BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRADLEY N. JOHNSON, Claimant, v. CITY OF REXBURG, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-025743** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** July 5, 2013

Pursuant to Idaho Code § 72-506, the above entitled matter was assigned to Referee LaDawn Marsters, who conducted a hearing on February 26, 2013 in Idaho Falls, Idaho. Claimant was present in person and represented by James D. Holman of Idaho Falls. Employer (City) and Surety (collectively, Defendants) were represented by Paul J. Augustine of Boise. Oral and documentary evidence was admitted, and one post-hearing deposition was taken. The matter was briefed and came under advisement on June 21, 2013.

ISSUES

The sole issue to be decided as a result of the hearing is whether and to what extent Claimant is entitled to medical care.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant suffers significant chronic neck pain and headaches as a result of his October 1, 2009 industrial accident. Claimant contends he is entitled to further

treatment recommended by Dr. Poston, including but not limited to repeat radiofrequency ablation, trigger point injections, directed physical therapy, medications and an evaluation by a neurologist, because they are likely to improve his pain. Defendants counter that Claimant has not sufficiently improved with past radiotherapy procedures, and he is unlikely to improve in the future by pursuing Dr. Poston's recommendations. Therefore, the treatment he seeks is not reasonable, and his claim should be denied.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits "A" through "O" admitted at the hearing;
2. The testimony of Claimant taken at the hearing; and
3. The post-hearing deposition testimony of Jason Poston, M.D. taken February 28, 2013 and Jeff Chung, M.D. taken March 12, 2013.

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

After considering 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.

BACKGROUND

1. Claimant was 40 years of age at the time of the hearing and resided in Blackfoot. On October 1, 2009, he was working as an inspector of various building components for the City when he fell off a ladder, catching himself abruptly with his left arm. At first, he did not think he had seriously injured himself but, after a few days, pain grew in his shoulders and arms. Claimant obtained medical treatment, which ultimately led to a diagnosis of cervical spine disc

herniation at C5-6 with left C6 radiculopathy related to his industrial accident. Claimant underwent a C5-6 discectomy and arthroplasty on February 2, 2010. He continued to experience pain and other symptoms so, on May 25, 2010, Claimant underwent a discectomy and fusion at C4-5.

2. Claimant has experienced significant neck pain and headaches since his surgeries. As a result of his post-surgical pain limitations and medical restrictions, he is unable to return to his former employment as an inspector. At the time of the hearing, Claimant was attending his second semester of a two-year program (Associate of Applied Science Degree in Energy Systems Instrumentation & Controls Engineering Technology) at Idaho State University through retraining benefits provided by Surety.

RECOMMENDATIONS FOR FURTHER TREATMENT

3. Jason Poston, M.D. Dr. Poston is an anaesthesiologist who, after completing a fellowship in interventional pain medicine, began his private practice in pain medicine in 2010. His physician assistant is Matt Nelson. Dr. Poston and Mr. Nelson treated Claimant beginning in May 2011.

4. Claimant reported progressive severe pain in his neck and shoulders, right greater than left, and headaches. On exam, Dr. Poston sought evidence of treatable pain. He explained that identifying the pain source is important because "there are defined treatments for different types of pain syndromes." Poston Dep. P. 11. Also, it is common for a patient to have multiple pain sources requiring different therapies.

> For instance, certain pain syndromes will respond to certain medications. Neuropathic pain, for instance, nerve-related pain, will respond to nerve pain medication oftentimes…Pain from muscle and surrounding investing tissues often does not respond to medications but respond – but can respond to other defined therapies, particularly selective trigger-point injections in combination with very

> appropriate skilled physical therapy…And then other types of pain syndromes, including arthritic pain, or joint-related pain, can respond to other therapies.

Id. at pp. 11-12.

5. Along those lines, Claimant demonstrated pain consistent with facet loading (pain in some of the joints of his neck). He also had weight loss, muscle aches, weakness, and full strength on motor exam. Dr. Poston diagnosed cervical facet mediated pain with secondary myofascial pain, and possibly some cervical radiculopathy into his arms. He recommended a medication regimen and right-sided cervical spine diagnostic medial branch nerve blocks. "These are blocks that are done with a needle under fluoroscopic guidance at defined levels that block a particular nerve called the "medial branch" that innervates facet joints in an attempt to relieve that type of pain, that facet pain." Poston Dep., p. 14. Further, "there is good evidence in the literature that patients who receive significant relief from this diagnostic procedure can have prolonged relief with a radiofrequency ablative procedure." *Id.* at p. 15.

