

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

MARIA GOMEZ, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 DURA MARK, dba BLACKFOOT BRASS, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )  
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**IC 2009-018790**

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

Filed January 31, 2011

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted an emergency hearing in Idaho Falls on October 6, 2010. Claimant was present and represented by Michael R. McBride of Idaho Falls. Paul J. Augustine of Boise represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. This matter then came under advisement on December 28, 2010.

**ISSUES**

Per the August 3, 2010, Notice of Hearing, the issues to be decided are as follows:

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof; and
2. Whether Claimant is entitled to Temporary Partial and/or Total Disability (PTD;TD) Benefits, and the extent thereof.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that her physical condition has improved with additional medical treatment since her benefits were terminated by Surety as the result of an IME it arranged. Surety should be held accountable for medical benefits post-IME because the treatment was required by her treating physician and was reasonable under the *Sprague* criteria. Claimant also seeks TTD benefits post-IME until her treating physician declares her at MMI.

Defendants contend that their IME physician was correct when he concluded that Claimant was at MMI as of February 16, 2010. Based on that opinion, Defendants were justified in terminating Claimant's medical and income benefits. Further, all the credible medical evidence establishes that Claimant does not have a herniated lumbar disk that is pushing on an exiting nerve root. Therefore, her right leg symptoms are inconsistent with MRI findings and have no organic/anatomic basis, and are not industrially related. Because there is no objective medical evidence supporting Claimant's alleged need for continuing medical care, her treating physician must rely on Claimant's credibility and she is not credible. Claimant is not entitled to any additional TTD benefits based on her medical stability, coupled with the fact that she was offered light-duty work within her restrictions, which she declined. Finally, Claimant's treating physician has been a "patient advocate" and has relied on Claimant's non-credible subjective complaints of pain with no anatomical basis, and his treatment regimen based thereon is not necessary or reasonable under the *Sprague* standard.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's foundry manager Josh Scott taken at the hearing.

2. Claimant's Exhibits 1-9 admitted at the hearing.
3. Defendants' Exhibits A-C admitted at the hearing.
4. The post-hearing deposition of David C. Simon, M.D., taken by Defendants on November 2, 2010.

The objections made during the taking of Dr. Simon's deposition are overruled.

### **FINDINGS OF FACT**

1. Claimant was 43 years of age and had resided in Blackfoot for 20 years at the time of the hearing. She was born in Mexico and completed the 6<sup>th</sup> grade there. Before commencing employment at Employer's foundry in 2001, Claimant worked in convenience stores as a cashier and deli manager. Claimant was a packaging inspector for Employer. She testified at hearing that she enjoyed her job, was paid well, and planned on continuing working there.<sup>1</sup>

2. Claimant suffered a work-related accident while working for Employer in 2002 when she hurt her back while lifting. After a course of physical therapy, Claimant was eventually released to return to work without restrictions.

3. In 2006, Claimant injured her neck and right shoulder in another work-related accident. She again participated in physical therapy and was eventually able to return to full-duty work without restrictions.

*Dr. Huneycutt*

4. Claimant suffered the subject industrial accident on July 24, 2009. At that time she injured her back while lifting a 60-65 pound box. Her injury occurred at about belt-line level

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<sup>1</sup> At the time of the hearing, Claimant was still employed by Employer, continued to be provided private health insurance, and received holiday pay even though she has not returned to work after her injury.

and radiated from her right buttocks down her right leg. At the recommendation of Gus Grimmett, FNP, Claimant underwent MRI evaluation of the lumbar spine on October 10, 2009.

That study was read in pertinent part as follows:

L4-L5: There is a broad-based central disc protrusion which causes effacement of the anterior portion of the thecal sac. There is a mild bilateral lateral recess narrowing. The neural foramen are widely patent. There is no significant central stenosis.

L5-S1: There is mild posterior disc bulging. There is a tear of the annulus fibrosis. There is no central or neural foraminal compromise.

