

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOEL BACKES,)
)
 Claimant,)
)
 v.)
)
 DEPENDABLE FABRICATION, INC.,)
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 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2007-016312

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

FILED: August 11, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d’Alene on December 20, 2010. Claimant, Joel Backes, was present in person and represented by Starr Kelso, of Coeur d’Alene. Defendant Employer, Dependable Fabrication, Inc., and Defendant Surety, Idaho State Insurance Fund, were represented by Paul Augustine, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on April 19, 2011.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether, and to what extent, Claimant is entitled to medical care for his back, neck, and left shoulder; and
2. Whether Claimant is entitled to attorney fees.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is entitled to additional medical care for his low back, neck, and left shoulder due to his industrial accident. He specifically requests a neurosurgical consult and lumbar, cervical, and left shoulder MRI scans. He alleges that he is entitled to an award of attorney fees for Defendants' failure to authorize his consultation with a neurosurgeon.

Defendants acknowledge Claimant's industrial accident, but maintain that they have provided all reasonable medical treatment needed therefor. They assert that any need for further medical care relates to Claimant's pre-existing conditions and/or subsequent events, not to his industrial accident. They deny liability for any attorney fees, asserting that they promptly authorized a neurological consultation as requested by Claimant's treating physician.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken May 26, 2009, and admitted into evidence as Defendants' Exhibit G;
3. The testimony of Claimant, Donna Cady, Travis Washburn, and Robert Lee Zahnow taken at the December 20, 2010 hearing;
4. Claimant's Exhibits A through I and Defendants' Exhibits A through H, admitted at the hearing;
5. The post-hearing deposition of Roger C. Dunteman, M.D., taken January 24, 2011;
6. The post-hearing deposition of Bret A. Dirks, M.D., taken January 27, 2011;
7. The post-hearing deposition of J. Craig Stevens, M.D., taken February 7, 2011.

All objections posed during Dr. Dunteman's deposition are overruled except Defendants' objection to testimony by Dr. Dunteman about whether Claimant should have MRIs as posed at page 20 thereof, which is sustained because Dr. Dunteman was not disclosed to testify to those

issues. All objections posed during Dr. Dirks' deposition are overruled. All objections posed during Dr. Stevens' deposition are overruled except Defendants' objections posed at pages 42 and 59 thereof, which are sustained.

Claimant's Motion to Reopen Evidence and Allow Introduction of Dr. Dunteman's Referral to Dr. Dirks Pursuant to [J.R.P. 10(C)(2)], filed May 12, 2011, is denied and Defendants' objection thereto, filed May 24, 2011, is sustained pursuant to J.R.P. 10(C). Claimant himself testified that the document he now attempts to offer as an exhibit has existed since 2007 and he has ostensibly had possession of the document since 2007. Although he may have only recently located the document among his belongings, all indications are that the proposed exhibit existed long prior to 10 days before hearing.

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

FINDINGS OF FACT

1. Claimant was 58 years old at the time of the hearing. He was born in Kansas and completed his junior year in high school. He received his GED in 1971 and joined the United States Army, where he served as a wheeled vehicle mechanic for six years in Vietnam. He was honorably discharged in 1977.

2. In approximately 1990, Claimant commenced working for Atlas Pellets. He worked for Atlas Pellets for 16 years as a bagger and loader and, eventually, as a millwright.

3. Claimant treated at the V.A. Medical Center from time to time for post-traumatic stress disorder resulting from his military service and other health issues. In January 2001, surgeon Henry Benson, M.D., at the V.A. Medical Center, recorded that Claimant had chronic back and hip pain.

4. In January 2006, Claimant commenced working for Dependable Fabrication as a laborer, earning \$10.00 per hour and working 40 hours per week. He unloaded steel and cut it to specifications for use by welders and fabricators.

5. No later than 2006, Claimant was diagnosed with a lipoma on his back. On January 2, 2007, Dr. Benson advised Claimant that his back lipoma was not involved in his chronic back and hip pain.

6. On February 2, 2007, Claimant presented to Susan Williams, R.N., and complained of throbbing, constant right hip and back pain, which he rated at seven out of ten.

7. In March 2007, Dr. Benson surgically removed the lipoma from Claimant's back. Dr. Benson noted that this would not lessen Claimant's chronic back pain.

