BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EDWIN BAEZ-ALICEA, Claimant, v. TAYLOR BROTHERS, INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2011-018772** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION** **FILED: 2/15/13**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on August 1, 2012. Robert A. Nauman of Boise represented Claimant. Roger Brown of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on February 6, 2013 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's cervical condition is due in whole or in part to a pre-existing and/or subsequent injury/condition; and

2. Whether and to what extent Claimant is entitled to the following benefits:

    1. Medical care;

    2. Temporary partial or temporary total disability benefits (TPD/TTD); and

    3. Attorney fees.

All remaining issues, including permanent partial impairment, retraining, and disability in excess of impairment are reserved for future proceedings.

CONTENTIONS OF THE PARTIES

Claimant suffered injuries to his low back, neck, right hand, left knee, and left ankle when he fell from a height while working for employer. While Claimant's injuries to his low back, right hand, left knee, and left ankle resolved with conservative care, his neck remains symptomatic. Claimant asserts that he is entitled to medical care, as well as TTD benefits until he reaches medical stability. Claimant also argues that Surety's termination of benefits was unreasonable in light of the medical evidence and he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

Defendants concede that Claimant injured his low back, neck, left leg, and right arm as the result of an industrial accident that occurred while Claimant was working for Employer at the Heinz plant in Ontario, Oregon on July 9, 2011. Defendants assert that they provided Claimant all benefits to which he was entitled, including medical care and TTD benefits until he reached medical stability on or about September 22, 2011. In their post-hearing brief, however, Defendants assert that the neck pain Claimant complained of in September 2011 actually occurred while Claimant was recreating at a water park with his family either before or after the industrial injury. Finally, Defendants argue that they have not unreasonably delayed or denied workers' compensation benefits such that Claimant is entitled to an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant offered at hearing; and
2. Joint exhibits 1 through 13 admitted without objection at hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

CLAIMANT

1. Claimant was twenty-nine years of age at the time of hearing. He lived in Caldwell with his wife and her three children. Claimant was born and raised in Puerto Rico, where he graduated from high school. He served three years in the U.S. Navy following his graduation. Following his discharge from the navy, Claimant lived in New York. He relocated to Idaho in 2008. Claimant's first language is Spanish. He communicates adequately, but not fluently, in English. A Spanish to English interpreter was available at the hearing upon Claimant's request, but her services were not used.

2. Claimant went to work for Employer in July 2008, three months or so after moving to Idaho.

3. Claimant had no prior history of injuries to his neck or back and no pre-existing conditions that bear on this proceeding.

EMPLOYER

4. Employer provides fire safety services to commercial businesses, including food service and food manufacturing facilities. The record does not include a comprehensive discussion of the breadth of Employer's business, but the component of the business in which Claimant worked as a fire safety technician is the regular cleaning and degreasing of commercial frying equipment.

5. Claimant's work required him to work at heights with pressure wash hoses and to climb ladders, walk and stand on pipes and catwalks.

ACCIDENT

6. On the date of his injury, July 9, 2011, Claimant was working at the Heinz French fry processing plant in Ontario, Oregon. Claimant had climbed an extension ladder and had stepped from the ladder to a piece of pipe in order to hand off the pressure washer hose to his co-worker. Claimant slipped and fell some five or ten feet to the ground, hitting various body parts on multiple pipes on the way to the ground.

7. Claimant was shaken and sore after his fall, but did not believe he had suffered any serious injuries. He continued to work and completed his shift that day. The accident occurred on a Saturday, and the following day was Claimant's day off. He was sore from his fall the day before and complained of a headache, but went with his family to a local water park for a day of recreation. Claimant testified that he played on most of the features at the park.

8. Claimant returned to work on Monday and performed his usual duties all week. On Thursday, July 14, Claimant was working from a ladder removing air conditioning filters at the same Ontario plant when his ladder shifted and he fell, hitting his head. As before, Claimant shook off the fall and continued working.

9. Claimant continued his regular work until July 28. On that date, in the evening, he was cleaning equipment at an Albertsons store. Claimant experienced significant neck pain and a loss of strength in his hands. He called his supervisor, who advised Claimant to leave work and go to the hospital.

