

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TENEILLE HOGGE,

Claimant,

v.

NAPOLEON'S FOR MEN, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2004-524023

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

Filed March 8, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers who conducted a hearing in Boise on September 1, 2011. Claimant appeared *pro se*. Neil D. McFeeley of Boise represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions taken. The parties submitted post-hearing briefs and this matter came under advisement on January 3, 2012.

ISSUES

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

1. Whether Claimant is entitled to past and future medical care;
2. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total (TPD/TTD) benefits;

3. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits; and

4. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to past and future medical benefits as the result of a compensable 2004 lifting injury, and she was prematurely declared medically stable by a physician who did not have Claimant's best interests in mind. Claimant has tried and failed to get an attorney; without an attorney she has not been able to obtain a PPI rating. She is still having symptoms associated with her lifting injury and seeks reimbursement for medical treatment she has sought on her own since being declared at MMI. She also seeks future medical care until she has at least been properly diagnosed and treated.

Defendants contend that Claimant has failed to meet her burden of proof regarding medical causation. Only one of the many physicians Claimant has seen since being declared at MMI have related the condition or conditions for which Claimant was receiving treatment to her 2004 lifting injury, and that opinion is not credible. That being the case, she is not entitled to any medical treatment beyond MMI. Further, Claimant has not proven her entitlement to TPD/TTD benefits by medical evidence, and no physician has provided Claimant with a PPI rating and without such, there can be no PPD.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, presented at the hearing.
2. Claimant's Exhibits 1-16, admitted at the hearing.

3. Defendants' Exhibits A-O, admitted at the 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

Pre-MMI treatment

1. Claimant was 32 years of age and resided in Caldwell at the time of the hearing. She worked for Employer as a licensed cosmetologist. On August 24, 2004, Claimant was carrying a five-gallon bucket full of water when she felt pain in her bilateral elbows, torso, and upper back on the left. Her condition worsened so the next day Employer gave her cash to see a physician. Claimant saw Michael Kennedy, D.O., on August 25, 2004 with a chief complaint of shoulder pain. Dr. Kennedy diagnosed rotator cuff tendinitis.¹ He prescribed Vioxx and told Claimant to follow-up in three weeks.

2. Claimant returned to Dr. Kennedy on September 29, 2004 and indicated that she had improved significantly, but that she still had tenderness when hairdressing at work. Dr. Kennedy prescribed medications and instructed Claimant on range of motion exercises and icing.

3. Claimant returned to Dr. Kennedy on January 31, 2005 and saw his physician's assistant, Eric Maus, for her continuing left shoulder pain. Claimant had no other complaints at that time. She was able to bend her neck left to right without difficulty and had no discomfort upon palpation of her arm. Mr. Maus referred Claimant to Howard Shoemaker, M.D., an occupational medicine specialist.

4. Claimant first saw Dr. Shoemaker on February 7, 2005 complaining of left shoulder and bilateral elbow pain. Upon examination, Dr. Shoemaker diagnosed left shoulder

¹ Claimant suffered a non-surgical rotator cuff tear in a motor vehicle accident in 2001 that had resolved and was asymptomatic at the time of her 2004 industrial accident.

rotator cuff tendinitis, bilateral elbow pain, and psychological factors affecting her physical condition. Regarding this diagnosis, Dr. Shoemaker noted, “She said today that I ‘barely touched her’ so that she was not sure of my diagnosis.” Defendants’ Exhibit L, p. 143. Dr. Shoemaker prescribed a Medrol Dosepak, as Claimant would not consent to a cortisone injection. He also prescribed physical therapy and referred her to orthopedic surgeon, Jeffrey Hessing, M.D., who had treated Claimant for her prior rotator cuff tear. Dr. Shoemaker believed her shoulder problem was chronic and that many psychological issues were involved.

5. Claimant returned to Dr. Shoemaker on February 21, 2005, before she saw Dr. Hessing. She informed him that after five physical therapy sessions, her left shoulder pain had not improved at all. Claimant was not working. She was still refusing a cortisone injection due to an adverse reaction to one administered by Dr. Hessing during his prior treatment of her. Dr. Shoemaker ordered a left shoulder MRI which, as he suspected, was completely normal. Even so, Claimant insisted on seeing Dr. Hessing for a second opinion. Dr. Shoemaker diagnosed left shoulder pain with the pain being out of proportion to physical findings. He noted, “. . . I really believe there are psychological factors here at play.” Defendants’ Exhibit L, p. 147.

