

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

PAMELA CARR,

Claimant,

v.

FAMOUS FOOTWEAR,

Employer,

and

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA,

Surety,  
Defendants.

**IC 2009-024074**

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

FILED 09/26/2012

---

**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, Idaho on June 20, 2011. Claimant, Pamela Carr, was present in person and represented by Starr Kelso, of Coeur d' Alene, Idaho. Defendant Employer, Famous Footwear, and Defendant Surety, Travelers Property Casualty Company of America, were represented by W. Scott Wigle, of Boise, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on June 19, 2012.

**ISSUES**

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

1. Claimant's entitlement to additional medical care; and

2. Claimant's entitlement to temporary partial and/or temporary total disability benefits.

### **CONTENTIONS OF THE PARTIES**

Claimant injured her ankle and low back in an industrial accident on September 1, 2009. Defendants acknowledged her accident and provided conservative medical treatment and temporary disability benefits. Claimant's ankle injury resolved, however she asserts that she is not medically stable from her low back injury and requests further medical care and temporary disability benefits. Defendants maintain that Claimant has reached maximum medical improvement and is entitled to no further medical care and no additional temporary disability benefits. Defendants have paid Claimant permanent impairment benefits equal to 5% of the whole person for her low back injury.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant, taken November 9, 2010;
3. The testimony of Claimant, taken at the June 20, 2011 hearing;
4. Claimant's Exhibits 1 through 4 and Defendants' Exhibits A through C, admitted at the hearing;
5. The post-hearing deposition testimony of John M. McNulty, M.D., taken by Claimant on August 1, 2011;
6. The post-hearing deposition testimony of Michael Ludwig, M.D., taken by Claimant on February 9, 2012; and

7. The post-hearing deposition testimony of Mark Bengtson, taken by Claimant on March 13, 2012.

All objections posed during the depositions are overruled.

After having considered 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 61 years old and had lived in Post Falls for 34 years at the time of the hearing.

2. Claimant was hired as an assistant manager by Employer in Post Falls where she worked for six years. On May 18, 2006, she slipped on a piece of cardboard at work and landed on her back on the floor, knocking the breath out of her. She sought medical attention; however, x-rays revealed no acute abnormalities and she returned to work. She noted no lasting difficulty and continued to perform her usual duties without complaint until September 2009.

3. By September 1, 2009, Claimant was working from 32 to 46 hours per week and earning \$10.10 per hour. Her duties included receiving shipments, moving large boxes, carrying a 12-foot ladder to arrange signs and displays, moving and arranging tables, and serving customers. After her work shift each day, she walked three miles for exercise.

4. On Tuesday, September 1, 2009, Claimant was at work when a customer snagged her purse on a ladder, causing the ladder to lean precariously. Claimant twisted and grabbed the ladder to prevent it from falling on the customer, and in the process Claimant twisted her ankle severely. Her ankle began swelling and her manager sent Claimant home to ice her ankle. After applying ice to her ankle and lying down, Claimant noticed a burning sensation in her right

buttock which progressed down to her right ankle. The next day she sought medical treatment for her ankle sprain. She also reported right buttock pain.

5. Claimant was assigned light-duty work, but experienced increasing back pain. She worked September 2 and 3, 2009. By Friday, September 4, 2009, she was in significant pain and called an ambulance to transport her to the emergency room of a local hospital. An MRI revealed pre-existing L2-3 disc bulging and L5-S1 anterolisthesis, and an acute L4-5 disc herniation. Claimant was referred to Michael Ludwig, M.D., medical director of the Kootenai Medical Center occupational medicine clinic.

6. On September 14, 2009, Dr. Ludwig examined Claimant and diagnosed an acute right-sided L4-5 disc herniation and right L4 radiculitis. He advised Claimant that her options were physical therapy, epidural steroid injections, or lumbar surgery. She was very hesitant about surgery and Dr. Ludwig endorsed her choice of physical therapy.

