BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT LARSON, Claimant, v. PRECO ELECTRONICS, INC., Employer, and CONNECTICUT INDEMNITY COMPANY, Surety, Defendants.	**IC 1999-024863** **ERRATUM ON FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 29, 2014

On September 26, the Findings of Fact, Conclusions of Law and Recommendation and Order were filed by the Commission in the above-entitled case. The following editing error should be changed as follows:

On the Findings of Fact, Conclusions of Law and Recommendation, Page 11, Paragraph 30, the sentence, "By late March, Surety had approved the BiOM prosthetic." should be changed to read "On or shortly before April 4, 2014, Surety approved the BiOM prosthetic."

DATED this _29th__ day of _September___, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of _September___, 2014 the foregoing **ERRATUM TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
P O BOX 278
NAMPA ID 83653

ERIC S BAILEY
BOWEN & BAILEY
PO BOX 1007
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_/s/_____

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Pursuant to Idaho Code § 72-506, the above-entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on February 13, 2014 in Boise, Idaho. Claimant was present and represented by Richard S. Owen of Nampa. Employer ("Preco") and Surety (collectively, "Defendants") were represented by Eric S. Bailey of Boise. Oral testimony and documentary evidence were admitted at the hearing. One post-hearing deposition was taken, and a briefing schedule was issued. Both parties briefed the matter; however, before Claimant's reply brief was due, the parties stipulated to reopen the record to admit additional evidence. An order reopening the record was issued, providing both parties an opportunity to file another brief. The matter was again briefed, and the case was placed under advisement on September 5, 2014.

ISSUES

Pursuant to the parties' stipulation at the hearing, the issues to be decided as a result of the hearing were significantly narrowed after the Notice of Hearing was issued. Defendants stipulated that a spinal cord stimulator was reasonable and necessary treatment for Claimant's chronic pain, and that the device had been approved. Also, the parties had resolved their disputes regarding causation, retention of jurisdiction, injurious practices, temporary disability benefits, permanent impairment, and permanent disability. The only remaining issues were 1) whether a BiOM ankle prosthetic constitutes reasonable and necessary medical treatment for Claimant's industrial below-knee amputation, and 2) whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

Following the hearing, Defendants approved the BiOM prosthetic, and the parties raised the additional issue of whether Defendants owe the full invoiced amount for that device, as well as for the spinal cord stimulator. As a result, by stipulation of the parties at and after the hearing, the issues to be determined are:

1. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for unreasonable delay and/or denial of a spinal cord stimulator trial and a bionic ankle prosthesis (a "BiOM" prosthesis); and

2. Whether Defendants are liable for the full invoiced amount for the spinal cord stimulator and the BiOM prosthetic pursuant to *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to an award of attorney fees because Surety unreasonably delayed accepting his claim for a BiOM prosthesis, unreasonably denied that

claim in January 2014, and unreasonably delayed formally confirming its approval for a spinal cord stimulator ("SCS") trial with Claimant's treating physician. After stipulating at the hearing that the SCS was approved, Surety refused to provide written confirmation until February 27, 2014. As to the BiOM foot, Dr. Roser made the recommendation in his April 2, 2013 chart note, but the claim was not approved for approximately one year. Claimant also asserts entitlement to reimbursement for his medical costs at the full invoiced amount, as per *Neel*, for the BiOM foot and the SCS trial.

Defendants counter that their initial denial of the BiOM prosthesis was reasonable because Claimant did not undergo an appropriate trial with the device until March 2014. Further, Dr. Cox recommended waiting until after the SCS trial to determine whether the additive effect of the BiOM prosthesis would significantly improve Claimant's pain. As to Defendants' delay in providing written authorization for the SCS trial, they assert that they were waiting for a clarification from Dr. Cox and that their two-week delay in providing written confirmation does not negate their approval such as to justify an award of attorney fees. Defendants also argue that they are only liable for the amounts provided by the appropriate medical fee schedule because *Neel* does not apply to this case.

EVIDENCE CONSIDERED

The record in this matter consists of:

1. The testimony of Claimant taken at the hearing;

2. Joint Exhibits ("JE") A through M, page numbered consecutively, admitted at the hearing, and N (Claimant's prehearing deposition taken April 10, 2013) admitted following the hearing by Order dated August 5, 2014; and

3. The post-hearing deposition testimony of: Steven Roser, M.D. taken March 14, 2014; and John Kralovec taken May 13, 2014.