6. Claimant saw Dr. Hessing on March 2, 2005 to evaluate her left shoulder and right elbow. Dr. Hessing noted, “Her pain responses appear exaggerated and magnified.” Defendants’ Exhibit G, p. 89. Dr. Hessing concluded that Claimant was overstating her symptoms, but recommended a neurologic evaluation and EMG to be sure:

I advised the patient that she demonstrates no obvious changes in her shoulder or elbows to explain her persistent symptoms. I think her symptoms are overstated and overdetermined. I recommend a neurologic evaluation with possible EMG’s [sic] to sort through her magnified complaints which far out weigh [sic] any objective findings. I doubt true shoulder pathology as the source of her ongoing symptoms. If the EMG is negative, I think she just needs to be pushed along.

Defendants' Exhibit G, p. 89.

7. Claimant returned to Dr. Shoemaker on March 14, 2005, still complaining of left shoulder and neck pain. Claimant informed Dr. Shoemaker that she had completed 10 physical therapy sessions without noticing any improvement. He reiterated that Claimant's left shoulder MRI was normal. Dr. Shoemaker noted that Dr. Hessing had no more to offer her from a shoulder perspective. Dr. Shoemaker ordered EMG studies which returned normal results. Cervical spine x-rays were also normal.

8. Claimant again saw Dr. Shoemaker on April 5, 2005, complaining of back pain radiating into both arms, but not so much neck pain. Dr. Shoemaker noted that there has been no improvement in Claimant's subjective complaints with any form of treatment. He also noted, "At this point, we have done all we can reasonably think of and the patient has continued with persistent pain as mentioned above and inability to do all her essential job functions, but I do believe there is a significant psychological or non-physiologic component to her pain and that clearly all her pain complaints are of soft tissue origin." *Id.*, p. 152. Dr. Shoemaker referred Claimant to Nancy Greenwald, M.D., a physiatrist.

9. Claimant first saw Dr. Greenwald on May 12, 2005 complaining of bilateral neck and arm pain. Dr. Greenwald was aware of Claimant's history of motor vehicle accident in 2000 and a left shoulder MRI in 2001 that revealed a full-thickness tear of the supraspinatus. She was also aware that Claimant's 2005 left shoulder MRI, upper extremity EMG and cervical x-rays were all completely normal. In addition, Dr. Greenwald knew that Claimant had been in and out of physical therapy without success, and that Claimant was no longer attending.

10. Claimant informed Dr. Greenwald that she had been fired a week earlier. She noted Claimant's current complaints: "The patient has a left upper trapezius pain. It goes down

her left arm and she has numbness and tingling starting at her elbow. It goes into her wrist and hand. On the right hand it starts at the elbow and goes into the lateral portion of her hand.” Defendants’ Exhibit E, p. 75.

11. Dr. Greenwald recommended a cervical MRI at C5-6 levels bilaterally to help further investigate the source of Claimant’s discomfort. If the MRI is negative, Dr. Greenwald anticipated she would recommend either a full work release or a work-hardening program. However, both the cervical MRI as well as another EMG of the radial nerves turned out to be normal. Dr. Greenwald had no focal findings that would preclude Claimant from cutting hair and she recommended the Work Fit Program and a return to work without restrictions following completion of that program.

12. Claimant began the work hardening program and, initially, was not going to complete it² or participate in a functional capacities evaluation (FCE). She felt that Dr. Greenwald did not have her best interests at heart and that she was being treated “uncivilly.” However, when she was informed that her benefits would be terminated unless she fully complied, Claimant finished the program and participated in the FCE. The physical therapist who conducted the FCE reported that Claimant’s results were invalid due to Claimant’s efforts to manipulate them:

This is identified to be an Invalid [sic] representation of the present physical capabilities of Teneille A. Hogge based upon consistencies and inconsistencies interfacing grip dynamometer graphing, resistance dynamometer graphing, heart rate variations, weights achieved, and selectivity of pain reports and pain behaviors. The results represent a manipulated effort by the client. Therefore, the levels identified by the client represent less than their true safe capability level.

