

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARILYN MORENO-BROWN,

Claimant,

v.

FIRST AMERICAN,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Surety,
Defendants.

IC 2008-018879

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

FILED JUNE 2 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on January 29, 2013. Robert Nauman represented Claimant. Alan Hull represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on March 4, 2014 and is now ready for decision.

ISSUES

At hearing the parties agreed that the sole issue was causation:

Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident.

The briefs make clear that the issue is whether Claimant's surgery and need for a second surgery were compensably related to the industrial accident. Other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends that she injured her low back when she fell from the steps of a school bus. Defendants accepted Claimant's claim and paid benefits until Claimant required surgery. The need for surgery was caused by the industrial accident. Claimant recovered

from the surgery and showed gradual improvement, but an unforeseen underlying condition caused her spine to destabilize following the surgery. Defendants do not dispute that a second surgery is required as a consequence of the first surgery. Claimant is entitled to medical care and time loss benefits for the first surgery continuing through the anticipated second surgery. The surgeon, R. Tyler Frizzell, M.D., was a treating physician within the chain of referral. If the Commission deems he was not within the chain of referral, the criteria of *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989) have been met to establish that the surgery constituted reasonable medical care under Idaho Code 72-432.

Defendants contend Claimant has received all benefits due her. Claimant completed a LifeFit program and was deemed medically stable. Treating physicians opined she was not a surgical candidate. Claimant sought Dr. Frizzell outside the chain of referral. Her need for surgery was not caused by the industrial accident. Moreover, under the factors of *Sprague*, Claimant did not show gradual improvement; her need for a second surgery is further evidence that the first surgery did not constitute reasonable medical care.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Joint exhibits 1 through 34 admitted at hearing; and
3. Depositions of treating surgeon R. Tyler Frizzell, M.D., volumes I and II, of neurosurgeon Paul Montalbano, M.D., of orthopedic surgeon Brian Tallerico, D.O., and of psychologist Michael McClay, Ph.D.

Objections made in depositions are OVERRULED. A motion to strike is DENIED.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

The Accident

1. Claimant worked as a school bus driver. On May 27, 2008 Claimant had driven her empty bus to a location convenient to begin the day's route. Having a few minutes available, she began sweeping out her bus. Sweeping one's bus was a job requirement to be performed before the bus was returned to the yard at the end of each day.

2. It was raining that morning. As Claimant swept dust and debris down the metal steps at the forward entrance to the bus, she slipped on a wet spot and fell. She landed on her back on the top step and slipped downward to the ground outside bouncing down the steps as she went.

3. She lay on the ground for an interval, perhaps 20 minutes, before she could collect herself and return to her bus. When she was able to get back in the bus, she immediately notified Employer. After discussion, she completed her morning route. She then returned to the yard and did not drive her afternoon route.

2008 Medical Care

4. Claimant passed her medical examination as a commercial driver just two months before the industrial accident. Both she and the physician reported no health issues related to her back.

5. Claimant visited Primary Health in Boise on the afternoon of the accident. Francis Palmer, M.D., examined her and noted small bruises on her back consistent with her description of the accident. X-rays of her thoracic and lumbar spine showed no fracture or malalignment.

6. On May 29 Claimant visited Primary Health in Boise, despite having been referred to the Nampa location. Pain medication was administered.

7. On May 29 Claimant visited Primary Health in Nampa and saw nurse practitioner Jeffrey Robbins, FNP. He ordered an MRI which showed, "Slight disc degeneration of L4-5 with a tiny 1 mm annular tear and protrusion in the left foramen without significant foraminal compromise or nerve root impingement." He referred Claimant to Michael Sant, M.D.

8. On June 5 Claimant telephoned NP Robbins. She reported that Dr. Sant's office was unable to see her promptly. She asked if NP Robbins would refer her to Dr. Frizzell. NP Robbins follow-up got her a prompt appointment with Mark Harris, M.D. Dr. Harris and Dr. Sant are in practice with Nancy Greenwald, M.D.

9. On June 11 Dr. Harris first examined Claimant. He believed Claimant's pain was myofascial or musculoskeletal without radiation or neurogenic symptoms.

10. A July 24 ER visit received a diagnosis of sciatica. Essentially, she visited because she had run out of pain medication and Dr. Harris was unavailable.

11. She saw Dr. Harris on July 26. She had developed left leg radiation with some nerve root irritation. Dr. Harris administered an epidural steroid injection on June 27. At the next visit on July 17 Claimant reported the injection provided five or six days of relief. Thereafter she felt worse than before the injection. Physical therapy and home exercises in the interval had helped some. A second injection was administered on July 31.

12. Claimant next visited Dr. Harris on August 19. A nurse case manager was present. A Medrol Dosepak was prescribed. Her physical therapy referral was changed because she felt she had been injured by the first therapist.