FINDINGS OF FACT

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

BACKGROUND

1. On August 16, 1999, Claimant rolled his right ankle at Preco, sustaining an injury that led to a fusion surgery, persistent chronic pain, and, in 2006, the amputation of his right leg about six inches below his knee. Thereafter, Claimant developed phantom limb pain; chronic hip, knee, and leg pain; a series of neuropathies that required about one revision surgery per year; and severe skin breakdowns from wearing his prosthetic.

2. At the time of his industrial accident, Claimant was a warehouse lead. He was 30 years of age. At the time of the hearing, Claimant was 44 years of age and working as a certified prosthetics technician, building and fitting prosthetics for clients at Idaho Orthotics and Prosthetics ("Idaho Orthotics").

CLAIM PROCESSING

3. **Spinal cord stimulator.** Barbara Quattrone, M.D., a physiatrist, has managed Claimant's pain medications since July 24, 2012 pursuant to a pain medication contract with Claimant. In November 2012, she first recommended an SCS trial to aid in reducing Claimant's narcotic pain medication intake. Toward that end, in March 2013, she referred Claimant to Robert Calhoun, Ph.D., for a psychological assessment. That

assessment was conducted in May 2013. Subsequently, Dr. Calhoun counseled Claimant in a few sessions regarding his chronic pain.

4. Dr. Quattrone reiterated her recommendation in November 2013. In response, John Kralovec, claims adjuster for Surety, scheduled an independent medical panel evaluation ("IME") with Craig Beaver, Ph.D., psychologist, and Rodde Cox, M.D., physiatrist, for January 17, 2014. He did not contact either Dr. Quattrone or Dr. Calhoun first.

5. In his IME report, Dr. Cox concurred that an SCS trial is medically reasonable. Nevertheless, Surety did not approve the recommendation.

6. Dr. Quattrone recorded her frustration with Surety's approval process in a February 5, 2014 chart note**:**

> Pt is here for f/u. He has had a IME with Dr Cox, and Dr Beaver. He has seen Dr Calhoon for eval but again his insurance co wants to get more opinions.
>
> …
>
> I is my opinion that he is a candidate for SCS to address his phantom pain. My hope for his is that this will allow us to taper him off some of the medications he is currently on to control his pain.
>
> I have been receiving letters from his insurance telling me how to prescribe and what doses to prescribe for my pt. They seem to have more financial interests here than actually doing what is write for the pt as they have not approved the stimulator trial. They just want the pt off his medications.
>
> …

JE-272d (reproduced as the text appears in the original).

7. Eight days later, at the hearing, Defendants, without reservation, stipulated that an SCS trial constituted reasonable and necessary care for Claimant's industrial low

back pain, and that benefits related to this treatment were approved. As a result, Claimant's entitlement to an SCS trial was removed from the list of issues to be decided.

8. Following the hearing, Dr. Quattrone required written approval from Surety before she would initiate the SCS trial. Mr. Kralovec initially refused to provide written approval because he was waiting for a clarification from Dr. Cox; however, at his post-hearing deposition, Mr. Kralovec could not recall the nature of that clarification.

9. After Claimant's counsel prompted him with a letter dated February 24, 2014, and without further apparent contact with Dr. Cox, Mr. Kralovec provided Dr. Quattrone with written approval for the SCS trial on February 27, 2014.

10. **BiOM prosthetic.** According to product literature, the BiOM Ankle System is a bionic device that purports to replace the function of lost muscle and tendon anatomy, enabling the wearer to walk with a more natural gait than is possible with other prosthetics. This is important because an altered gait, commonly associated with wearing a lower extremity prosthesis, leads to arthritis pain in the back, hips, and knees. The BiOM system also relieves added fatigue associated with ambulating with a prosthesis because it has its own power source. It actually expends more energy than the wearer imparts. In addition, the BiOM device features directional movement not available in other products, enabling surer movement over uneven surfaces and increasing ambulation speed.

11. Steven Roser, M.D., Claimant's orthopedic surgeon since 2003, first recommended the BiOM device for Claimant on April 2, 2013. His chart note records his opinion that Claimant is an "ideal candidate" who could "drastically decrease the level of discomfort that he suffers in his knee his hip and his back [*sic*]." JE-137.