8. On April 20, 2007, Claimant was working for Employer installing a sign. He climbed approximately seven or eight feet up on a three-legged ladder. One ladder leg broke, and Claimant fell onto the concrete sidewalk on his left side. He sustained abrasions on his head, left hip, left hand, and left shoulder. Paramedics placed him in a cervical collar and he was taken by ambulance to the Kootenai Medical Center. At the emergency room, he reported neck discomfort, head, left arm, and left hip pain, and some mild soreness in his left shoulder. He had contusions of his left shoulder and left hip. Claimant reported hitting his head, but denied loss of consciousness; however, at hearing he testified that he might have blacked out for a few seconds. Claimant had good range of motion in his hip. His neck exam revealed no significant neck tenderness, and his back exam was benign. X-rays of Claimant's left shoulder, left hip, and neck were negative. His cervical x-rays were normal except for moderate spondylitic spurring at C4-5 anteriorly. Left wrist x-rays revealed a left distal radius fracture and Claimant was referred to board certified orthopedic surgeon Roger Dunteman, M.D.

9. On April 23, 2007, Claimant presented to Dr. Dunteman, who took further wrist x-rays and recommended surgical treatment of the left wrist fracture. At that visit, Claimant denied any other injuries. On April 26, 2007, Dr. Dunteman completed a surgical open reduction and internal fixation of Claimant's left wrist fracture.

10. On May 9, 2007, Claimant presented to Mark Fickert, P.A., who recorded his report of low back and left hip pain. There is no mention of neck or left shoulder symptoms. Fickert referred Claimant for low back and left hip x-rays. The x-rays were read as negative. Claimant's back x-rays revealed normal alignment, with mild degenerative changes and disc space narrowing at L2-3 to L5-S1 and mild anterior osteophytes in the lumbar and lower thoracic spine.

11. On May 16, 2007, Dr. Dunteman recorded that Claimant had moderate pain in his left wrist, headaches, blurred vision, and pain in his left hip and lower back. He noted that Claimant reported "numbness when he lays down in the front of the leg." Claimant's Exhibit B, p. 19. Claimant did not report any neck or shoulder pain. Dr. Dunteman carefully reviewed prior x-rays of Claimant's left hip and low back and noted that they revealed mild osteoarthritis and mild degenerative disk disease, respectively. Dr. Dunteman prescribed physical therapy and recorded that he was going to refer Claimant to a neurosurgeon for evaluation of his back and headaches.

12. Claimant testified that Dr. Dunteman provided him a written referral to neurosurgeon Bret Dirks, M.D. Dr. Dirks did not then keep copies of his written referrals, nor did Dr. Dunteman. Claimant never provided Defendants with a referral to Dr. Dirks. Claimant was never examined or treated by Dr. Dirks. Defendants apparently received a handwritten fax cover sheet from Dr. Dunteman's office on May 16, 2007, stating: "Dr. Dunteman is requesting neurological consult for Joel Backes #200707803 for his headaches. Thank you." Claimant's Exhibit B, p. 18. Dr. Dunteman's chart notes of May 16, 2007, were apparently attached to the cover sheet and faxed to Defendants that same day. The chart note indicated: "we are going to refer him to a neurosurgeon for evaluation of his back and headaches." Claimant's Exhibit B, p. 19. In accordance with the handwritten cover sheet from Dr. Dunteman's office, Defendants apparently arranged for Claimant to be examined by neurologist James Lea, M.D. Defendants never received a referral to Dr. Dirks nor a request from any physician for authorization for an MRI.

13. Claimant testified that he went to Dr. Dirks' office with his referral slip in hand, but Dr. Dirks' receptionist telephoned the Surety's adjustor, Donna Caddy, who declined to pay for an examination by Dr. Dirks.

14. Dr. Dunteman examined Claimant again on May 30, 2007, and noted that his left wrist continued to heal. He recommended physical therapy. Dr. Dunteman made no record of any shoulder symptoms.

15. On June 4, 2007, Claimant presented to Daniel Keele, PA-C, at the V.A. Medical Center for a routine visit. Claimant reported his recent left wrist fracture and reasonably controlled depression. He also reported an aching back and left wrist pain at four out of ten. He denied any other medical problems at that time.