13. Another MRI on August 27 showed the L4-5 abnormality more clearly. Dr. Harris ordered more injections as a prerequisite to consideration of potential surgery.

14. On September 11 Dr. Harris recorded, "She has been referred to Dr. Tyler Frizzell

for a second opinion and possible surgical evaluation and we are still waiting for authorization for that.” On this and subsequent treatment notes, Dr. Harris “cc’d” Dr. Frizzell. In depositions, Dr. Frizzell twice testified that Dr. Harris had provided the referral to him for treatment.

15. Claimant visited Dr. Frizzell’s office on September 15. Dr. Frizzell wrote Dr. Harris on September 18, recounting the examination. He recommended surgery.

16. On September 19 Dr. Montalbano wrote Dr. Harris thanking him for referring Claimant to Dr. Montalbano for a neurosurgical consultation. Oddly, Dr. Harris’ records do not show—or even suggest—that he made this referral. Moreover, Dr. Montalbano asked Dr. Harris to perform neurologic testing. Dr. Montalbano then stated he, Dr. Montalbano, would provide follow-up care.

17. On September 24 Dr. Harris performed an EMG and nerve conduction study. Dr. Harris summarized it as “largely nondiagnostic.” The document shows Dr. Harris viewed this to be a situation in which Dr. Montalbano was referring Claimant to Dr. Harris for this testing.

18. On October 20 Dr. Frizzell corresponded with Dr. Harris. In passing, Dr. Frizzell thanked Dr. Harris for the referral.

19. On October 23 Dr. Harris, for the first time, included notes suggesting Claimant’s complaints were “actually very exaggerated.” Dr. Harris recommended that Howard King, M.D., perform an IME.

20. On October 27 Dr. Frizzell’s notes show receipt of a letter from Surety stating Dr. Frizzell is not the authorized treating physician.

21. On a November 20 visit Dr. Harris noted that the Surety refused to allow the IME by Dr. King. Dr. Harris recommended consideration of a WorkFit program.

22. On a December 18 visit Dr. Harris noted that the Surety had reversed position; the IME by Dr. King was on again. He noted that the WorkFit program could have been completed in the time it took the Surety to schedule an IME. He noted Claimant was limping on the wrong leg. He noted Claimant's toxicology screen was negative for all medications, including the pain killers she was supposed to be taking by prescription.

2009 Medical Care

23. On January 6 a repeat toxicology screen was positive for prescription medications.

24. Also on January 6 Howard King, M.D., examined Claimant at Surety's request. He opined Claimant's back pain was related to the industrial accident. He opined she was not a surgical candidate. He expressed concern about her leg pain as possibly arising from a vascular condition. He recommended additional diagnostic and medical care as well as pain management by Dr. Harris. He suggested consideration of a LifeFit or WorkFit program.

25. Dr. Harris examined Claimant on January 29 in anticipation of entering a WorkFit program. He did not see her again until March 17, 2010.

26. Claimant began the WorkFit program on February 9. Emphasis was toward weaning her from narcotic pain medications and improving physical function and stamina. Near completion of the program, Dr. Greenwald approved a job site evaluation to allow her to return to work as a school bus driver.

27. On February 25 Dr. Greenwald performed an examination for rating permanent impairment. Dr. Greenwald opined Claimant "will be at MMI" in two days upon completion of the WorkFit program. Dr. Greenwald imposed 30 days of restrictions to be lifted thereafter. A repeat toxicology screen was consistent for Oxycontin metabolites, but negative for Norco which should also have been present.

28. A March 2 treatment with Mark Clinger, M.D., was related to her back pain.
29. Throughout the Fall and Winter of 2008-2009, Claimant continued to treat with Dr. Frizzell. Dr. Frizzell noted ambiguous findings over various visits and delayed surgery.
30. On June 4 James Whiteside, M.D., provided treatment for her back. He recommended Claimant be seen by Dr. Frizzell for consideration of surgery.
31. A July 20 MRI showed little or no interval change. Nevertheless, it provided Dr. Frizzell the objective evidence he needed to perform surgery.
32. Dr. Frizzell performed surgery on July 29. He performed an L4-5 foraminotomy and microdiscectomy. In surgery he found a disk fragment compressing the L4 nerve root. He removed it and other noncontributory loose fragments.
33. On August 2 Claimant visited an ER with increasing back pain. An MRI suggested infection was present. Claimant was particularly attentive to the possibility of infection because her husband had contracted MRSA in the past.
34. On August 7 Dr. Clinger provided the first of several post-surgical follow-up visits. Claimant's radiculopathy had resolved. Her back condition waxed and waned thereafter, with additional unrelated complicating conditions. Dr. Clinger provided trigger point injections and medication along with other conservative treatment.
35. On August 11 Dr. Frizzell noted substantial improvement.
36. On September 17 Dr. Frizzell noted continued improvement. He gave her a return-to-work date. He referred Claimant back to Dr. Harris for an SI injection. Claimant did not follow through.
37. Upon returning to work, Claimant began noticing new symptoms which Dr. Frizzell attributed to the fact that she was deconditioned and suddenly was sitting for

a nine-hour day.