6. Radiofrequency ablation involves "placing specialized needles at described locations in the cervical spine. And then through those needles, placing a small catheter that is able to dispense a radiowave to these defined locations within the cervical spine." Poston Dep., p. 23. The purpose is to prevent the nerve from conducting pain impulses from the cervical facet joints. Dr. Poston explained that the procedure does not yield permanent results. It wears off "--usually in about a year, two years, sometimes shorter. But [*sic*] a year or two years, you repeat them again. Many times you have to repeat this every year." *Id.* at p. 24.

7. Dr. Poston took Claimant off work until the medial branch blocks could be performed because Claimant reported that his pain was so severe it prevented him from working.

8. Dr. Poston performed right-sided medial branch nerve blocks to C2 through C5 in June 2011. One week later, Claimant reported significant improvement in his pain and sleep, without any side effects. As a result, Dr. Poston concluded that at least part of Claimant's pain was facet-mediated and that radiofrequency ablation may be beneficial. He requested, and received, Surety's approval to perform the radiofrequency procedure.

9. On August 2, 2011, Dr. Poston performed radiofrequency ablation of Claimant's cervical medial nerve branches at C2 through C5. On September 15, 2011, Claimant reported 60% improvement on the right side and 40% pain relief overall. Although he hoped for more improvement, Dr. Poston opines this was a significant change in Claimant's condition for the better. He opined that medications could only provide 20% to 30% improvement, and the radiofrequency procedure doubled that. Also on this day, Claimant was started on Ambien for sleep problems, and Mr. Nelson recommended trigger point injections followed by physical therapy for myofascial pain signs and symptoms Claimant demonstrated on exam. Dr. Poston agreed with these recommendations and explained that the physical therapy recommendation was limited to specialized modalities that stretch and lengthen muscle fibers, and did not include muscle-strengthening approaches that can often harm pain patients.

10. On October 25, 2011, Dr. Poston performed radiofrequency medial branch ablation of Claimant's left C2-C4 nerve branches. He did not first perform diagnostic nerve blocks, as he did on the right side, and as is his common practice, because Surety instructed him to skip the nerve blocks.

11. On December 6, 2011, Claimant followed up, reporting only 20% improvement from the left-sided procedure. Dr. Poston was somewhat disappointed. Nevertheless, he believed this improvement was significant. "[T]here's no evidence for using pain medications

longer than 16 weeks, and at best, we get 20 to 30 percent out of them. This is as good as pain medication without the significant risk." Poston Dep., p. 32. He posited that he may get better results a second time around by placing the ablation needle in a different spot, by adding the C5 nerve branch, and by completing the diagnostic nerve block before advancing to the radiofrequency procedure. "I think if I would have been able to - - there's times when you do a radiofrequency procedure and you don't get the response that you need. And it may have been technical error, and then when you repeat that and they have fantastic long-lasting relief." *Id.* at p. 46.

12. Dr. Poston recommended continuing Claimant's treatment with a multidisciplinary approach, including repeat radiofrequency ablation procedures and trigger point injections, as needed.

> A multidisciplinary approach is an approach that has been shown in the literature to be beneficial for patients who experience severe and debilitating chronic pain.
>
> It involves working with multiple other providers and physicians as well as using multiple different therapies to improve a patient's quality of life, function and pain.
>
> We generally use appropriate psychology in this, appropriate physical therapy. We employ interventions when needed, as well as appropriate pain medications to improve – all working together to improve a patient's function and pain. And it's been shown in the literature that this approach is beneficial.

Poston Dep., p. 37.

13. Dr. Poston opined that it is inappropriate for Claimant to rely upon medications, alone, to relieve his pain. As stated, above, medications only provide 20% to 30% relief. Further, no authoritative study has shown opioid pain medications (such as Methadone) to be effective after 16 weeks of use.

> Does it mean that we don't use them longer? No. But we are – there are no good studies to support their use longer than 16 weeks. If the patient isn't receiving improvement in their ability to function and improvement in their pain scores, then I believe it is reasonable to continue with them. But that's what we look at.

Poston Dep., p. 42. And then, it must be recognized that opioids are addictive and carry significant risks, such as "sedation, confusion, constipation, sexual dysfunction, respiratory depression and even death." *Id.*, pp. 40-41.

14. Relying upon Dr. Chung's opinions (see below), Surety denied benefits for further Methadone prescriptions, radiofrequency ablation, trigger point injections and physical therapy.