MEDICAL CARE

West Valley Medical Center

10. Claimant presented at West Valley Medical Center in the early hours of July 29, 2011. His primary complaint was of pain on both sides of his cervical spine, which he described

as 8/10, and "sharp." Claimant's pain did not radiate into his upper extremities. He reported that the pain had started several days after his July 9 industrial fall. Claimant also reported that he continued to have some pain in his right hand, left lower extremity, and low back from the fall.[1] Jeffrey R. Dingman, M.D., saw and examined Claimant and diagnosed neck spasm and multiple contusions of the right hand and left knee.

11. Dr. Dingman's discharge instructions included a prescription for Ibuprofen, and the following restrictions: "Limit lifting. No restrictions to activity. No strenuous activity." Ex. 2, p. 07. Dr. Dingman also advised Claimant to follow up at Job Care in five days, even if he was feeling better.

Kevin Chicoine, M.D.

12. On August 2, Claimant presented at the occupational medicine clinic at St. Alphonsus Medical Group where he saw Dr. Chicoine. Claimant told Dr. Chicoine of his July 9 industrial accident and his continuing neck pain. On exam, Claimant had full range of motion in his neck but some paracervical muscle tenderness bilaterally. Dr. Chicoine ordered x-rays, prescribed muscle relaxers and analgesics, and imposed work restrictions—essentially limiting Claimant to deskwork.[2] Dr. Chicoine planned to start Claimant on physical therapy if the x-rays were negative.

13. Claimant returned to the clinic for follow up with Dr. Chicoine on August 4. X-rays ordered during the previous visit were negative. Claimant's neck symptoms were

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[1] Claimant's low back, left lower extremity, and right hand pain eventually resolved with conservative care. Only Claimant's neck injury remains at issue in this proceeding, and these collateral injuries will not be discussed further in these findings.

[2] Employer did not have any light duty work available for Claimant, so Dr. Chicoine's work restrictions effectively took him off work.

unchanged. Dr. Chicoine continued Claimant's work restrictions and his medications and referred him to Rulin Hawks at Caldwell Physical Therapy for evaluation and treatment.

14. Claimant began physical therapy on August 8, 2011. He participated in therapy three times per week, missing only a few scheduled appointments. Claimant's neck complaints did not resolve, and some of the therapeutic modalities actually worsened his neck pain.

15. Dr. Chicoine followed Claimant's progress weekly, with visits on August 11 and 19. When Claimant's neck complaints worsened after a couple of weeks of therapy, Dr. Chicoine ordered an MRI. When Claimant returned to Dr. Chicoine on August 26, they discussed the results of the MRI which showed some minimal degenerative disc disease at C3-4 and C6-7 without evidence of pathology that would account for Claimant's symptoms. Dr. Chicoine continued Claimant's physical therapy, focusing on his neck complaints, and eased his work restrictions slightly, but not enough that he could return to work.

16. Claimant continued with his physical therapy. The chart note for Claimant's August 31, 2011 therapy session includes a new finding under the assessment portion of the note: "His [Claimant's] C1-C2 facet joint is dysfunctional." Ex. 6, p. 80. On September 1, Mr. Hawks wrote to Dr. Chicoine regarding Claimant's progress:

> Right cervical rotation 80°, left rotation 65°, side bending is WNL, flexion is normal, extension moderately limited. Palpation: the left transverse processes of C1-C2 are tender.
>
> * * *
>
> He has left C1-C2 facet joint dysfunction. That joint is inflamed and sore. Over this past week we have been able to increase cervical rotation in both directions, but left rotation is still impaired and painful. He has no neurological symptoms. His facet joint is stuck, but I think it is improving and will continue to improve over time.

Id., at p. 82.

17. Claimant returned to Dr. Chicoine on September 2. On exam Dr. Chicoine observed: "Neck shows good flexion, extension, has discomfort in moving his neck to the left, some tenderness on the left C1-C3 paraspinal musculature. Some tenderness left trapeziua." Ex. 5, p. 45. Dr. Chicoine's assessment noted for the first time the possibility of facet syndrome. Dr. Chicoine referred Claimant to Beth Rogers, M.D., a physiatrist, for evaluation of possible facet syndrome and treatment.