38. On October 22 Claimant visited an ER with a five-day history of increased pain and pressure in her low back and swelling in her lower extremities. An MRI showed expected surgical changes and decreasing edema.

2010 Medical Care

39. Claimant visited Dr. Harris in March and April for treatment. He recommended and administered SI joint injections. He opined her back condition was causally related to the industrial accident. He did not separate the industrial accident from the first surgery. His April 15 letter to Surety indicates he considered the first surgery to be causally related to the accident. He opined she was not yet medically stable and commented “So far, treatment has been very difficult given the inability to have medications authorized.”

40. On June 18 Dr. Montalbano thanked Surety for an IME referral. Despite having established a treating physician relationship with Claimant in 2008, he proceeded as if none had been established. He recommended another MRI before he could render opinions. On July 8 he noted the MRI showed evidence of disc herniation with compression of the left L4 nerve root. He opined that her condition was unrelated to the industrial accident. He opined that the first surgery was unrelated to the industrial accident.

41. On December 3 an MRI showed scar tissue, foraminal stenosis, and severe left facet hypertrophy, mild to moderate on right. Claimant visited an ER two hours later with vague symptoms including a cough. A possible allergic reaction to the contrast medium was considered.

42. On December 20 facet joint injections were administered.

2011 Medical Care

43. On January 11, after significant conservative care and a bone scan, Dr. Frizzell

recommended a second surgery, a lumbar fusion.

44. On September 7, 2011, Dr. Montalbano was asked again to perform an IME for Defendants. This date represents the first written request for IME in evidence. Dr. Montalbano examined Claimant and ordered an MRI and X-rays before offering an opinion. On September 26 he opined a fusion was appropriate. On October 19 he opined the need for it was unrelated to her industrial accident. He opined she remained at MMI and had no work restrictions relating to the industrial accident.

45. On October 31 Claimant visited an ER relating to a longstanding pancreas condition. On this occasion she reported the epigastric pain radiated to her back. Nevertheless, neither this visit nor this condition appears to be related to her industrial injury. No physician has opined otherwise.

Expert Opinions

46. Dr. Frizzell opined that Claimant's need for the first surgery was caused by the industrial accident. He opined that her back condition as it existed on January 21, 2010 was related to her industrial accident. He opined that her need for a fusion is related to the industrial accident and first surgery.

47. Dr. McClay evaluated Claimant for purposes of the WorkFit program. He opined that her psychological profile did not disqualify her from the program.

48. Dr. Montalbano opined that Claimant's first surgery was not related to the industrial accident. He opined that she needs the second surgery but that it is entirely related to sequelae of the first surgery, not to the industrial accident.

49. On December 13, 2012, Brian Tallerico, D.O., examined Claimant for an IME at Defendants' request. He opined that Claimant suffered merely a lumbar strain and superficial bruise from the accident "which should have resolved within a few weeks following the injury."

He opined that the disk bulge and annular tear were unrelated to the accident; he characterized the tear as “an incidental finding”. Therefore, he opined, the surgery to alleviate the consequences of the tear—the disc fragments and nerve root compression—were also unrelated to the accident. Claimant’s ongoing complaints of back pain, dysfunction, radiculopathy, etc., were similarly unrelated to the accident. He disagreed with Dr. Montalbano’s opinions only about whether a second surgery should be recommended; Dr. Tallerico was against it.

Other History and Medical Care

50. Claimant previously suffered shoulder and ankle injuries as well as cardiac and other medical conditions which do not bear on the issue litigated. Some of these continued and she received treatment for some of these during the recovery period following the industrial injury.

51. Additional medical conditions—unrelated to her low back—arose and were treated after the industrial accident.

52. Claimant previously has been diagnosed as having fibromyalgia and has received prescriptions for antidepressants and anti-anxiety medications. Dr. McClay opined that Claimant’s psychological testing and history suggest a statistically increased possibility of a less than optimal surgical result. He did not opine it likely that Claimant’s psychological factors would likely cause a poor surgical result.

DISCUSSION AND FURTHER FINDINGS OF FACT

53. 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).

54. Claimant appears credible at hearing. She is an average historian. She does not

appear to be intentionally exaggerating her history or symptoms. Her testimony is largely consistent with the available record.