16. Claimant attended physical therapy as prescribed by Dr. Dunteman from approximately June 11 through August 8, 2007. However, his attendance was sporadic and he missed a number of scheduled physical therapy sessions.

17. On June 19, 2007, neurologist James Lea, M.D., examined Claimant. The Surety authorized and paid for Claimant's visit to Dr. Lea. Dr. Dunteman later testified that he did not know how Claimant was referred to Dr. Lea. However, following the examination, Dr. Lea addressed correspondence to Dr. Dunteman reporting his examination and recommendations for Claimant and thanking Dr. Dunteman for the referral. Dr. Lea recorded Claimant's complaints of headaches and neck and back pain, noting that the "pain in the back does not radiate down into the legs although occasionally he has tingling of the anterior thighs." Defendants' Exhibit F, p. 1. Claimant did not report any shoulder discomfort. Claimant falsely told Dr. Lea that he had never had back pain prior to his industrial accident. Dr. Lea examined Claimant's neck, noting that Claimant had fairly good neck range of motion without pain. He also examined Claimant's back and recorded that Claimant's motor exam revealed normal tone, strength, and bulk throughout, Claimant's reflexes were 2+ throughout, and straight leg raising tests were negative bilaterally.

Dr. Lea concluded that Claimant's cervical and low back problems were probably simply strains and there was no clinical evidence of radiculopathy. Dr. Lea ordered a CT head scan, which ruled out subdural hematoma. Dr. Dunteman received Dr. Lea's report, and Dr. Dunteman's records document no further referral or request for a neurosurgical consultation.

18. On August 21, 2007, Claimant underwent left ankle x-rays after he rolled his ankle. The x-rays were normal.

19. On September 4, 2007, Claimant returned to the Kootenai Medical Center emergency room for low back pain. He reported that standing for more than 20 minutes produced front thigh discomfort, including pins and needles. Claimant did not report any shoulder or neck symptoms. Upon examination, Claimant's neck was supple and he had no leg weakness. The emergency room physician, Mark Manteuffel, M.D., found negative straight leg raising, symmetric lower extremity reflexes, and no neurologic deficits. He concluded that if symptoms persisted, "an MRI might be warranted, but at this juncture there is no evidence of neurologic deficit." Claimant's Exhibit A, p. 14.

20. Also on September 4, 2007, Claimant presented to the V.A. Medical Center emergency room and reported cramping, burning sacral and lumbar pain at a level of seven out of ten for the prior two weeks. He denied any specific trauma but reported doing some yard work over the prior two weeks. He denied any radiculopathy or referred pain.

21. On September 5, 2007, Claimant presented to Dr. Dunteman reporting slight grip weakness and some persisting left wrist discomfort. X-rays showed that his left wrist fracture was healed. Dr. Dunteman recommended that Claimant be seen for a functional capacity evaluation or an independent medical evaluation (IME). There was no report of neck, back, or shoulder pain. On October 3, 2007, Dr. Dunteman examined Claimant again and found his grip strength weaker. Dr. Dunteman discussed Claimant's work situation and determined to await the results of a forthcoming independent medical evaluation. There was no report of neck, back, or shoulder pain.

22. On October 10, 2007, Claimant was examined and evaluated by J. Craig Stevens, M.D., at Defendants' request. He tested Claimant's grip strength and sensation. Claimant did not recall any other testing except that Dr. Stevens pressed on the top of his head, which Claimant later testified caused neck pain. Claimant testified that Dr. Stevens did not examine his leg, shoulder, or back. However, Dr. Stevens recorded Claimant's complaints of left wrist pain, occasional left hand numbness and tingling in a vague distribution, low back pain, and episodic numbness and tingling into the legs generally over the anterior aspect of the thighs. He reported that Claimant exhibited normal cervical range of motion with intact cranial nerves II-XII, full left shoulder range of motion (including flexion and abduction to 180 degrees and external rotation to 75 degrees), global left arm muscle group weakness not confined to a discrete peripheral nerve pattern, tenderness to lumbar paraspinal palpation, and negative straight leg raising bilaterally at 90 degrees while seated, but low back pain with straight leg raising bilaterally at 60 degrees while supine. Dr. Stevens found positive Waddell signs. He reported on Claimant's lumbar lordotic curve, forward flexion, extension, and lateral flexion. He concluded that Claimant's left shoulder contusion had resolved and that his cervical and lumbar pain probably constituted strains, which had all resolved. He also noted a very significant degree of inconsistency between the active and passive ranges of motion in Claimant's left wrist. Dr. Stevens rated Claimant's left wrist impairment at 1% of the whole person and recommended a cortisone injection for Claimant's wrist. There was no reference to any neck symptoms. Dr. Stevens released Claimant to return to full work duty without restrictions. The Referee finds Dr. Stevens' records and subsequent testimony more reliable than Claimant's memory and concludes that Dr. Stevens evaluated Claimant as described in his October 10, 2007 report.