18. Dr. Chicoine sought approval from Surety for the referral. Surety did not respond to the referral request, but did schedule Claimant for an independent medical examination (IME) with Brian D. Tallerico, D.O., an osteopathic/orthopedic surgeon.

19. Dr. Chicoine continued to monitor Claimant's condition as he awaited the IME with Dr. Tallerico. On the day before Claimant's IME, Dr. Chicoine noted:

> I am still concerned that there may be a facet impingement going on here. That would certainly explain his symptoms. I would still like to get him in to see Dr. Rogers. I do not know what the IME opinion will be, but I think that the best course would be to get those facet joints looked at by an appropriate specialist.

Ex. 5, p. 54. Dr. Chicoine continued Claimant's restrictions, his medications, and expressed hope that Surety would approve a referral to Dr. Rogers.[3]

Dr. Tallerico

20. Claimant saw Dr. Tallerico on September 22, 2011. Dr. Tallerico reviewed the medical records from West Valley Medical Center and Dr. Chicoine's records through September 2. He had Claimant fill out a patient medical history form. Dr. Tallerico performed some standard neurological testing with no neurologic findings. Dr. Tallerico tested Claimant's cervical range of motion and found it within normal limits. On palpation, Dr. Tallerico noted:

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[3] Dr. Chicoine did not need authorization to refer Claimant to Dr. Rogers. Idaho Code § 72-432(6).

> Palpatory examination on the cervical region shows guarding and wincing with just skin pressure applied to the upper left paraspinal cervical region basically just below the occiput. . . There is no appreciable myospasm throughout the cervical region or into the trapezius musculature or upper thoracic region.

Ex. 7, p. 90. Claimant testified that Dr. Tallerico spent approximately fifteen minutes with him during the exam.

21. Based on the written history and brief exam, Dr. Tallerico diagnosed cervical strain related to the industrial injury and "ongoing complaints of cervical pain without any objective findings." *Id.,* at p. 91. Dr. Tallerico then answered twenty questions posed by Surety. A summary of his relevant conclusions includes:

- Claimant's injuries resulted from his industrial injury and all had since resolved except for the cervical complaints;
- Claimant's *continuing* subjective cervical complaints could not be attributed to the industrial injury because of a lack of convincing physical exam findings;
- Claimant's treatment was reasonable to date, but he did not need any further diagnostic studies or treatment;
- Claimant was at maximum medical improvement and could return to work without restrictions.
- Claimant had no impairment as a result of his industrial injury.

Dr. Chicoine

22. Surety forwarded a copy of Dr. Tallerico's report to Dr. Chicoine for comment. Dr. Chicoine reviewed the report and consulted with Dr. Rogers regarding facet disease. He then drafted a letter to Surety concerning Dr. Tallerico's report. In his letter, Dr. Chicoine raised a number of concerns.

- Dr. Tallerico's qualifications were not specified. "It is not clear whether he is an [sic] Certified orthopedic spine specialist or even Board Certified in [the] field of orthopedics." Ex. 5, p. 58;
- Dr. Tallerico's particular qualifications were pertinent because orthopedic surgeons are not ordinarily trained in the diagnosis and treatment of facet disorder injuries—particularly those that are non-surgical;
- Dr. Tallerico's report contains internal inconsistencies, most notably stating that there are no objective findings for Claimant's condition while

> documenting reduced cervical rotation to the left, and tenderness at the base of the left occiput—both of which findings can be objective evidence of a facet disorder.

Dr. Chicoine observed that he had requested a consultation with Dr. Rogers, a physiatrist, *specifically* because he and Mr. Hawks believed that Claimant's problem was in his facet joints, and a physiatrist was most qualified to evaluate and treat Claimant for just such a problem. He concluded by stating that Claimant was not at MMI, and that he still needed to be evaluated for facet syndrome because Dr. Tallerico had not done so.

Beth Rogers, M.D.