15. Claimant followed up with Mr. Nelson on September 12, 2012. He had increased neck pain and headaches. Mr. Nelson referred Claimant to a neurologist for his headaches, recommended trigger point injections and physical therapy for his myofascial pain, and increased Claimant's Methadone (still a low dose). Claimant paid for his Methadone out-of-pocket, but he was unable to afford to follow up on the rest of Mr. Nelson's recommendations.

16. He confirmed in February 2013 that he still believes a multidisciplinary approach to Claimant's pain is appropriate:

> Again, I would like to have a multidisciplinary approach to his pain, including appropriate physical therapy, trigger-point injections when needed, periodic radiofrequency ablated procedures, and appropriate psychology working with Brad on relaxation techniques, coping skills, things that help him cope better with his pain.
>
> And I believe that with – if we employed this multidisciplinary approach, we could help him further; decrease his suffering, improve his function. And that is my – that would be my – my recommendations.

Id. at p. 47. Dr. Poston added that appropriate medications may also be beneficial, but that he believes Claimant's pain can be improved over the relief he gets from medications alone.

INDEPENDENT MEDICAL EVALUATIONS

17. David C. Simon, M.D. On April 12, 2010, Dr. Simon, a physiatrist, conducted an independent medical evaluation (IME) at Surety's request. Among other things, he determined that Claimant had not yet reached medical stability; however, Dr. Greenwald, Claimant's treating neurosurgeon, had released him to full duty without restrictions. On December 22, 2010, Dr. Simon again evaluated Claimant, this time finding him medically stable "although he needs ongoing treatment for palliative measures and optimal maintenance of his condition." JE-G15. Dr. Simon assessed 19% whole person Permanent Partial Impairment in relation to Claimant's cervical spine condition, all attributable to the industrial injury. He also opined that the continuing treatment recommendations of Dr. Greenwald were reasonable. They included medications (amitriptyline and Lyrica), physical therapy and a TENS unit. Dr. Simon noted that Claimant should discontinue his medications periodically to reevaluate the effect on his symptoms. He also specified that physical therapy need not be continued indefinitely, particularly if Claimant has a TENS unit at home. Dr. Simon recommended five or six more visits to a physical therapist before transitioning to a home exercise program.

18. Jeff Chung, M.D. Dr. Chung, a physiatrist practicing in Utah, specializes in pain management medicine. He performed an IME on behalf of Surety consisting of a medical records review, an interview with Claimant, and an examination. Dr. Chung produced his initial report on September 12, 2011, and supplemented that report on January 10, 2012.

19. Dr. Chung diagnosed Claimant with severe, permanent chronic neck pain. He believes Claimant's physicians, to the extent they have led Claimant to believe a "cure" may exist for his pain, have misled him. He believes Claimant needs to spend time learning to cope with his pain rather than searching for a cure.

20. As for palliative care, Dr. Chung believes medications will only improve Claimant's pain by 20% to 30%, and any search for a different drug, or combination of drugs, to further improve Claimant's condition over that range would be futile and, possibly, harmful. He recommends that Claimant continue to take Lyrica, Celebrex and Tizanidine, that he use a TENS unit for pain relief, and that he obtain some counseling to develop skills to cope with his pain (but only if he is open to this). However, Dr. Chung believes that the following treatments do not constitute reasonable medical care:

a. Methadone – Because it appears that the side effects outweigh its benefits. Claimant has lost 20 pounds due to nausea, apparently from Methadone.

b. Ambien – Dr. Chung opines this sleep aid would not improve Claimant's pain.

c. Any additional medications – He would not rule out different medications, but would only approve adding any medication after first eliminating a current medication on a one-for-one basis. He does not believe Claimant can achieve any more pain relief from medications than he already has, so adding medications with their attendant side effects and risks would not be reasonable.

d. Radiofrequency rhizotomy (ablation) – This procedure requires fluoroscopy, with inherent risks, and it only offers temporary relief from pain. Dr. Chung did not find Claimant's reports of improvement from his prior radiofrequency treatments significant.

e. Trigger point injections and physical therapy – These would only provide Claimant with palliative relief and could not be considered maintenance or curative care.

CLAIMANT'S CREDIBILITY

21. There is no dispute that Claimant experiences severe neck pain, that he seeks relief from his pain, and that he desires to return to work. Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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).

REASONABLE MEDICAL CARE

Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment. *Wichterman v. J.H. Kelly, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007). It is clear that in order to recover medical benefits, the injured worker must prove <u>both</u> that the need for medical care is causally related to the accident <u>and</u> that the medical care is "reasonable." See *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006).