12. Defendants deposed Claimant on April 10, 2013. Through that deposition, they learned that a representative brought a BiOM prosthetic to Idaho Orthopedics sometime between May and September 2012 for Claimant to try out. After a trial walk, Claimant was impressed at how the BiOM foot improved his ability to ambulate.

13. Also, Claimant explained that his current prosthetic caused bruising, tissue breakdown, and infections, and he believed the BiOM foot would alleviate those issues. To Claimant's understanding, Dr. Roser believed the BiOM foot would delay the need for further amputation of his leg, and would also help keep his other lower extremity joints, even on his contralateral (left) side, healthier longer. Claimant and others at Idaho Orthopedics were currently in the process of preparing a formal proposal to Surety to obtain benefits for the device.

14. Around this time, Dr. Roser referred Claimant for an IME with Kevin Krafft, M.D., a physiatrist, because Claimant was considering entering into a settlement with Defendants. Dr. Krafft evaluated Claimant on May 31, 2013. In his report, he opined a BiOM prosthetic would be helpful for Claimant. He wrote that the BiOM foot may provide better distribution of the forces transferred to Claimant's residual limb, preventing skin breakdown and alleviating some of his pain**.**

15. Claimant's skin breakdown difficulties were well documented in his medical records by the time of Dr. Roser's and Dr. Krafft's recommendations. For example, Claimant's lesions and periodic inability to wear his prosthesis are described by Dr. Quattrone who, in September 2012, referred Claimant to a wound care clinic for treatment of infected lesions on his residual limb. Along those lines, medical records document Claimant's treatment at the Elks Wound Center from September 2012 through April 2013. Further,

Dr. Roser had noted Claimant's skin breakdown problems related to his amputation, and had taken Claimant off work in the past to allow his residual limb to heal. He took Claimant off work for several months in 2013 for this reason. Surety paid temporary total disability benefits and, thus, was contemporaneously aware of Claimant's circumstances.

16. Dr. Roser again recommended the BiOM prosthetic in his chart note of November 11, 2013. Unfortunately, Dr. Roser's chart notes are rife with spelling and grammatical errors, many severe enough to obfuscate their intended meaning. This note is particularly garbled: "Cousin with continued ulcerations he can hours prosthetic. Because and hours prosthetic he is unable to go to work. Therefore his work status is off work. … Once his skin is in better shape on the day set of prosthesis. One for getting wet showering and the other with a Biom foot." JE-143.

17. John Kralovec became a claims adjustor for Surety in September 2013. He regularly reviewed medical records from providers to determine whether benefit payments were appropriate. He received a letter dated November 25, 2013 from Claimant's attorney enclosing medical records and advising that Dr. Roser had recommended a BiOM prosthetic.

18. On November 27, 2013, Dr. Roser signed a "prescription" for the BiOM leg. The document, prepared by Idaho Orthopedics, itemized all of the necessary components and their costs, totaling $88,780.41. On the same day, Claimant's attorney forwarded the prescription to Mr. Kralovec in a letter.

19. In response, Mr. Kralovec did nothing further to investigate the medical necessity of the claim, as Claimant's panel IME was already scheduled for January 14, 2014. He did not contact Dr. Roser regarding his recommendation or seek clarification regarding his notes.

20. Mr. Kralovec forwarded the invoice to his supervisor and contacted Denise at Idaho Orthotics. Denise wanted a cost breakdown before Idaho Orthotics would agree to build the leg. Mr. Kralovec routed the request to his supervisor at Surety's, who forwarded it to someone at Med-Pay, who forwarded it to someone at Procura, who in turn forwarded it to someone at Multi-Plan, in the course of the "normal" payment process. Eventually, Bill Karcher, owner of Idaho Orthotics, executed a contract to provide the device for an agreed price.

21. Claimant was evaluated by Drs. Cox and Beaver on January 17, 2014, as scheduled. In his IME report, Dr. Cox listed the medical records he reviewed prior to rendering his opinion. He did not review the records of Drs. Calhoun or Krafft. His review of Dr. Roser's records ended with the April 2, 2013 entry, and his review of the Wound Center records ended with the February 8, 2013 entry.

