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 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:

JAMES RUCHTI
275 S 5TH AVE STE 140
POCATELLO ID 83201

DANIEL BOWEN
PO BOX 1007
BOISE ID 83701

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS C. MILLARD, Claimant, v. ABCO CONSTRUCTION, INC., Employer, and THE WORKER'S COMPENSATION FUND OF UTAH, Surety, Defendants.	**IC 2007-008413** **ORDER** Filed 8/21/15

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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, pursuant to Idaho Code § 72-432(1), he is entitled to reimbursement of all medical charges for Dr. Garg's treatment from October 2012 through the time he became an authorized provider in November 2013.

2. Claimant has proven he is entitled to reimbursement at the full invoiced amount of all medical charges, pursuant to *Neel v. Western Construction, Inc.*, for Dr. Garg's treatment from October 2012 through the time he became an authorized provider in November 2013.

3. Claimant has proven, pursuant to Idaho Code § 72-432(13), he is entitled to mileage and associated travel expenses for Claimant's treatment with Dr. Garg from October 2012 through the time he became an authorized provider in November 2013.

4. Claimant has failed to prove he is entitled to continuing quarterly epidural steroid injections for the present time.

5. Claimant has failed to prove that he is entitled to reimbursement for the full invoiced amounts of his past prescription and physical therapy charges.

6. Claimant has proven that he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial of treatment with Dr. Garg from October 2013 through October 2014.

7. Claimant has proven that he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable delay in approving his claim for prescription drugs, transportation charges, physical therapy treatments, and change of physician request.

8. Claimant is entitled to an award of attorney fees under Idaho Code § 72-804. Unless the parties can agree on an amount for reasonable attorney's 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, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to

determine reasonable attorney fees and costs in the matter. See *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's 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 and costs.

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

DATED this 21st day of August, 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 21st day of August, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

JAMES RUCHTI
275 S 5TH AVE STE 140
POCATELLO ID 83201

DANIEL BOWEN
PO BOX 1007
BOISE ID 83701

/s/

jsk