7. On September 22, 2009, Claimant commenced physical therapy with Zachary Norling. Claimant periodically talked with Dr. Ludwig about her progress and also the possibility of epidural steroid injections. An October 14, 2009 EMG was abnormal, indicative of denervation. The EMG showed right L5 and possible L4 nerve involvement, consistent with the abnormalities shown by the MRI. Claimant took prescription medications and continued with physical therapy where she made slow but steady progress.

8. By October 28, 2009, Dr. Ludwig released Claimant to sedentary work four hours daily; however, Employer closed its Post Falls location and offered Claimant no further work.

9. Dr. Ludwig was pleased with Claimant's steady gains in physical therapy and began transitioning Claimant to an independent exercise program. She made steady progress in physical therapy and completed approximately 40 therapy sessions from September 2009

through January 2010. By January 21, 2010, Dr. Ludwig believed Claimant was approaching maximum medical improvement and scheduled Claimant for a functional capacity evaluation (FCE). Claimant's last physical therapy session was February 10, 2011.

10. On Friday, February 12, 2010, Claimant underwent a FCE, supervised by Mark Bengtson, MPT. Claimant testified that Bengtson pushed her to move quickly through the evaluation routine and her back pain increased as she attempted to sustain the rapid pace. She could not keep up with the pace that Bengtson expected. Claimant testified that her back pain increased to the point that she could not finish the FCE. Bengtson testified that the pace of the FCE was consistent with standard protocols. He recorded that the "overwhelming characteristic of the FCE was pain focused behavior, demonstrations of [shortness of breath], facial expressions, groaning, pain talk and verbal expressions of incredible pain experience and a visual display of poor physical ability. ... Chronic [low back pain] and significant de-conditioning are clearly present." Defendants' Exhibit A-4, p. 10. Bengtson concluded the FCE results were invalid. After the FCE, Claimant drove herself home. She testified that she curled up in the fetal position and remained so during the entire weekend.

11. On Monday morning, February 15, 2010, Claimant went to the emergency room where she received pain medication. Sometime later, on February 15, 2010, Claimant presented for her regularly scheduled appointment with Dr. Ludwig. She requested epidural steroid injections; however, Dr. Ludwig responded the injections were "off the table." He later indicated that epidural steroid injections were most likely to be effective during the acute phase of a disc herniation and that Claimant would likely obtain no lasting benefit from such injections six months after her injury. However, Claimant's complaints of increased back pain were sufficiently concerning that Dr. Ludwig ordered another lumbar MRI. It was completed that

same day but showed no change from the abnormalities documented by the September 2009 MRI.

12. On February 25, 2010, Claimant returned to Dr. Ludwig. He reviewed with her the FCE results, noting they were unfavorable and revealed inconsistent performance and exaggerated pain behavior. Claimant's performance during several portions of the FCE was less than she had performed during physical therapy sessions only weeks earlier. The FCE documented that Claimant repeatedly verbalized pain and engaged in pain behaviors including sighing, grunting, and crying during the evaluation and that she had unilaterally terminated her participation in the FCE. Dr. Ludwig reaffirmed his conclusion that no epidural steroid injections were warranted. Claimant stood during much of this discussion. Dr. Ludwig noted that she sometimes leaned forward on the exam table, demonstrating almost 90 degrees of forward lumbar flexion. He considered her medically stable without surgery and recommended a 5% permanent impairment rating for her 2009 injuries. Defendants paid Claimant permanent impairment benefits equal to 5% of the whole person for her 2009 low back injuries.

13. On March 22, 2010, Claimant presented to orthopedic surgeon, John McNulty, M.D., at her attorney's request. Dr. McNulty recorded Claimant's antalgic gait, positive pinprick test, very limited forward flexion and positive right straight leg raising at 30 degrees. He noted she was unable to stand on her toes or to heel walk on the right side. Dr. McNulty reviewed Claimant's prior MRIs and concluded that she had not reached maximum medical improvement and would benefit from referral to a neurosurgeon for further treatment, possibly including epidural steroid injections and/or surgery.