22. Dr. Cox did not address the medical necessity of a BiOM leg from a skin breakdown perspective. He did not consider whether it would increase Claimant's functionality and/or decrease his pain by alleviating his prosthetic-related lesions.

23. Dr. Cox did consider whether a BiOM prosthetic was a medically reasonable alternative to decrease Claimant's pain and comorbidities by improving his gait. From this perspective, he opined that Claimant walked with a near-perfect gait wearing his usual prosthesis; therefore, the potential improvement with a BiOM device was unclear. He did not address whether the BiOM leg would likely delay Claimant's need for further amputation. Also, Dr. Cox was unable to opine as to the potential for spine-mediated pain in Claimant's hip, back, and knee until after Claimant completed his spinal cord stimulator trial.

24. Surety initially denied benefits for the BiOM prosthetic based upon Dr. Cox's recommendations. On January 29, 2014, by letter, Surety notified Idaho Orthotics of the denial.

25. Mr. Kralovec took issue with this denial because it was done without his knowledge. Although his signature appears on the letter, he believed Surety had signed it for him. Mr. Kralovec testified that he told someone at Idaho Orthotics in December 2013 that the claim had been approved. He was unaware of why a hearing was required. Mr. Kralovec thought he had notified Defendants' attorney, but he had no notes with him to verify this recollection. He acknowledged that he would have kept such notes. He never wrote to Idaho Orthotics, nor to Claimant, advising that the BiOM leg was approved.

26. After reviewing the IME report, Dr. Roser returned an undated "check-box" letter to Claimant's attorney indicating that a BiOM prosthetic is appropriate for Claimant, regardless of his response to the SCS. He explained, "Robert has very little in the way of soft tissue coverage on his amputation. He needs every available advantage to lessen the pressure created by a prosthetic leg and the BIOM will have a positive effect in my opinion." Kralovec Dep., Ex. 7.

27. At the hearing, the compensability of the BiOM prosthetic was still at issue. Claimant's testimony was consistent with his deposition testimony.

28. Following the hearing, in March 2014, Claimant underwent an extensive trial of a BiOM prosthetic, for several days.

29. Dr. Roser testified to the following points at his post-hearing deposition on March 14, 2014:

- Since Claimant's amputation in 2006, Dr. Roser has performed revision surgeries about once each year to clip painful nerves higher in Claimant's leg, leading the tissue covering the residual limb of his amputated limb to shrink more

than normal and become thinner. As a result, Claimant has tissue breakdown and persistent sores from wearing his prosthetic.

· Claimant's residual limb problems and tissue difficulties, unabated, could lead to an above-knee or through-knee amputation. Dr. Roser recommends avoiding above-knee or through-knee amputation, if possible, because most patients who undergo that procedure find ordinary activities, like walking and maintaining balance while standing, much more difficult than with a below-knee amputation.

· Prior to recommending the BiOM foot for Claimant, Dr. Roser had worked with other amputees who used the BiOM prosthetic, and they all had positive results. That being said, Dr. Roser also opined that a trial use was reasonable to determine whether the device would actually ameliorate Claimant's nerve problems contributing to his skin breakdown.

· During Claimant's March 2013 trial of the BiOM prosthetic, Dr. Roser observed Claimant's gait and how his stump fits into the socket. He explained how there is much less movement of Claimant's residual limb within the socket due to the BiOM prosthetic's ability to provide active energy, as well as increased directional functionality. As a result, Claimant should experience significantly less skin breakdown with the BiOM prosthetic. Indeed, after a few days, Claimant's abrasions on his stump had completely healed for the first time in a year to a year-and-a-half. Dr. Roser opined that the mechanical benefits should extend into the future, forestalling or maybe even eliminating the need for any additional revision surgeries.

· Dr. Roser recommends the BiOM prosthetic mainly to reduce Claimant's tissue degradation, though it should assist with his chronic pain, too. He also agreed that the BiOM prosthetic could improve Claimant's gait which, in turn, could decrease his back pain. Further, if Claimant were to receive the BiOM and spinal cord stimulator devices at the same time, it would be extremely difficult to discern whether one, the other, or both, were responsible for any resultant reduction in Claimant's spine-mediated pain.

30. By late March, Surety had approved the BiOM prosthetic. Although Mr. Kralovec believes the approval was rendered on February 25, 2014, his testimony is unpersuasive on this point. Surety issued a check in the amount of $54,738.49 to Idaho Orthotics on April 4, 2014.