23. Following Dr. Tallerico's report, Employer asked Dr. Chicoine if he could arrange for Claimant to see Dr. Rogers. Claimant did see Dr. Rogers on October 13, 2011. She took Claimant's history, reviewed the radiographic images, and examined Claimant. Claimant reported that Dr. Rogers spent approximately an hour with him and discussed the likely cause of his symptoms and treatment options. Under "Impression/Plan," Dr. Rogers noted:

> Cervicogenic headache. I had a discussion with [Claimant] and his wife. It is quite possible that the headaches are coming from the facet joints up at C2-C3 on the left and the second possibility is that the disk at C3-C4 is largely responsible for his pain. In either case, I think that the industrial injury of July is clearly responsible for the onset of his headache and that he is quite credible in his presentation. We discussed blocking the left third occipital nerve at C3 medial branch as a first course of action, and we will schedule him for this and go from there.

Ex. 8, p. 97. Employer paid for this initial consultation, but Claimant could not afford the recommended treatment. The record documents that Claimant made several requests to Surety for such treatment, but there is no record of any response.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

24. The burden of proof in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

25. Defendants conceded that Claimant suffered an industrial injury on July 9, 2011, in which he injured his cervical spine. Tr., p. 12. Defendants investigated the claim, found it compensable, and paid benefits. Defendant's IME physician opined that Claimant injured his neck in the July 9, 2011 industrial accident. In their briefing, Defendants raise the notion that Claimant's neck injury actually occurred on July 8, 2011 while he was at a water park with his family. Defendants point to Claimant's telephone interview with Surety's adjuster following the accident. In that interview, Claimant stated that he was at the water park the day before the industrial injury. Ex. 3, p. 21. It is apparent from the record as a whole that Claimant misstated the order of events during the telephone interview. The documentary evidence, Claimant's testimony under oath at hearing, and Surety's handling of the claim support such a conclusion. The day before July 9, 2011 was a Friday, and there is nothing in the record to suggest Claimant was even off work that day. If Surety really believed that Claimant's injury occurred at the water park on July 8, then why did they not produce evidence that Claimant was not at work that day? The day after July 9, 2011 was Sunday, Claimant's day off. At hearing he clearly testified that he went to the water park with his family despite the fact he had a headache and was sore from his fall the day before. Surety did not rely on Claimant's statement during the interview, since they accepted the claim and paid benefits. None of the physicians who saw Claimant for his

industrial injuries disputed that he had injured his neck as a result of the accident. Even Dr. Tallerico related Claimant's neck complaints to the industrial accident.[4]

26. The Referee finds that Claimant has established that he suffered a neck injury as a result of his industrial accident on July 9, 2011.

MEDICAL CARE

27. 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 required by the employee's physician or needed immediately after an injury or disability from 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. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

28. On page 2 of their brief, Defendants state:

> While this dispute appears, on its face, to be a simple matter of differing medical opinions, the analysis performed by the Commission in deciding the outcome of this case must involve consideration of more than just the actual medical opinions themselves. Defendants' position is that the Commission must also take into consideration the experience, qualifications, and credentials of each of the respective medical professionals.

The Referee agrees, and on the record before her, finds that the opinions of Drs. Chicoine and Rogers are more persuasive than that of Dr. Tallerico.

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[4] Dr. Tallerico was aware of the substance of Claimant's telephone interview with the adjuster because he discusses it in his report, including the discrepancy as to the date of the visit to the water park. But Dr. Tallerico does not go so far as to opine that Claimant's neck complaints were the result of events at the water park. Ex. 7, p. 91.

Nature of Relationship

29. Dr. Chicoine, who practices occupational medicine, is Claimant's treating physician. Dr. Chicoine saw Claimant weekly for several months. In the course of his treatment, Dr. Chicoine had the opportunity to observe Claimant over a period of time, and to observe changes in his condition as treatment progressed. Such frequent interaction also provided Dr. Chicoine an opportunity to observe Claimant's credibility and note whether Claimant exhibited symptom magnification or expressed non-anatomic complaints. Nothing in Dr. Chicoine's notes suggest that Claimant's behavior sent up any red flags.