14. On December 21, 2010, neurosurgeon Jeffrey Larson, M.D., examined Claimant at Defendants' request. He found her presentation inconsistent and exaggerated compared to

prior evaluations by Drs. Ludwig and McNulty. Dr. Larson opined that the abnormalities revealed in Claimant's September 2009 imaging studies pre-existed her September 1, 2009 accident. He did not believe Claimant would benefit from further medical intervention but recommended a repeat lumbar MRI based on the dramatic increase in her reported symptoms.

15. On December 30, 2010, Claimant underwent a repeat lumbar MRI which revealed various abnormalities including a mixed spondylotic disc protrusion rightward eccentric at L4-5 and a rightward soft disc protrusion "which exerts mass effect upon the exiting right L4 nerve root." Defendants' Exhibit A-6, p. 6.

16. By letter of January 4, 2011, Dr. Larson opined that Claimant's December 30, 2010 MRI showed a dominant finding of degenerative disc disease and revealed no significant change from her prior MRI. Dr. Larson opined that Claimant's complaints were exaggerated, subjective, not substantiated by objective findings, and that Claimant would not benefit from any further medical intervention.

17. On January 8, 2011, Claimant presented again to Dr. McNulty. He reaffirmed his conclusion that Claimant would benefit from referral to a neurosurgeon for evaluation and further treatment.

18. At the time of the hearing, Claimant had determined that she was willing to undergo steroid injections and even lumbar surgery, if required to resolve her persisting back and right leg pain. She is able to walk only two or three blocks at a time. She experiences increased pain from lifting a gallon of milk. Claimant has looked for cashiering and other work in Post Falls. She has approached clerical, hardware, and other businesses in Post Falls, but has received no job offers.

19. Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds that Claimant dramatically portrays her back pain and projects greater incapacity and pain than is customary given her medical condition. Nevertheless, her symptomatic L4-5 disc herniation is clearly documented by repeated objective diagnostic testing.

### **DISCUSSION AND FURTHER FINDINGS**

20. 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).

21. **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 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). Of course 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).

22. 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 Computune, 2011 IIC 0015 (February 25, 2011); Richan v. Arlo G. Lott Trucking, Inc., 2001 IIC 0008 (February 7, 2011).

23. In the present case, Claimant seeks additional medical care for her low back. Defendants argue that Claimant is medically stable and has not proven that the additional medical care she desires is related to her industrial accident. Claimant asserts she cannot perform to her pre-accident capability and thus concludes she is entitled to additional medical treatment. However, persisting limitations are also consistent with a permanent physical impairment, which Defendants herein have already acknowledged and paid, and do not necessarily establish entitlement to further medical care.

24. Jeffrey Larson, M.D., a practicing neurosurgeon, examined Claimant on December 21, 2010, at Defendants' request. At that time Claimant was five feet, five inches tall and weighed 238 pounds. Dr. Larson found that Claimant needed no further medical intervention for her low back. However, Dr. Larson also opined that all of Claimant's lumbar abnormalities documented on MRI pre-existed her 2009 industrial injury. The record is clear that Claimant worked for approximately three years between her 2006 fall and her 2009 industrial accident which is the basis of the instant case. Dr. Larson's opinion as to the causation of Claimant's L4-5 disc pathology is not persuasive given Dr. Ludwig's opinion that Claimant's September 2009 MRI documented an acute L4-5 disc herniation caused by Claimant's

September 1, 2009 industrial accident. Dr. Larson's opinion as to Claimant's need for further medical treatment due to her 2009 industrial injury is similarly unpersuasive.

25. Claimant's treating physician, Dr. Ludwig, opined that Claimant had reached maximum medical improvement without surgery by February 25, 2010. As he expressly stated, this conclusion was based upon the conservative measures that Claimant was willing to allow and honored Claimant's decision at that time to not undergo surgery. Claimant has now changed her mind and is willing to consider surgical treatment of her injury. Therefore, Dr. Ludwig's conclusion that she has reached maximum medical improvement without surgery may potentially be moot.