DISCUSSION AND FURTHER FINDINGS

31. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods,* 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc*., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

ATTORNEY FEES

32. The first issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Defendants approved an SCS trial for Claimant at the hearing, and then approved the purchase of a BiOM prosthetic on or shortly before April 4, 2014. However, Claimant asserts that Surety's adjustment of these claims was unreasonable, entitling him to an award of attorney fees.

33. 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.

34. 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).

35. **BiOM prosthesis.** Following Dr. Roser's April 2, 2013 recommendation, Surety had a duty to conduct a timely investigation of the claim and either accept or deny it within a reasonable period. Given the medical nature of Dr. Roser's recommendation, if Surety was not going to approve the device, then it needed to obtain a *timely* qualified medical expert opinion rebutting it.

36. Surety was actually aware of Dr. Roser's recommendation on or before April 10, 2013, when it questioned Claimant at length about it. Yet, it did nothing to investigate the compensability of the claim until the end of November, when Mr. Kralovec acknowledged Dr. Roser's recommendation and added it to the list of items for the IME panel to address in mid-January 2014. Then, on the basis of Dr. Cox's IME opinion, Surety denied the claim. On or around April 4, 2014, Surety reversed its decision, and approved it.

37. Defendants do not deny that they failed to act on Dr. Roser's (and Dr. Krafft's) recommendations until after November 27, 2013. However, they assert that the delay was reasonable because Claimant did not complete a sufficient trial of the BiOM leg until March 2014. Before then, it was unknown whether the device would fit correctly or function as intended. They cite Dr. Roser's post-hearing opinion that it would be reasonable to try before buying, and that Claimant would not be negatively impacted if he were required to trial the prosthetic before purchasing it. Defendants also rely upon Dr. Cox's opinion.

38. *BiOM trial.* Until Dr. Roser's March 14, 2014 deposition, no physician was ever questioned about the need for a BiOM trial, and none had rendered an opinion on this topic.

Surety's assertion that a trial was necessary before it could be required to act upon Dr. Roser's recommendation is not supported by evidence in the record to the requisite reasonable medical probability.

39. Further, Dr. Roser did *not* opine that Claimant must undergo a trial before the BiOM device could be deemed medically reasonable. On the contrary, Dr. Roser believed that Claimant must change to a BiOM prosthesis as soon as practicable in hopes of improving his skin breakdown issues and prolonging the period before further amputation becomes necessary. For those reasons, as well as expected improvements in Claimant's functioning and overall pain, Dr. Roser maintained his prior recommendation and opinion that a BiOM prosthesis is medically reasonable.

40. Also, even if Dr. Roser's testimony could be held to establish that a trial was necessary, it nevertheless cannot operate retrospectively, after nearly a year, to justify the added legal costs Claimant incurred due to Surety's failure to investigate the claim earlier.

41. No medical opinion rebutting Dr. Roser's recommendation was rendered; therefore, Defendants should have accepted the claim within a reasonable period.

42. In addition, Claimant had already trialed a BiOM leg, several months before the hearing. Defendants knew this as of the date of Claimant's deposition. It is undisputed that Claimant's March 2014 trial was more extensive than his pre-recommendation trial. However, no physician has opined that the earlier trial was insufficient. Defendants' argument that it was inadequate is unsupported by the medical evidence in the record.

43. Surety's delay in investigating Claimant's claim for a BiOM prosthesis cannot be justified on the grounds that Claimant had not yet undergone a trial use.

44. *Dr. Cox's opinion.* In reliance upon Dr. Cox's January 17, 2014 opinion, Surety subsequently denied the claim. For the reasons discussed, below, Surety's reliance upon that IME was unreasonable.

45. Surety did not provide the IME panel with the information it needed to properly address the reasonableness of Dr. Roser's recommendation. For example, it did not provide Dr. Krafft's report, Dr. Roser's post-April 2, 2013 chart notes, or an accurate statement of the reasons why Dr. Roser (and Dr. Krafft) each recommended the BiOM prosthesis. It did not seek or provide clarification of Dr. Roser's garbled notes. Not surprisingly, then, Dr. Cox did not address Dr. Roser's primary reasons for his recommendation – Claimant's skin breakdown and staving off another amputation. As a result, even though Dr. Cox evaluated Claimant and provided his opinions in a lengthy report, this evidence, nevertheless, does not provide a sufficient rebuttal to Dr. Roser. Dr. Cox's failure to address pivotal causation issues is the direct result of Surety's failure to investigate the claim and provide him with relevant information.

