

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,
CONCLUSION OF LAW,
AND RECOMMENDATION**

Filed June 7, 2013

INTRODUCTION AND BACKGROUND

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. After the hearing, the Commission issued its order of September 26, 2012, concluding that Claimant had proven her entitlement to additional medical care in the form of evaluation by a neurosurgeon. The Commission also determined that pending evaluation by a neurosurgeon, Claimant's entitlement to additional temporary disability benefits was not yet ripe for adjudication. Defendants thereafter authorized Claimant's evaluation by a neurosurgeon who recommended lumbar surgery. Claimant promptly reasserted her request for additional temporary disability benefits.

On January 28, 2013, the referee conducted a telephone conference with all parties. Claimant, Pamela Carr, was 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. During the telephone conference all parties agreed to submit the question of Claimant's entitlement to temporary disability benefits to the Commission for decision pursuant to JRP 10B. Pursuant to the referee's January 31, 2013 Order on Motion to Compel Payment of Temporary Total Disability Benefits, the parties thereafter filed written statements submitting the issue for decision pursuant to JRP 10B. The matter came under advisement on February 25, 2013.

ISSUE

The sole issue is Claimant's entitlement to additional temporary total disability benefits prior to February 11, 2013.

CONTENTIONS OF THE PARTIES

Defendants acknowledged Claimant's September 1, 2009 industrial accident and paid temporary disability benefits through approximately February 25, 2010. Claimant requests additional total temporary disability benefits for her lumbar injury from approximately February 25, 2010, until February 11, 2013. Defendants maintain that Claimant is entitled to no additional temporary disability benefits.

EVIDENCE CONSIDERED

The record consists of the following:

1. All evidence considered in the Commission's September 26, 2012 decision in this matter;
2. The Industrial Commission legal file;
3. Claimant's Exhibits 1 through 4 attached to her Motion to Compel Payment of Temporary Total Disability Benefits (and if necessary an Expedited Hearing by Teleconference), filed January 14, 2013;

4. Claimant's single page exhibit attached to her Supplemental Information Regarding Claimant's Motion to Compel Payment of Temporary Total Disability Benefits, filed January 25, 2013;
5. Claimant's Notice of Surgery, filed February 11, 2013; and
6. The February 11, 2013 operative report of Bret Dirks, M.D.

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

FINDINGS OF FACT

1. On September 1, 2009, Claimant sustained a low back injury at work when she abruptly twisted and caught a ladder to keep it from falling on a customer. She soon developed increasing back and right buttock pain and sought medical attention. A September 4, 2009 lumbar MRI revealed pre-existing L2-3 disc bulging and L5-S1 anterolisthesis, and an acute L4-5 disc herniation. Physiatrist Michael Ludwig, M.D., began treating Claimant and on September 13, 2009, he 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 elected physical therapy. An October 14, 2009 EMG showed right L5 and possible L4 nerve involvement, consistent with the abnormalities revealed by the MRI. By October 28, 2009, Dr. Ludwig released Claimant to sedentary work four hours daily; however, Employer had closed its Post Falls location and offered Claimant no further work. She attended physical therapy sessions from September 22, 2009, through February 10, 2010, making gradual progress.

2. On February 12, 2010, Claimant underwent a FCE but declined to fully participate, citing complaints of increasing back pain. The FCE results were deemed invalid. Claimant's complaints of increased back pain prompted a February 15, 2010 lumbar MRI that

showed no significant structural change from the abnormalities documented by the September 2009 MRI.

3. On February 25, 2010, Dr. Ludwig reviewed the FCE and MRI results and declined to order epidural steroid injections. He considered Claimant medically stable, as she had declined lumbar surgery, and recommended a 5% permanent impairment rating for her 2009 lumbar injuries. Defendants ceased payment of temporary disability benefits and paid Claimant permanent impairment benefits equal to 5% of the whole person.

4. On March 22, 2010, orthopedic surgeon John McNulty, M.D., examined Claimant, reviewed her MRIs, and concluded that she had not reached maximum medical improvement. He encouraged evaluation by a neurosurgeon for further treatment.

5. On December 21, 2010, neurosurgeon Jeffrey Larson, M.D., examined Claimant at Defendants' request. He opined that the abnormalities revealed in Claimant's September 2009 imaging studies pre-existed her September 1, 2009 industrial accident and that Claimant would not benefit from further medical treatment of her low back.

6. A December 30, 2010 lumbar MRI revealed 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. In spite of the MRIs, Dr. Larson continued to opine that all of Claimant's lumbar abnormalities pre-existed her 2009 industrial injury. In its September 26, 2012 decision, the Commission found Dr. Larson's conclusions unpersuasive given Dr. Ludwig's opinion that the September 4, 2009 MRI documented an acute L4-5 disc herniation caused by Claimant's September 1, 2009 industrial accident.