23. On October 26, 2007, Dr. Dunteman discussed Dr. Stevens' evaluation and findings with Claimant and administered the recommended cortisone injection. On November 1, 2007, Dr. Dunteman agreed with Dr. Stevens' findings, but wanted to allow time to see whether the cortisone injection would be beneficial before determining Claimant's lifting restrictions for work.

24. On November 16, 2007, Dr. Dunteman examined Claimant and noted improvement after the cortisone injection, but continued Claimant's restrictions against heavy lifting with his left arm due to his prior left wrist fracture. Dr. Dunteman opined that by February 16, 2008, Claimant should be able to return to full-duty work. There was no report of neck, shoulder, or back pain.

25. On April 21, 2008, Dr. Dunteman noted that Claimant "presents today with a chief complaint of Other [sic] problems reported f/u in the left shoulder, arm, wrist, low back and thigh." Claimant's Exhibit B, p. 29. There is no record of neck complaints. Dr. Dunteman examined Claimant and recommended removal of his left wrist hardware. Defendants approved the hardware removal. Surgery was scheduled for June 10, 2008. However, Claimant failed to attend his pre-operative appointment on June 4, 2008, forcing Dr. Dunteman to cancel the scheduled surgery.

26. Sometime after his industrial accident, Claimant fell down approximately five steps to his basement at home and his back pain worsened. He testified that his left knee buckled, causing his fall. He went to Kootenai Medical Center for treatment, but admitted that he did not produce the medical record of that visit to Defendants.

27. Approximately June 14, 2008, Claimant presented at the Kootenai Medical Center emergency room with left shoulder pain and underwent left shoulder x-rays. This was shortly after he was handcuffed in connection with a domestic incident. His left shoulder x-rays were normal.

28. On June 22, 2008, Claimant presented to the V.A. Medical Center complaining of left shoulder pain for the prior two weeks and right knee pain for three weeks from working on his knees on his job. He was diagnosed with a knee contusion and shoulder pain. Claimant later denied telling the V.A. physicians that he had injured his right knee while working.

29. At his deposition on May 26, 2009, Claimant denied working after his industrial accident. However, at hearing, where his stepson Travis Washburn was subpoenaed to testify,

Claimant acknowledged that he worked about six weeks helping lay carpet and about one month helping in metal fabrication and delivery driving. Washburn testified that Claimant never complained of back or shoulder pain while working for him.

30. On July 19, 2008, Claimant presented at the V.A. Medical Center complaining that he injured his left wrist and thumb that same day while taking up carpet.

31. On July 29, 2008, Claimant's counsel wrote Defendants requesting that Claimant's back be evaluated by an orthopedic surgeon. On August 13, 2008, Defendants denied this request, in reliance upon Dr. Stevens' report and citing Claimant's non-compliance with his medical treatment and failure to attend his pre-surgery appointment with Dr. Dunteman, an orthopedic surgeon, for the removal of his left wrist hardware.

32. On August 18, 2008, Claimant presented to the V.A. Medical Center reporting chronic left shoulder and lower back pain intermittently for the prior 20 months. However, he denied any known injury. He did not report any neck symptoms. Claimant was examined by Lloyd Witham, M.D., who noted Claimant's discomfort in his left wrist and recommended hardware removal.

33. On August 21, 2008, Claimant's counsel wrote Defendants again, requesting that Claimant's back be evaluated by an orthopedist.

34. On December 9, 2008, Claimant presented to the V.A. Medical Center and was diagnosed with chronic back pain and bronchitis. He did not report neck or shoulder symptoms.

35. On December 31, 2008, Claimant presented to the V.A. Medical Center and reported low back pain at six out of ten, which he attributed to an accident or injury. He also reported shoulder pain. However, on examination, he had good range of motion and no particular left shoulder tenderness. He did not report neck pain and demonstrated full range of neck motion.