46. Dr. Cox's opinion regarding the BiOM foot's effect on Claimant's gait – that the potential effects are unknown – is insufficient to satisfy the legal standard. He opines neither that the device is more likely to assist Claimant, nor that it is more likely not to assist Claimant. His written response equates to "I don't know," and there is no testimony from him in the record which might clarify his intended meaning.

47. Dr. Cox does not address the potential for avoiding or delaying comorbidities associated with Claimant's altered gait or their associated treatments, including additional amputation. Dr. Cox does not opine that a new BiOM trial is necessary.

48. Dr. Cox's opinion that the net effect of a BiOM prosthetic on Claimant's back, hip, and knee pain would be unclear until after he trialed the SCS is persuasive, but insufficient on its own to render the denial of the BiOM foot reasonable.

49. Surety's delay in adjusting the claim for a BiOM prosthesis after Dr. Roser's April 2, 2013 recommendation was unreasonable. Its denial based upon the January 17, 2014 IME report was also unreasonable. Claimant has proven by a preponderance of evidence that he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 related to Surety's unreasonable delay and unreasonable denial in adjusting his claim for a BiOM prosthesis.

50. ***SCS trial.*** At the hearing, Defendants stipulated that Dr. Quattrone's recommendation for an SCS trial, in which Dr. Cox had concurred, was approved. Thereafter, Surety refused to signal that approval to Dr. Quattrone in writing. Dr. Quattrone's request for written approval was not only reasonable, but common.

51. Surety's approval of Claimant's claim was unqualified. Claimant relied upon that unqualified approval in stipulating to remove the issue from those to be addressed at the hearing. Therefore, any further delay to determine the conditions of the approval was unwarranted. Mr. Kralovec's explanation – that he was waiting for some clarification from Dr. Cox – is insufficient to excuse Surety's failure to take the action necessary to effectuate its approval without further investigation.

52. Surety's delay in providing written approval to Dr. Quattrone for the SCS trial was unreasonable. Claimant has established he is entitled to an award of attorney fees as a result of Surety's unreasonable delay.

EXTENT OF DEFENDANTS' LIABILITY

53. *Neel v. Western Construction,* 147 Idaho 146, 206 P.3d 852 (2009), provides that a claimant is entitled to reimbursement of the full invoiced amount for reasonable medical costs incurred following a denial of further treatment. Application of *Neel* depends on finding the injured worker was forced to obtain medical care outside the workers' compensation system has, or may have, exposure to pay the full invoiced amount of medical bills incurred with connection with his treatment.

54. Here, unlike in *Neel*, there is insufficient evidence that Claimant, or any agent or insurer on his behalf, entered into any contracts for medical services outside the workers' compensation system. Idaho Orthotics entered into a contract with Surety; however, Claimant was not a party to that agreement. Neither the BiOM device nor the SCS trial was purchased outside the workers' compensation system. Claimant's associated physician appointments were apparently paid for by Surety; in any event, Claimant makes no specific argument related to diagnostic treatment associated with either device. Claimant was not at risk for any of his relevant medical payments, and there is no discount to be redeemed.

55. Claimant is not entitled to payment of the full invoiced amount of his unpaid reasonable medical expenses related to his industrial ankle injury.

CONCLUSIONS OF LAW

1. 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 a spinal cord stimulator trial from February 13, 2014 through February 27, 2014.

2. Claimant has proven that he is entitled to attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable delay in adjusting his claim for a BiOM

prosthesis from April 2, 2013 through April 4, 2014, and for its unreasonable denial of that claim, from January 17, 2014 through April 4, 2014.

3. Claimant has failed to prove that he is entitled to reimbursement for the full invoiced amounts of his medical bills. Defendants are liable for Claimant's medical costs consistent with the applicable medical fee schedule.

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 __22nd____ day of September, 2014.

INDUSTRIAL COMMISSION

__/s/_____
LaDawn Marsters, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __26th_____ day of __September___, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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