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by a claimant's 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 is reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

The Idaho Supreme Court has held that medical treatment is reasonable when three circumstances exist: 1) the claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 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.* However, the *Sprague* standard anticipates a situation in which treatment has already been rendered, and the *Sprague* analysis is not readily applicable to care, like that at issue in the instant matter, that is prospective in nature. *See*, *Richan v. Arlo G. Lott Trucking, Inc.,* IC 2007-027185 (Feb. 2011); and *Ferguson v. CDA Computune, Inc.*, *et. al*., consolidated case numbers IC 2001-005778, IC 2001-021764, IC 2004-504577 and IC 2004-000161 (filed Feb. 2011).

22. There is no dispute that Claimant is entitled to reasonable palliative care going forward. Dr. Poston and Dr. Chung have both recommended medications and assistance with developing Claimant's coping skills. They part ways, however, when it comes to additional trigger point injections, directed physical therapy, and radiofrequency ablation procedures. To determine whether these disputed recommended procedures are "reasonable," the Commission must ascertain whether the required care is likely to be efficacious. In other words, if, from the medical evidence adduced by Claimant, it appears more probable than not that the care required by Dr. Poston will improve Claimant's condition, then the care is "reasonable."

23. Defendants argue that the recommended procedures will not make Claimant more functional at work, so they are not reasonable. They agree that the procedures offer temporary pain relief, but urge the Commission, nonetheless, to find Dr. Poston's recommendations do not constitute reasonable medical care.

24. The Referee finds Dr. Poston's and Claimant's testimony, that Claimant improved with radiofrequency ablation, more persuasive than Dr. Chung's testimony that he did not. Dr. Chung's definition of improvement is narrower than that developed through Idaho Workers' Compensation Law. Improvement in Claimant's chronic pain, even though it has not thus far been accompanied by significant functional improvement, is nonetheless an improvement in his condition. By Dr. Chung's own standard – that past experience should guide future treatment decisions – Claimant's demonstrated past improvement warrants repeat radiofrequency ablation procedures.

25. Similarly, Dr. Chung's opinion that the trigger point injections and directed physical therapy recommended by Dr. Poston will not provide a long-standing benefit is insufficient to establish that the recommendation is not reasonable. After all, medications only offer temporary improvement, and even Dr. Chung finds that type of treatment reasonable.

26. Dr. Chung and Dr. Poston both recognize that a risk/benefit analysis must be applied to treatment decisions. Dr. Chung's concern over the risks associated with radiofrequency ablation are offset by Dr. Poston's concerns about the risks and potential for declining effectiveness associated with opioid pain medications over time. Dr. Poston drew a different conclusion after engaging in this analysis than did Dr. Chung. This fact fails to establish that Dr. Poston's recommendations are not reasonable.

27. The record establishes that implementation of Dr. Poston's recommendation for a multidisciplinary approach to the treatment of Claimant's chronic pain is likely to improve his condition. The Referee finds Claimant has proven he is entitled to further reasonable palliative medical treatment, specifically including but not limited to: medications (including but not limited to Ambien and Methadone), radiofrequency ablation and related diagnostic procedures,

trigger point injections, directed physical therapy, a referral to a neurologist regarding his headaches, and psychological support to help develop Claimant's coping skills, as directed by Dr. Poston.

CONCLUSION OF LAW

Claimant has proven that he is entitled to additional reasonable and necessary medical care for his chronic neck pain and headaches, specifically including but not limited to: medications (including but not limited to Ambien and Methadone), radiofrequency ablation and related diagnostic procedures, trigger point injections, directed physical therapy, a referral to a neurologist regarding his headaches, and psychological support to help develop Claimant's coping skills, as directed by Dr. Poston.

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 in Boise, Idaho, on the __28th_____ day of ____June_____, 2013.

INDUSTRIAL COMMISSION

/s/_____
LaDawn Marsters, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __5th____ day of ___July_____, 2013, 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:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRADLEY N. JOHNSON, Claimant, v. CITY OF REXBURG, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-025743** **ORDER** July 5, 2013

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 that he is entitled to additional reasonable and necessary medical care for his chronic neck pain and headaches, specifically including but not limited to: medications (including but not limited to Ambien and Methadone), radiofrequency ablation and related diagnostic procedures, trigger point injections, directed physical therapy, a referral to a

neurologist regarding his headaches, and psychological support to help develop Claimant's coping skills, as directed by Dr. Poston.

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

DATED this __5th____ day of ____July_____, 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 __5th____ day of ____July_____, 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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