26. Dr. McNulty is a practicing orthopedic surgeon, although not a practicing spinal surgeon. He reviewed Claimant's prior MRIs and concluded that she had not reached maximum medical improvement and would benefit from evaluation by a neurosurgeon for further treatment, possibly including lumbar surgery. Dr. McNulty's opinion is supported by multiple MRI's, showing L4-5 disc herniation. Particularly relevant is the December 30, 2012 MRI showing an L4-5 disc herniation exerting a mass effect on the exiting L4 nerve root.

27. Defendants challenge Dr. McNulty's opinion noting that his report specified compromise of the L5 nerve root, while the MRI shows mass effect on the L4 nerve root. In his deposition, Dr. McNulty addressed indications of both L4 and L5 radiculopathy. Claimant's multiple MRIs indicate abnormalities at multiple levels, particularly L4-5. Dr. Ludwig assessed right radiculopathy of both L4 and L5. EMG testing confirmed right L5 and possible L4 radiculopathy with denervation. Dr. McNulty's opinion persuasively addresses both nerves.

28. It is clear that Claimant demonstrated exaggerated pain behavior during the FCE. Her FCE results document less capacity than she demonstrated in previous physical therapy

sessions only weeks before. However, the fact that Claimant exaggerated her pain and limitations during her FCE does not refute the objective MRI evidence of her L4-5 disc herniation which exerts mass effect on the existing L4 nerve root and EMG testing objectively confirming radiculopathy. Her invalid FCE results do not preclude her from having a legitimate injury which may require further treatment. Evaluation by a neurosurgeon is reasonable medical care under the totality of the circumstances presented.

29. Claimant has proven her entitlement to additional medical care for her 2009 industrial accident in the form of evaluation by a neurosurgeon.

30. **Temporary disability.** The second issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

31. In Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986), the Supreme Court noted:

[O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a

reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

32. In the present case, Claimant requests temporary disability benefits for her period of recovery from February 2010, through the time of the hearing. Dr. Ludwig opined that Claimant reached maximum medical improvement without surgery by February 2010. Dr. Larson opined that Claimant would not benefit from further medical intervention. Only Dr. McNulty has opined that Claimant is still in a period of recovery due to her industrial accident and has recommended evaluation by a neurosurgeon.

33. Given Claimant's entitlement to additional medical care for her low back injury, she may be entitled to additional temporary disability benefits. However, the additional medical care to which she has proven her entitlement is evaluation by a neurosurgeon. Whether a neurosurgeon will conclude that Claimant needs lumbar surgery or other further medical treatment due to her industrial accident, and thus is still in a period of recovery, is presently unknown.

34. Pending evaluation by a neurosurgeon, Claimant's entitlement to additional temporary disability benefits is not yet ripe for adjudication.

#### **CONCLUSIONS OF LAW**

1. Claimant has proven her entitlement to additional medical care in the form of evaluation by a neurosurgeon.

2. Pending evaluation by a neurosurgeon, Claimant's entitlement to additional temporary disability benefits is not yet ripe for adjudication.

**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 13th day of September, 2012.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of September, 2012, 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

W SCOTT WIGLE  
PO BOX 1007  
BOISE ID 83701-1007

sb

\_\_\_\_\_/s/\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

PAMELA CARR,

Claimant,

v.

FAMOUS FOOTWEAR,

Employer,

and

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA,

Surety,  
Defendants.

**IC 2009-024074**

**ORDER**

FILED 09/26/2012

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 proven her entitlement to additional medical care in the form of evaluation by a neurosurgeon.
2. Pending evaluation by a neurosurgeon, Claimant's entitlement to additional temporary disability benefits is not yet ripe for adjudication.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 26th day of September, 2012.

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 26th day of September, 2012, 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  
COEUR D'ALENE ID 83816-1312

W SCOTT WIGLE  
PO BOX 1007  
BOISE ID 83701-1007

sb

/s/