36. On January 21, 2009, a V.A. Medical Center psychiatrist diagnosed Claimant with moderate recurrent major depression.

37. On February 2, 2009, Claimant presented to the V.A. Medical Center with left wrist pain complaints. He was advised that one screw was backing out of the plate in his left wrist, causing hardware bursitis. He also underwent lumbar spine x-rays at the V.A. Medical Center, which revealed mild degenerative disk disease including mild degenerative facet changes in the lower lumbar region and degenerative disk changes from L2 down to L5 with slight disk space narrowing and some anterior osteophytes. Defendants' Exhibit C, p. 11.

38. On March 12, 2009, Claimant was examined at the V.A. Medical Center for cough and upper respiratory infection. He reported that he had no pain issues.

39. On April 8, 2009, Claimant presented at the V.A. Medical Center and reported that his Flexeril prescription was not alleviating his spasms.

40. On April 20, 2009, Claimant was examined at the V.A. Medical Center and reported that he had no pain issues.

41. On July 23, 2009, Claimant's left wrist hardware was removed by Jeffrey Bert, M.D., at the South Coast Surgery Center in Coos Bay, Oregon.

42. On September 21, 2009, Claimant presented to Dr. Bert in follow-up to his left wrist hardware removal. Dr. Bert noted that Claimant had a "very weak grip; however, he has calluses on his hand and I am not sure I am getting a full effort here." Claimant's Exhibit G, p. 138. Dr. Bert had previously given Claimant a prescription for physical therapy. He noted that Claimant had not yet attended therapy and was a little vague about why he had not attended. Dr. Bert strongly encouraged Claimant to participate in therapy to regain full left hand function.

43. On September 24, 2010, neurosurgeon Bret Dirks, M.D., responded to correspondence from Claimant's counsel opining that, based upon the records Dr. Dirks had reviewed and as a result of Claimant's industrial accident, it would be reasonable and necessary medical care for Claimant to undergo lumbar, cervical, and left shoulder MRIs due to his persistent lumbar, cervical, and left shoulder symptoms.

44. Claimant's credibility is crucial to the issues currently before the Commission. Claimant testified in his deposition that he had not worked since the date of his industrial accident and had no source of income other than unemployment and workers' compensation benefits. However, at hearing he acknowledged that he had worked for two different employers for at least one month each and also delivered papers since his accident. In his deposition, Claimant denied any further accidents after his industrial accident. However, at hearing he acknowledged that subsequent to his industrial accident he fell down approximately five stairs and sustained increased back pain. At hearing, Claimant admitted that he did not disclose in discovery his involvement in any other litigation when, in fact, he was involved in a third-party suit arising from his industrial accident. At hearing he initially denied, then admitted, his conduct in a domestic incident. Both Dr. Stevens and Dr. Bert commented on Claimant's inconsistent attendance at physical therapy and his inconsistent performance during evaluation, which led them to expressly question whether he was giving full effort. Claimant refused to sign a release to allow Defendants' adjustor to access his V.A. medical records which, when ultimately obtained, documented his repeated complaints of low back and hip pain to his V.A. physicians well prior to his industrial accident and the absence of reports of back, neck, and shoulder pain for various periods after his industrial accident. At hearing, Claimant denied chronic low back pain prior to his industrial accident even though reports of back pain are clearly and repeatedly documented in his V.A. medical records.

45. Having reviewed the evidence, observed Claimant at hearing, and considered his testimony, the Referee finds that Claimant is not a credible witness.

DISCUSSION AND FURTHER FINDINGS

46. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

47. **Additional medical care.** The first issue is whether Claimant is entitled to additional medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. However, an employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Thus, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

48. In Sprague v. Caldwell Transportation, 116 Idaho 720, 722-723, 779 P.2d 395, 397-398 (1989), the Court held that medical treatment already received is reasonable when: 1.) the claimant made gradual improvement from the treatment; 2.) the treatment was required by the claimant's physician; and 3.) the treatment was within the physician's standard of practice, the charges for which were fair, reasonable, and similar to charges in the same profession. The Court has announced no similar standard for prospective medical treatment; thus, Sprague provides some guidance but the instant case must be judged on the totality of the circumstances. Ferguson v. CDA Computone, 2011 IIC 0015 (February 25, 2011) and Richan v. Arlo G. Lott Trucking, Inc., 2001 IIC 0008 (February 7, 2011). It is important to note, however, that in both

Richan and Ferguson, it was not disputed that the condition for which treatment was sought was causally related to the accidents at issue in those cases. What was at issue was whether the claimant was entitled to a particular type of treatment for an otherwise compensable condition. Conversely, in the instant matter causation is central to the dispute.