² Claimant was adamant in her testimony and briefing that Dr. Greenwald was doing her more harm than good and she wanted a referral to a chiropractor which Surety and Dr. Greenwald denied. Claimant filed a Petition for Change of Physician, which was also denied.

Defendants' Exhibit J, p. 116.

13. Dr. Greenwald performed what she described as an Independent Medical Examination upon Claimant's completion of the Work Fit Program on June 27, 2005. Claimant reported various upper and low back symptoms:

Improving her endurance for pain. Biceps and forearms are still burning, still pins and needles in the wrists and thumbs, and the issue with her "elbows". Her low back is worse. She states a belt was placed on her in the pool, it was too loose and it caused some low back pain. Also, her left shoulder is sore and her knees are sore as well.

Defendants' Exhibit E, p. 81.

14. Dr. Greenwald found Claimant to be at MMI and without PPI. She released Claimant to her time-of-injury employment without restrictions and recommended no further medical treatment. Dr. Greenwald found no permanent impairment as a result of the August 2004 industrial injury:

The patient has had an extensive work-up. She has had two EMGs. She has had a cervical MRI as well as a left shoulder MRI as well as completed a work hardening program. There have been no definitive findings of any neuropathy or shoulder abnormalities or neck abnormalities. From today's examination as well as diagnostic criteria as well as her functional capacity assessment response, I do not find any permanent impairment related to the work injury of August 2004.

Id., p. 82.

15. As mentioned in footnote 2, Claimant saw a chiropractor during her participation in the Work Fit Program. She saw Jeffrey Pewe, D.C., on June 16, 2005 and embarked upon a lengthy and extensive course of treatment. Dr. Pewe's handwritten notes are, for the most part, illegible. In any event, the Referee cannot find, and Claimant has failed to point out, just what condition(s) Dr. Pewe was addressing or whether such condition(s) was/were in any way related to her 2004 accident.

Post-MMI treatment

16. Claimant saw Stanley Moss, M.D., an orthopedic surgeon, one time only on August 22, 2005, a few months after being released by Dr. Greenwald. Dr. Moss examined Claimant and reviewed the results of her various diagnostic tests. He described her case as “very complex.” Dr. Moss was aware that Claimant had seen many physicians, chiropractors, and therapists. Claimant was complaining of tingling in her forearms and hands, yet her EMG was completely negative. She was also complaining of bilateral shoulder tenderness and some left hip pain. Dr. Moss observed that Claimant and her doctors were all frustrated. Claimant’s physical examination was essentially unremarkable. Dr. Moss indicated that Claimant needed to see a physiatrist because she did not have an orthopedic problem. Dr. Moss did not reach a diagnosis, and expressed no opinion regarding causation.

17. Claimant next saw K. Cheri Wiggins, M.D., a physiatrist in Twin Falls, on September 29, 2005. Although Dr. Wiggins did not have the benefit of reviewing Claimant’s prior medical records, she did review the diagnostic studies and agreed all were normal except the cervical spine which showed some lordosis of the neck. Dr. Wiggins’ examination was essentially normal. She referred Claimant to a physical therapist in Boise who specializes in postural restoration. She also recommended a physiatrist in Boise nearer to Claimant’s home, but she refused.

18. Claimant returned to Dr. Wiggins on November 8, 2005, after working with the postural restoration therapist in Boise for four weeks. Claimant again refused Dr. Wiggins’ offer to have her care transferred to Boise. Claimant reported that she was seeing some improvement, especially with her left hip; she estimated she was 80% better. However, her shoulder and cervical pain has not improved. Dr. Wiggins continued Claimants’ physical therapy.

19. Dr. Greenwald reviewed Dr. Wiggins' records. She did not change her mind regarding the conclusions she reached in her IME.

20. Claimant last saw Dr. Wiggins on May 15, 2006 for myofascial pain that, ". . . is the direct result of her on the job injury." Claimant's Exhibit 7, (pages not numbered).