**IMPRESSION:**

1. Shallow midline posterior disc protrusion at L4-L5 with mild bilateral lateral recess narrowing.
2. Small annular tear at L5-S1 with shallow posterior disc bulging.
3. No evidence of significant central or neural foraminal compromise.

Defendants' Exhibit C., p. 5.

After seeing a chiropractor, a family nurse practitioner, a physical therapist and undergoing a trial of medications, Claimant came under the care of W. Scott Huneycutt, M.D., a neurosurgeon, who she first saw on November 11, 2009. Dr. Huneycutt noted, "She reports that prior to this date [July 24, 2009], she was doing quite well, although she has a distant history of low back pain following a previous industrial incident, perhaps three years previous." Claimant's Exhibit 2, p. 28. Claimant informed Dr. Huneycutt that she was experiencing pain, weakness, and numbness in her right leg as well as low back pain. Reviewing Claimant's MRI, Dr. Huneycutt stated:

The radiology is reviewed. The patient presents with a recent lumbar MRI. This imaging study reveals incidence of herniation of the disk at L4-5 with impingement of the exiting nerve root on the right side and resultant neural foraminal stenosis. Note, there is desiccation and collapse of the disk at L5-S1 as well.

Claimant's Exhibit. 2, p. 29.

Based on an October 2009 lumbar MRI, Dr. Huneycutt diagnosed a herniated lumbar disk with radiculopathy and low back pain. After discussing treatment options, including surgery, Claimant opted to pursue pain management and possible spine injection therapy. Regarding causation, Dr. Huneycutt indicated, “I have made no statement in reference to causality. I made it clear to the patient that I would defer to a physical medicine specialist in the determination of causality or disability determinations.” *Id.*, p. 29. Dr. Huneycutt referred Claimant to Jake Poulter, M.D., a physiatrist and pain management specialist.

*Dr. Poulter*

5. Claimant first saw Dr. Poulter on December 7, 2009, with chief complaints of back pain with right lower extremity radiation. Dr. Poulter noted, “MRI report from a study dated October 10, 2009, was reviewed in the clinic today. This study reveals a disc protrusion at the L4-L5 level with a bilateral lateral recess narrowing. She also has a small disc bulge at the L5-S1 level. There is impingement of the exiting nerve root on the L4-L5 level on the right side due to the neuroforaminal stenosis produced by the disc bulge.” Defendants’ Exhibit C, p. 92. Dr. Poulter further commented, “She has an MRI that nicely matches the pain distribution of the nerve root that has been impinged at the L4-L5 level.” *Id.* Claimant’s treatment with Dr. Poulter consisted of epidural steroid injections and physical therapy referral.

### **DISCUSSION AND FURTHER FINDINGS**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). **A claimant bears the burden of proving that medical expenses and**

**treatment were incurred as a result of an industrial injury** and 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, 890 P.2d 732 (1995). (Emphasis added). “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). No “magic” words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician’s oral testimony is not required in every case, but his or her medical records may be utilized to provide “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

Claimant is correct in arguing that under the *Sprague, Id.*, criteria, the appropriate inquiry is not whether the treatment is necessary, but whether the treatment is reasonable. The treatment is reasonable when three criteria are met: 1) the claimant made gradual improvement from the treatment received, 2) the treatment was required by the claimant’s physician, 3) the treatment received was within the physician’s standard of practice, and the charges were fair, reasonable, and similar to charges in the same profession. *Id.*, at 722-723, 397-398. However, the issue in this case, as noticed, is whether Claimant is entitled to reasonable and necessary medical treatment, and if so, the extent thereof. Before *Sprague* comes into play, Claimant must first show that there is a causal relationship between the accident and the injuries for which she claims benefits. Claimant bears the burden of adducing medical proof to prove her claim for compensation to a reasonable degree of medical probability. She must show that it is more likely than not that her need for treatment is causally related to the subject accident.