30. Similarly, Mr. Hawks saw Claimant regularly for physical therapy. The physical therapy notes do not include any statements that suggest Claimant's reports were inconsistent or exaggerated.

31. When Claimant was eventually able to see Dr. Rogers, she spent an hour with him—performing her examination and discussing her findings and treatment recommendations. Dr. Rogers reviewed the medical records pertinent to Claimant's injury, including the records from the hospital, from Dr. Chicoine, from Dr. Tallerico, and the radiographic imaging.

32. Dr. Tallerico had access to the hospital records, Dr. Chicoine's records, the radiographic imaging, and additional information from Surety's claim file. He did not have an opportunity to review Dr. Roger's records. As he stated in his report, he dictated the history outside the presence of Claimant. According to Claimant's uncontroverted testimony, Dr. Tallerico spent approximately fifteen minutes with Claimant.

Qualifications

33. There is limited information in the record regarding the qualifications of the three

physicians who have offered an opinion on Claimant's condition. [5] Thus, the Referee's ability to weigh "the experience, qualifications, and credentials of each of the respective medical professionals" is somewhat limited. The record reflects that Drs. Chicoine and Rogers are both M.D.s. Dr. Chicoine practices in an occupational medicine clinic; Dr. Rogers is a physiatrist. Dr. Tallerico is a D.O., and an orthopedic surgeon.

34. In his letter to Surety in which he commented on Dr. Tallerico's report, Dr. Chicoine specifically raised questions regarding Dr. Tallerico's qualifications and experience *vis a vis* the diagnosis and treatment of facet disease. Dr. Chicoine observed that such expertise would not ordinarily be a part of an orthopedic surgeon's portfolio. Contrary to Surety's assertions in their brief, Dr. Chicoine did not impugn Dr. Tallerico's qualifications as an orthopedic surgeon. Dr. Chicoine questioned whether an orthopedic surgeon was the appropriate specialist to diagnose and treat facet disease. It was a pertinent question, and Surety did not respond to the question despite opportunities to do so before hearing, at hearing, and after the hearing in a post-hearing deposition.

35. Defendants' blatant attempt to remediate their failure of proof by inserting new evidence into their brief did not go unnoticed, and the Referee strikes the first two sentences of the first full paragraph on page 14 of Defendant's brief wherein Defendants set out Dr. Tallerico's qualifications.

36. Dr. Chicoine's concerns about Dr. Tallerico's expertise in diagnosing and treating facet dysfunction are worthy of consideration. According to his report, Dr. Tallerico took basic range of motion measurements and performed simple neurologic tests. He found that Claimant

[5] Dr. Tallerico did not make himself available for post-hearing deposition within a reasonable time following the hearing, and the Referee ordered that the matter be briefed and submitted before he was deposed. His CV was not included in the record.

had some minor restriction in his cervical range of motion, particularly on the left, and exhibited no neurological symptoms. On this basis, Dr. Tallerico determined that Claimant's reported symptoms had no objective medical basis. Claimant had never reported neurological symptoms, and neither Dr. Chicoine nor Mr. Hawks suspected a neurological cause for Claimant's complaints. There is nothing in Dr. Tallerico's report to suggest that he made any examination of Claimant's facet joints, or considered facet dysfunction as a possible cause of Claimant's pain complaints.

37. Dr. Chicoine observed that Dr. Tallerico specifically stated in his report that he found no objective evidence to support Claimant's symptoms, even suggesting that Claimant was exhibiting symptom magnification. However, Dr. Chicoine pointed out that the report included two objective findings that are consistent with facet disease: Reduced range of motion on the left, and tenderness over the facet joints. These were the same symptoms Claimant reported, and which were observed on exam, throughout his course of treatment by Dr. Chicoine and Mr. Hawks.

38. Defendants asked the Referee to consider not just the medical opinions of Drs. Chicoine, Rogers, and Tallerico, but "the experience, qualifications, and credentials of each of the respective medical professionals" as well. Defendants offered no evidence on which the Referee could make a finding that Dr. Tallerico was better qualified to evaluate Claimant for facet disease than Drs. Chicoine and Rogers. Dr. Chicoine's concerns were timely raised, and remain uncontroverted leaving the Referee to rely upon the opinions of Drs. Chicoine and Rogers.