49. In the present case, Claimant asserts entitlement to additional medical care for his low back, neck, and left shoulder. He specifically alleges that evaluation by a neurosurgeon is reasonably required medical treatment necessitated by his industrial accident. He has also requested MRIs of his left shoulder and cervical and lumbar spine. Defendants argue that Claimant has not proven that the additional medical care he desires is related to his industrial accident.

50. Progression of back, neck, and shoulder complaints. Claimant's medical records establish patterns which are significant to his assertions herein regarding the causation of his current lumbar, cervical, and left shoulder conditions and his present need for additional treatment. Although Claimant repeatedly denied any pre-existing low back pain, his V.A. medical records clearly establish that he suffered chronic low back pain commencing no later than 2001—six years before his industrial accident. By February 2007—less than three months before his industrial accident—Claimant described his low back pain as constant and rated it at seven out of ten. Lumbar spine x-rays taken within three weeks after the industrial accident revealed degenerative changes, including mild anterior osteophytes in Claimant's lumbar and lower thoracic spine. Thus, the medical records show that his back pain was persistent and significant well before his industrial accident. Two years after his accident, when examined at the V.A. Medical Center on December 31, 2008, Claimant reported back pain at six out of ten—less severe than before his industrial accident.

51. Claimant's cervical complaints waned noticeably shortly after his industrial accident. Cervical x-rays taken the day of Claimant's accident revealed the degenerative condition of moderate spondylitic spurring at C4-5 anteriorly. Following his initial examination on the day of his accident, Claimant apparently attended at least five medical appointments between April 20 and June 19, 2007, before again reporting any neck symptoms. On June 19, 2007, Dr. Lea recorded Claimant's

report of neck pain, but noted that Claimant had fairly good neck range of motion without pain. His neck was supple upon examination on September 4, 2007. After June 19, 2007, Claimant attended more than 20 medical appointments but, insofar as the Referee is able to determine from the medical records, did not report any further neck symptoms over the ensuing three years.

52. Claimant's left shoulder symptoms have waned and waxed since his accident. Following his initial examination the day of his industrial accident, Claimant apparently attended at least ten medical appointments between April 20 and October 10, 2007 with no report of shoulder symptoms. On October 10, 2007, Dr. Stevens examined Claimant and found his left shoulder contusion had resolved. Claimant's reports of shoulder symptoms reappear in medical records beginning approximately June 14, 2008, when Claimant presented to the Kootenai Medical Center emergency room reporting left shoulder pain shortly after he was handcuffed in connection with a domestic incident. Thereafter, Claimant reported left shoulder pain when examined by physicians on June 22, August 18, and December 31, 2008. Claimant then attended four more medical appointments with no report of left shoulder symptoms until October 2010.

53. Physicians' opinions. Several physicians have evaluated Claimant's present need for additional medical care, and some have opined regarding the causation of his currently reported symptoms.

54. Neurosurgeon Bret Dirks, M.D., responded to correspondence from Claimant's counsel on August 3, 2010, opining that it would be reasonable and necessary medical care for Claimant to undergo lumbar, cervical, and left shoulder MRIs due to his persistent lumbar, cervical, and left shoulder symptoms. Dr. Dirks never examined Claimant and apparently did not have the benefit of Claimant's V.A. medical records, which document Claimant's chronic back pain prior to the industrial accident. In his post-hearing deposition, Dr. Dirks reaffirmed his conclusions and noted that if Dr. Dunteman in May 2007 thought Claimant needed a neurosurgical evaluation, he needed a neurosurgical evaluation. Dirks Deposition, p. 16. Dr.