## **Causation:**

*Dr. Simon*

6. At Defendants' request, David C. Simon, M.D., a physiatrist, conducted an Independent Medical Evaluation (IME) of Claimant on February 16, 2010. He examined Claimant and reviewed medical records. He prepared a report and was deposed. Dr. Simon reported that Claimant ". . . specifically denied any prior problems with her low back." Defendants' Exhibit A., p. 1. By the time of his examination, Claimant had completed the physical therapy prescribed by Dr. Poulter. She informed Dr. Simon that she limits her home exercises due to pain, and that the injection Dr. Poulter administered did not help. Dr. Simon labeled Claimant as an unreliable historian based on her failing to disclose her prior low back problems, and therefore, he discounted her subjective complaints. While Dr. Simon observed exaggerated pain behaviors, he did not find any evidence of symptom magnification on Claimant's pain diagram.

7. Dr. Simon concluded that Claimant's back strain had resolved and the cause of her current complaints could not be determined. Claimant's physical examination (including a negative straight leg raise) was not consistent with her symptoms being related to a disk herniation and radiculopathy. She is at MMI, needs no further treatment, has no permanent physical impairment, and can return to work without restrictions regarding her work-related low back injury.

8. Claimant returned to Dr. Poulter on February 23, 2010, complaining of persistent pain that prevented her from returning to work. Contrary to what Dr. Simon reported, Dr. Poulter indicated that Claimant told him that she had experienced a 30-40% improvement with the epidural steroid injection; however, Claimant chose to pursue physical therapy rather than

undergo another injection. Because Claimant's physical therapy had not been proven to be effectual, Dr. Poulter recommended, and Claimant agreed to, another injection to be scheduled later.

9. In an April 8, 2010, letter to the Idaho Falls office of the Industrial Commission Rehabilitation Division, Dr. Poulter wrote, *inter alia*:

It is my opinion that the patient has a persistent disc bulge which continues to be symptomatic. I do not feel like she is ready to return to work. We had a previous treatment plan in place, but unfortunately this has been halted secondary to a recent workman's compensation evaluation. I do not agree with Dr. Simons [sic] findings. I find that the patient continues to have neural tension signs on physical examination and findings in her right lower extremity which are concerning for ongoing neural tension and neurological changes.

Claimant's Exhibit 1, p. 2.

10. On April 7, 2010, Dr. Simon authored a letter to a claims examiner for Surety regarding his opinion of Dr. Poulter's letter mentioned above. Dr. Simon begins by stating that, "As a treating physician, Dr. Poulter appears to admirably be advocating for his patient." Defendants' Exhibit A, p. 8. He believes their differences of opinion stem from their respective interpretations of the October 2009 lumbar MRI. Dr. Simon reviewed the radiologist's report as well as the MRI study itself. Dr. Simon did not appreciate any neuroforaminal stenosis nor did the radiologist. Dr. Simon also disagrees that there is an "acute" herniation at L4-L5 based on a 2003 chiropractic record indicating that Claimant was then experiencing low back and leg pain. This would indicate a chronic protrusion, as Dr. Simon saw no evidence of an acute herniation on the MRI. Dr. Simon also questions which nerve root Dr. Poulter suspects is causing Claimant's symptoms. If, as Dr. Poulter found, there is a discrepancy in Claimant's reflexes bilaterally, he must mean the patellar and ankle reflexes. If so, that would be indicative of problems with the L4 and S1 nerve roots. If Claimant did have an L4-L5 disk herniation



resulting in neuroforaminal stenosis, that would involve the L5 nerve root. Dr. Simon saw no evidence of neuroforaminal stenosis at this level, nor did the radiologist, “The neural foramen [at L4-L5] are widely patent.” Defendants’ Exhibit C, p. 5. Dr. Simon is unsure whether Dr. Poulter is implicating three separate nerve roots; however, the MRI does not show any objective evidence of that being the case. Finally, Dr. Simon opines that if this matter is looked at objectively (as opposed to being the patient’s advocate),<sup>2</sup> the only conclusions that can be reached are as stated in his IME report.