7. By the time of the 2011 hearing, Claimant had determined she was willing to undergo lumbar surgery; however, Defendants declined to authorize further treatment. Following issuance of the Commission's September 26, 2012 decision, Defendants authorized Claimant's evaluation by a neurosurgeon. On November 1, 2012, Claimant was examined by neurosurgeon Bret Dirks, M.D. On February 11, 2013, Claimant underwent lumbar surgery as recommended by Dr. Dirks.

DISCUSSION AND FURTHER FINDINGS

8. 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).

9. **Temporary disability.** The sole issue is Claimant's entitlement to additional 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).

10. 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.

11. In the present case, Claimant requests total temporary disability benefits for her period of recovery from approximately February 25, 2010, through February 11, 2013, when she underwent lumbar surgery by Dr. Dirks.

12. Dr. Larson's opinion that Claimant's December 30, 2010 lumbar MRI showed a dominant finding of degenerative disc disease and revealed no significant change from her prior MRI is unpersuasive, as is his conclusion that Claimant would not benefit from any further medical intervention. Claimant's multiple MRIs, particularly the December 30, 2010 MRI, documented several abnormalities, including L4-5 disc herniation exerting mass effect on the exiting L4 nerve root. EMG testing confirmed right L5 and possible L4 radiculopathy with denervation. Dr. Ludwig noted, as early as September 13, 2009, that Claimant's L4-5 disc herniation was acute and was caused by her September 1, 2009 industrial accident.

13. Dr. Ludwig continued to restrict Claimant to occasional pushing, pulling, and lifting of no more than 10 pounds through February 10, 2010. On February 25, 2010, he found Claimant had reached maximum medical improvement absent surgery. His conclusion was expressly constrained by Claimant's decision at that time declining lumbar surgery. Dr. Ludwig then opined that Claimant had progressed to a point where she likely would have been able to

tolerate many of her pre-injury job duties. Claimant's time-of-injury duties consisted mainly of arranging shoe displays and waiting on customers, but also included strenuous activities such as lifting large boxes, going up and down ladders, and moving tables. Claimant's unresolved debilitating back and leg pain prompted her to change her mind regarding potential lumbar surgery and request surgical consultation. However, on March 2, 2010, Dr. Ludwig released Claimant to return to work lifting 10 pounds continuously, 20 pounds occasionally, and 35 pounds rarely. Unfortunately, Employer had closed its Post Falls location, eliminating any work opportunity. Moreover, Dr. McNulty concluded on March 22, 2010, that Claimant had not reached maximum medical improvement from her industrial accident and would benefit from evaluation by a neurosurgeon for consideration of surgical treatment. He thereafter concluded that Claimant was able to perform sedentary work only.

14. The Commission's September 26, 2012, decision in this matter stated: "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." Claimant has now been evaluated by a neurosurgeon, Dr. Dirks, who recommended and performed lumbar surgery on February 11, 2013. Dr. Ludwig's conclusion that Claimant had reached maximum medical improvement absent surgery is moot. Dr. McNulty's evaluations and opinions and Dr. Dirks' evaluation and surgery establish that Claimant was still in a period of recovery due to her industrial accident after February 25, 2010, until the time of her surgery.

15. Inasmuch as Claimant was still in a period of recovery between February 25, 2010, and February 11, 2013, pursuant to Maleug she is entitled to total temporary disability benefits unless and until Defendants offer her suitable light-duty work or establish that such was otherwise available to her in the general labor market. Defendants have established neither.

Employer closed its business location several months after the industrial accident and offered Claimant no suitable employment after February 25, 2010. Defendants have offered no evidence disputing Claimant's testimony that she unsuccessfully searched for cashiering and other work in Post Falls. She approached clerical, hardware, and other businesses in Post Falls, but received no job offers.

16. Claimant has proven her entitlement to total temporary disability benefits from February 25, 2010, until February 11, 2013.

CONCLUSION OF LAW

Claimant has proven her entitlement to total temporary disability benefits from February 25, 2010, until February 11, 2013.

RECOMMENDATION

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

DATED this 31st day of May, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Alan Reed Taylor, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION 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

kh

_____/s/_____

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IC 2009-024074

ORDER

Filed June 7, 2013

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion 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 conclusion of law as its own.

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

1. Claimant has proven her entitlement to total temporary disability benefits from February 25, 2010, until February 11, 2013.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 7th day of June 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 7th day of June 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

STARR KELSO
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