Dirks opined that Claimant probably does not need surgery, but he does need a neurosurgical evaluation. Dirks Deposition, p. 17. He opined that Claimant's fall was severe enough to cause significant damage, including accelerating normal degeneration, and that he should have had MRI scans shortly after his accident. He opined that Claimant presently needs MRIs to determine the etiology of his reported symptoms. However, Dr. Dirks testified: "Now we are three or four years later and ... he will ultimately get MRIs done. And with those MRIs the conjecture is going to be ... was this caused by the April 20th accident, or was this a long standing injury. And the answer is you're not going to know." Dirks Deposition, p. 11, l. 24 through p. 12, l. 5. He reiterated: "We don't have any diagnostic studies. So is there a left shoulder problem? I don't know. Is it a neck problem? I don't know. Is it related to the accident? You don't know. I don't." Dirks Deposition, p. 23, ll. 19-23.

55. Dr. Dunteman, a board certified orthopedic surgeon, was Claimant's treating physician. He was not aware of Claimant's chronic back pain, which pre-existed his industrial accident. Dr. Dunteman performed Claimant's wrist surgery and is an experienced shoulder surgeon, fully capable of treating Claimant's alleged left shoulder condition had Claimant reported shoulder symptoms to him. Even though Dr. Dunteman apparently intended initially to refer Claimant to a neurosurgeon in May 2007, he knew that Claimant had been referred to and examined by a neurologist, Dr. Lea. Dr. Dunteman received Dr. Lea's evaluation and made no further request for a neurosurgical evaluation. Dr. Dunteman testified that Claimant showed no neurologic deficits. He thereafter recommended that Claimant undergo an IME.

56. Dr. Lea, a neurologist, examined Claimant on June 16, 2007, and concluded that his back and neck problems from his industrial accident were probably simple strains, requiring no additional medical treatment. Dr. Dunteman had no reason to dispute Dr. Lea's conclusions in this regard. Dr. Lea did not refer Claimant for evaluation by a neurosurgeon, although Dr. Lea was qualified to judge whether neurological complaints were potentially surgical.

57. Dr. Manteuffel examined Claimant for back pain at the emergency room on September 4, 2007, and found negative straight leg raising, symmetric lower extremity reflexes, and no neurologic deficits. He concluded that there was no evidence of neurologic deficit at that time that would warrant a lumbar MRI. He did not refer Claimant for neurosurgical consultation. Dr. Dunteman had no reason to dispute Dr. Manteuffel's conclusion that Claimant displayed no neurologic deficit.

58. Claimant was examined and/or treated repeatedly by a number of medical providers from the V.A. Medical Center, including family nurse practitioners Deanna McDermott and Jana Brooks, physician Brian Hayes, and surgeon Henry Benson. Although Claimant reported various symptoms over several years after his accident, none of these practitioners ordered an MRI or requested a neurosurgical consult for Claimant's back, neck, or left shoulder conditions.

59. Dr. Stevens examined Claimant on October 10, 2007, and reviewed additional medical records on June 15, 2010, at Defendants' request. He noted that Claimant reported pain in his left wrist and thumb, frontal headaches, low back pain, and some episodic tingling in his legs. Dr. Stevens testified that Claimant exhibited inconsistent symptoms in his left shoulder range of motion and strength testing and pain complaints. He noted that Claimant's complaints did not conform to any discrete nerve root pattern. While Claimant's professed numbness in his anterior thighs could be a neurologic symptom, he had no motor weakness to objectively suggest a neurologic deficit. Furthermore, Dr. Stevens recorded inconsistencies on straight leg raising and positive Waddell signs. Dr. Stevens opined that Claimant's left shoulder contusion and lumbar and cervical strains had resolved. In his deposition, Dr. Dunteman agreed with each of these conclusions. Dr. Stevens testified that neurologists and neurosurgeons perform similar neurologic and physical examinations and that Claimant did not currently need a neurosurgical consultation.

60. Neurosurgeon Paul Montalbano, M.D., reviewed some of Claimant's medical records and opined that the x-rays of Claimant's lumbar spine performed on May 9, 2007,

shortly after his industrial accident, demonstrated degenerative changes. Dr. Montalbano reviewed Dr. Stevens' medical report and agreed with his evaluation and recommendations.