*Dr. Montalbano*

11. At Defendants’ request, Paul Montalbano, M.D., a neurosurgeon, reviewed Claimant’s medical records including the lumbar MRI scan and x-rays, Dr. Simon’s IME, and the two letters written by Dr. Poulter. In a letter to Defendants’ counsel dated August 12, 2010, Dr. Montalbano, after having personally reviewed the actual MRI scan, agrees with Dr. Simon’s opinions as expressed in his IME report and subsequent letter. Dr. Montalbano found no evidence of significant canal/foraminal stenosis or any instability. He also found no evidence of any acute herniation at any lumbar level. He believes Claimant is at MMI and needs no further treatment for her work-related lumbar strain.

*Dr. Simon’s deposition testimony*

12. Dr. Simon has been board certified in physical medicine and rehabilitation since 1997 and practices in Idaho Falls. He is the medical director at the rehabilitation unit at Eastern Idaho Regional Medical Center where he sees patients and conducts electrodiagnostic testing.

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<sup>2</sup>Judging by the number of IMEs performed by Dr. Simon between 2007 and 2009, the argument could be made that he is a “surety advocate.” See, Exhibits 2-4 to Dr. Simon’s deposition. However, the Referee sees no purpose in “name calling” when addressing legitimate differences of medical opinion.

He also has an office practice where he treats patients and performs IMEs, which for the last couple of years have constituted more than half of his income.

13. Dr. Simon saw Claimant for an IME at Surety's request on February 16, 2010. His IME report was admitted into evidence and is referenced in findings numbers 6 and 7 above. Dr. Simon testified as follows regarding his take on the lumbar MRI:

Q. (By Mr. Augustine): All right. And your independent review of the MRI of the lumbar spine, what did you see that was significant to you in diagnosing the cause of her problems, if anything?

A. Well, I think I would answer that more by saying what I didn't find that was significant. I mean, one of the concerns given her complaints and potentially the exam findings would be a nerve being pinched, you know, particularly nerves going down the right leg. And I didn't see any nerves being pinched.

You know, what I did see was some desiccation of the bottom of two discs which is just a, you know, a phenomenon which some would call degenerative disc disease which isn't really a disease, but just a normal part of aging, and so she had some of that. And there was a small protrusion of the L4-5 disc, but I didn't see it pinching any nerves or creating any stenoses, is what we call it.

Dr. Simon Deposition, pp. 17-18.

14. Dr. Simon reached two diagnoses. The first was back and right leg pain, based solely on Claimant's subjective view of her symptoms. The second was that the cause of her current symptoms cannot be determined. He opined that even if what Dr. Poulter claims he identified on the MRI was true, it still would not provide an anatomical basis for Claimant's symptoms. Because Claimant's subjective complaints outweighed her objective symptoms and because she was not forthright with him regarding her prior low back problems,<sup>3</sup> Dr. Simon discounted any subjective complaints that she was reporting. Based thereon, as well as his, the radiologists, and Dr. Montalbano's interpretation of the MRI, Dr. Simon concluded that there

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<sup>3</sup> It is unknown why Claimant had earlier informed Dr. Huneycutt of her prior back problems but did not so inform Dr. Simon.

was no relationship between the symptoms reported by Claimant and her industrial accident and low back strain.

15. One of the puzzling aspects of this case is the significant difference of opinion over the interpretation of Claimant's MRI study. Drs. Biddulph, Simon and Montalbano, all had the opportunity to review the films. Dr. Biddulph, the radiologist who initially read the study, failed to see in it any evidence of significant, central canal, or neuroforaminal compromise. In other words, the MRI did not reveal any anatomic changes that might explain the seeming radicular component to Claimant's pain. This interpretation of the study was shared by Drs. Montalbano and Simon, who, as well, had the opportunity to review the actual films.

On the other hand, Drs. Huneycutt and Poulter reviewed the identical study, and came to a much different conclusion. Those physicians felt that the study revealed evidence of a disk herniation at L4-5 with impingement on the exiting nerve root on the right. Per Dr. Poulter, the MRI study correlated well with Claimant's clinical exam; her right-sided lower extremity discomfort was consistent with the L5 nerve root lesion.