Causation

55. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician’s testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor’s conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

56. The record shows a number of reasons why Defendants may have been skeptical about Claimant’s condition and claim: She had worked for Employer for less than two months before she had an unwitnessed accident; she has a history which suggests a predisposition to over report pain; her first post-accident MRI showed only a one millimeter tear in the L4-5 annulus which did not clearly impinge a nerve root; her symptoms and complaints were somewhat ambiguous as to whether a true radiculopathy versus a peripheral neuropathy was present; drug tests suggested she may not have been taking all of the prescribed painkillers; other facts were similarly inconsistent or ambiguous.

57. However, a number of facts support the compensability of Claimant’s claim and condition: Claimant reported the accident promptly and consistently described it;

the treating physician on the date of the accident saw obvious bruising on her back which was consistent with her description of the accident; her medical records do not show any significant history of back pain before the accident; the annulus tear shown in the first post-accident MRI was as likely to represent a traumatic event as a degenerative one; as time went on, some complaints and symptoms became more consistent with a nerve root impingement while others became more consistent with other unrelated medical problems and conditions, and it became easier to sort and separate which were which; when Dr. Frizzell performed surgery, he saw and reported a disk fragment impinging the nerve root; he removed it and her radicular symptoms abated almost immediately.

58. This is a case in which two experts' opinions do not outweigh one. Dr. Frizzell was in a more timely position to evaluate Claimant over time. Dr. Montalbano's sporadic visits do not, in this case, counterbalance Dr. Frizzell's continuing treatment. Moreover, Dr. Frizzell was the only physician to actually observe the fragment impinging the nerve root. Dr. Frizzell was in the best position to opine about the nature and cause of Claimant's injury. Dr. Frizzell's operative record and testimony outweigh the ambiguities and inconsistencies perceived by other treating physicians and IME evaluators. Claimant's annular tear and impinging fragment of disk material on her nerve root was likely caused by the industrial accident.

59. Surety's position that Dr. Frizzell was not in the chain of referral is not well taken. Indications from both Drs. Frizzell and Harris show that Dr. Harris referred Claimant to Dr. Frizzell for treatment. Surety ignored this referral until after Dr. Frizzell first recommended surgery and then made the spurious claim that he was not with the chain of referral. Conversely, there is insufficient evidence of record to show how Dr. Montalbano is connected to the chain of referral. After Dr. Frizzell was recommended, Dr. Montalbano

wrote to Dr. Harris and suggested he would be taking over Claimant's treatment. Dr. Montalbano saw her only a few times, recommended against surgery, and then faded from view until brought back on two separate occasions to render IME opinions favorable to Surety.

60. We find Dr. Frizzell provided treatment within the chain of authority.

61. After Dr. Frizzell first recommended surgery, continuing ambiguities and unrelated complicating conditions caused him to reevaluate that recommendation. He treated her for another several months before returning to his original recommendation. Dr. Frizzell well explained his reasoning for his course of treatment and basis for ultimately performing surgery.

62. The weight of medical opinions supports that a fusion surgery is reasonable and necessary as a consequence of the first surgery.

63. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). Dr. Harris unequivocally referred Claimant to Dr. Frizzell and was "waiting for authorization." Dr. Frizzell is a treating physician within the chain of referral. Because of this, the *Sprague* factors are not required. Nevertheless, *arguendo*, the post-surgical medical records do show Claimant immediately improved with an amelioration of her radiculopathy, then gradually improved for a significant period of time in which she returned to driving school bus. Brief setbacks or exacerbations which are commonly seen in these cases do not outweigh or disprove the evidence of a general improvement for purposes of a *Sprague* analysis.

CONCLUSIONS

1. Claimant's condition for which she received surgery in July 2009 was causally related to the May 2008 industrial accident;

2. Claimant is entitled to future medical care including a fusion surgery as a compensable consequence of the accident; and

3. Dr. Frizzell is a treating physician within the chain of referral, obviating need for a *Sprague* analysis regarding the first surgery.

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 27TH day of May, 2014.

INDUSTRIAL COMMISSION

/S/ _____
Douglas A. Donohue, Referee

ATTEST:

/S/ _____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 2ND day of JUNE, 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:

ROBERT A. NAUMAN
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BOISE, ID 83705

ALAN K. HULL
P.O. BOX 7426
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dkb

/S/ _____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARILYN MORENO-BROWN,

Claimant,

v.

FIRST AMERICAN,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Surety,
Defendants.

IC 2008-018879

ORDER

FILED JUNE 2 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's condition for which she received surgery in July 2009 was causally related to the May 2008 industrial accident.
2. Claimant is entitled to future medical care including a fusion surgery as a compensable consequence of the accident.
3. Dr. Frizzell is a treating physician within the chain of referral, obviating need for a *Sprague* analysis regarding the first surgery.

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

DATED this 2ND day of JUNE, 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 2ND day of JUNE, 2014, a true and correct copy of **ORDER** were served by regular United States Mail upon each of the following:

ROBERT A. NAUMAN
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