61. As previously noted, Claimant's credibility is lacking. In large part, the basis for Claimant's current request for a neurological consult is his subjective reports of pain and anterior thigh numbness and tingling, not corroborated by objectively measurable neurologic deficits. The evidence suggests that Claimant may presently need further medical treatment for his back, neck, and left shoulder. However, considering his documented pre-existing conditions, post-accident activities, and fall at home and the sporadic history of his waxing and waning complaints, the medical evidence collectively establishes that Claimant has received reasonable and necessary medical care for his back, neck, and left shoulder injuries resulting from his industrial accident. Dr. Dirks, Claimant's own medical expert, acknowledged that even if the requested MRIs were to be completed now, there would be no way to know whether any abnormalities which might be identified were caused by Claimant's industrial accident.

62. Claimant has not proven his present entitlement to additional medical care for his back, neck, or left shoulder due to his industrial accident.

63. **Attorney fees.** The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Claimant asserts his entitlement to attorney fees for Defendants' failure to authorize his examination by Dr. Dirks.

64. 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:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment

of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant 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).

65. In the present case, Claimant asserts that Defendants violated Idaho Code § 72-432(4)(a) by denying Dr. Dunteman's referral of Claimant to a neurosurgeon—Dr. Dirks. Claimant testified that Dr. Dunteman wrote him a referral to Dr. Dirks, but that when he went to Dr. Dirks' office with the referral slip in hand, Surety's adjustor, Donna Caddy, advised Dr. Dirks' receptionist via telephone that the Surety would not pay for an examination by Dr. Dirks. Even accepting Claimant's testimony on this point as credible, the time of the alleged refusal—whether occurring prior or subsequent to Dr. Lea's scheduled or actual examination of Claimant—is not clear. However, it is clear that Defendants never received a referral for Claimant to Dr. Dirks by Dr. Dunteman or anyone else and were never asked by any physician to authorize an MRI. It is also clear that Claimant never provided Defendants with a referral slip to Dr. Dirks. Furthermore, it is clear that Claimant thwarted Defendants' access to Claimant's V.A. medical records prior to the commencement of litigation herein by refusing to provide a release when requested by Caddy.

66. As noted previously, Defendants received a handwritten fax cover sheet from Dr. Dunteman's office on May 16, 2007, stating: "Dr. Dunteman is requesting neurological consult for Joel Backes #200707803 for his headaches. Thank you." Claimant's Exhibit B, p. 18. Dr. Dunteman acknowledged that the handwritten fax requested a referral for a neurological consult. Defendants also received Dr. Dunteman's notes of May 16, 2007, indicating that "we are going to refer him to a neurosurgeon for evaluation of his back and headaches." Claimant's Exhibit B, p. 19. Defendants promptly arranged for Claimant to be examined by Dr. Lea, a neurologist, in

June 2007. As noted, even though Dr. Dunteman apparently intended initially to refer Claimant to a neurosurgeon, he knew that Claimant had been examined by a neurologist, Dr. Lea. Dr. Dunteman received Dr. Lea's evaluation and made no further request for a neurosurgical evaluation. By October 2007, Dr. Stevens found Claimant had recovered from his back, neck, and left shoulder injuries and Dr. Dunteman expressly agreed with these conclusions.

67. It is unfortunate that Claimant never provided Defendants with a referral from Dr. Dunteman to Dr. Dirks and that Defendants received ambiguous, or at best unclear, signals from Dr. Dunteman's office. However, Defendants reasonably acted upon the handwritten fax from Dr. Dunteman's office requesting a neurological consult. Defendants never received any indication from Dr. Dunteman or from Claimant that Dr. Lea's evaluation was not sufficient until well after this claim went to litigation. By then, it was too late to determine via MRI what injuries resulted from Claimant's industrial accident as compared to his pre-existing conditions. Under these circumstances, Defendants did not unreasonably deny medical care. Claimant has not proven his entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has not proven his present entitlement to additional medical benefits.
2. Claimant has not proven his entitlement to an award of attorney fees.

RECOMMENDATION

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

DATED this 9th day of August, 2011.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701-1521

sc

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOEL BACKES,)
)
 Claimant,)
)
 v.)
)
 DEPENDABLE FABRICATION, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2007-016312

ORDER

FILED: August 11, 2011

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

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

1. Claimant has not proven his present entitlement to additional medical benefits.
2. Claimant has not proven his entitlement to an award of attorney fees.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 11th day of August, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
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PAUL J AUGUSTINE
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/s/