In resolving this conflict, the Referee is more persuaded by the opinions expressed by Drs. Simon, Montalbano and Biddulph, than those of Drs. Poulter and Huneycutt, regarding the etiology of the condition which required Claimant to receive on-going treatment from Dr. Poulter following Dr. Simon's February 16, 2009, IME.

Dr. Poulter's treatment both before and after Dr. Simon's IME was ostensibly directed at Claimant's L4-L5 nerve root and alleged right leg radiculopathy. However, the MRI report itself is clear that there is no nerve root impingement at that level, and is so read by Drs. Simon and Montalbano, as well as the radiologist. While Dr. Poulter may well have also been treating some myofascial pain and whatever pain may have arisen from the annular fibrosis tear at L5-S1, there

is nothing in the record in that regard. Further, the record does not reveal the bases for Drs. Huneycutt's or Poulter's reading of the MRI in the manner they do.

16. The Referee recognizes that Claimant reported improvement from the therapy she received following Dr. Simon's IME. The Referee would note that Claimant is not a very reliable historian when it comes to describing the efficacy of the conservative therapies that she has received. At hearing, Claimant denied that the first epidural steroid injection provided any relief from her symptoms. In fact, she stated that it sent her to bed for a period of days due to increased discomfort. She also evidently told Dr. Simon that the first epidural steroid injection was not effective. However, Dr. Poulter reported that Claimant gave him a history of having experienced 38-40% improvement in symptomology as a result of the first epidural steroid injection. However, even if it be accepted that Claimant did make significant improvement as a result of the medical treatment provided following the independent medical examination, this fact, standing alone, is insufficient to support the claim for medical benefits where Claimant has failed to demonstrate the condition for which the treatment was received is causally related to the subject accident. It is important to remember that even if it be assumed that the subject accident did cause a disk herniation thought to compromise an exiting nerve root, Claimant's clinical exam by Dr. Simon demonstrated that Claimant's symptoms are not in the distribution that one would expect from a right-sided L5 nerve root lesion. Whatever else might be the cause of Claimant's symptoms, the alleged L4-5 work related nerve root lesion is not the cause. The Referee finds that Claimant has failed to prove that the medical benefits she seeks were incurred for conditions related to her industrial accident and injury. Therefore, a *Sprague* analysis is unnecessary.

17. All other issues are moot.

**CONCLUSIONS OF LAW**

- 1. Claimant has failed to prove that the medical treatment she received after Dr. Simon’s February 16, 2010, IME is related to her industrial accident and injury.
- 2. All other issues are moot.

**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 31<sup>st</sup> day of January, 2011.

INDUSTRIAL COMMISSION

/s/  
Michael E. Powers, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of January, 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:

MICHAEL R MCBRIDE  
1495 EAST 17<sup>TH</sup> ST  
IDAHO FALLS ID 83404

PAUL J AUGUSTINE  
PO BOX 1521  
BOISE ID 83701

ge

Gina Espinoza

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

MARIA GOMEZ, )  
)  
          Claimant, )  
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          v. )  
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DURA MARK, dba BLACKFOOT BRASS, )  
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          and )  
)  
STATE INSURANCE FUND, )  
)  
          Surety, )  
)  
          Defendants. )  
\_\_\_\_\_ )

**IC 2009-018790**

**ORDER**

Filed January 31, 2011

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 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 has failed to prove that the medical treatment she received after Dr. Simon’s February 16, 2010, IME is related to her industrial accident and injury.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 31<sup>st</sup> day of January, 2011.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
Thomas P. Baskin, Commissioner

   PARTICIPATED BUT DID NOT SIGN     
R. D. Maynard, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of January 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE  
1495 EAST 17<sup>TH</sup> ST  
IDAHO FALLS ID 83404

PAUL J AUGUSTINE  
PO BOX 1521  
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/s/