21. Claimant next saw Daryl McCarter, M.D., on September 13, 2006, at the Idaho Arthritis and Osteoporosis Center, on a referral from her physical therapist, to evaluate her myofascial pain. She was complaining of pain in her chest and lower and upper back. A right shoulder x-ray revealed degenerative changes involving the right AC joint. A thoracic spine x-ray revealed moderate scoliosis. An lumbar spine x-ray revealed probable early degenerative disc disease. Dr. McCarter diagnosed fibromyalgia syndrome with associated restless legs, irritable bowel syndrome, sleep disturbance, and fatigue. Claimant continued to treat with Dr. McCarter until at least July 2007. Dr. McCarter does not relate Claimant's fibromyalgia to her industrial accident.

22. Claimant also saw Richard Radnovich, D.O, a physiatrist, at an attorney's suggestion on April 19, 2010. She was complaining of upper back, neck, and arm pain. Dr. Radnovich questioned the fibromyalgia diagnosis and cited a possible underlying metabolic disorder or a possible lower cervical lesion. His diagnosis was chronic pain syndrome and he continued to treat Claimant for that condition until May of 2011. He does not relate that condition to Claimant's August 2004 industrial accident.

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 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). “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).

23. Surety paid for Claimant’s pre-MMI medical care. Only her post-MMI medical care is at issue.

24. The only evidence of a causal connection between any treatment received by Claimant after being declared at MMI and her industrial accident was found in a two-sentence “To Whom It May Concern” letter authored by Dr. Wiggins on March 9, 2006. “Ms. Hogge’s Flexeril is certainly prescribed for her myofascial pain which is the direct result of her on the job injury.” Claimant’s Exhibit 7, (pages not numbered).

25. There are a number of problems with this “causation opinion.” First is lack of foundation. It cannot be known upon what factors Dr. Wiggins relied in reaching her diagnosis or in connecting the same with her accident. Second, as Defendants point out, Dr. Radnovich casts doubt upon the soundness of Dr. Wiggins’ diagnosis because he disagrees that Claimant’s symptoms are caused by fibromyalgia and myofascial pain syndrome. Third, Dr. Greenwald

maintained her opinion that there is no causal connection between Claimant's symptoms and her industrial accident after reviewing Dr. Wiggins' records.

26. Claimant adamantly disagrees with Dr. Greenwald. However, she has brought forth no credible medical evidence suggesting that anything Dr. Greenwald did by way of treatment was unreasonable or that Claimant was not at MMI on June 27, 2005. Dr. Greenwald was more familiar with the totality of Claimant's circumstances than any other physician. As a result of the weak foundation for Dr. Wiggins' opinion as compared with Dr. Greenwald's, the Referee finds Dr. Greenwald's more persuasive. Claimant reached MMI on June 27, 2005 and she has failed to establish that any symptoms she suffered after that date were caused by her August 2004 industrial accident.

CONCLUSIONS OF LAW

1. Claimant has failed to prove she is entitled to any further medical care as a result of her accident on August 24, 2004.
2. Claimant has failed to prove she is entitled to TTD/TPD benefits.
3. Claimant has failed to prove her entitlement to PPI benefits.
4. Claimant has failed to prove she is entitled to PPD 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 __29th__ day of February, 2012.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 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:

TENEILLE A HOGGE
PO BOX 696
NEW PLYMOUTH ID 83655

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

ge

Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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NAPLEON'S FOR MEN, INC.,

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IC 2004-524023

ORDER

Filed March 8, 2012

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 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 failed to prove she is entitled to any further medical care as a result of her accident on August 24, 2004.
2. Claimant has failed to prove she is entitled to temporary partial and/or temporary total (TTD/TPD) benefits.

3. Claimant has failed to prove her entitlement to permanent partial impairment (PPI) benefits.

4. Claimant has failed to prove she is entitled to permanent partial disability (PPD) benefits.

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

DATED this __8th__ day of _March_, 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 __8th__ day of __March__ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

TENEILLE A HOGGE
PO BOX 696
NEW PLYMOUTH ID 83655

NEIL D MCFEELEY
PO BOX 1368
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ge

_____/s/_____