39. Neither Drs. Chicoine nor Rogers found Claimant to be medically stable. Both are of the opinion that he needs additional medical care, including nerve blocks which are both

diagnostic and therapeutic. Claimant is entitled to such medical care as Dr. Chicoine, Dr. Rogers, or any physician to whom they refer Claimant, deems necessary and reasonable. This includes payment for Claimant's October 2011 visit to Dr. Rogers upon referral by Dr. Chicoine.

TPD/TTD

40. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Compan*y, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Here, the Referee has found the opinions of Drs. Chicoine and Rogers to be persuasive, and each is of the opinion that Claimant remains in a period of recovery from his July 9, 2011 industrial accident. Claimant is entitled to back TTD benefits from the time Surety terminated them through the date of hearing. Following the date of hearing, Claimant will be entitled to TTD benefits until such time as he has reached medical stability.

ATTORNEY FEES

41. Attorney fees are not granted to a claimant 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. That section provides for a punitive award of attorney fees if a Surety or Employer contests a workers' compensation claim without reasonable grounds, neglects or refuses to pay a claimant within a reasonable time the compensation required by law, or discontinues payment without reasonable grounds. The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

42. Defendants initially undertook to pay Claimant the benefits to which he was

entitled. Surety did not actively prevent Claimant from seeing Dr. Rogers pursuant to Dr. Chicoine's referral since no authorization was necessary. Sending Claimant for an IME was clearly within Surety's authority. Surety terminated benefits once it received Dr. Tallerico's report, and this is where Surety's handling of the claim departed from the reasonable.

43. Defendants' initial reliance on Dr. Tallerico's report was reasonable. Surety then provided a *pro forma* check-box form to Dr. Chicoine (Ex. 5, p. 56). Dr. Chicoine could have checked either box on the form without comment. Instead he took the time to review his records, consult with Dr. Rogers, and prepare a detailed response that brought the substance of Dr. Tallerico's findings and opinions into question. Dr. Chicoine's comments, together with Dr. Roger's records created an obligation for Surety to consider and address those concerns. *Farrar v. Adecco, Inc.,* 208 IIC 0056 at 0556.13 (2008). If Surety considered the comments of Dr. Chicoine and the medical opinion of Dr. Rogers, there is no indication of it in the hearing record. Rather, Surety terminated Claimant's income benefits and denied additional treatment. Claimant contacted Surety in writing on two occasions in October 2011, asking Surety to review the additional information and reinstate Claimant's benefits apparently without receiving any response. Shortly before hearing, Claimant again asked Surety to reinstate benefits, without success.

44. The Referee finds that Surety's failure to re-evaluate the claim in light of Dr. Chicoine's comments, which Surety specifically requested, or to consider Dr. Roger's medical opinion regarding Claimant's condition, was unreasonable and is grounds for an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant's neck complaints are the result of the industrial accident that occurred

on July 9, 2011.

2. Claimant is entitled to additional medical care as recommended by his treating physician.

3. Claimant is not medically stable and is entitled to TTD benefits from the date Surety terminated them to the date of hearing and thereafter until he has reached medical stability.

4. Claimant is entitled to an award of attorney fees for Surety's unreasonable termination of medical and income benefits.

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 7 day of February, 2013.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EDWIN BAEZ-ALICEA, Claimant, v. TAYLOR BROTHERS, INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2011-018772** **ORDER** **FILED: 2/15/13**

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 neck complaints are the result of the industrial accident that occurred on July 9, 2011.

2. Claimant is entitled to additional medical care as recommended by his treating physician.

3. Claimant is not medically stable and is entitled to TTD benefits from the date Surety terminated them to the date of hearing and thereafter until he has reached medical stability.

4. Claimant is entitled to an award of attorney fees for Surety's unreasonable termination of medical and income benefits. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. See, *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 15 day of February, 2013.

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 15 day of February, 2013, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

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kla /s/_____