

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTIE LEN WAI,)
)
 Claimant,)
)
 v.)
)
 AXELSEN CONCRETE CONSTRUCTION,)
 INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
 Defendants.)
 _____)

IC 2006-524520

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

Filed: July 19, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on August 25, 2009. Rick Tuha of Nampa represented Claimant. Kent W. Day of Boise represented Defendants. The parties submitted oral and documentary evidence and took two post-hearing depositions. Both parties filed post-hearing briefs. The matter came under advisement on April 8, 2010, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition; and

3. Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;

b. Temporary partial and/or temporary total disability benefits (TPD/TTD).

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that his October 9, 2006 industrial injury caused a deep vein thrombosis (DVT) in his right leg; therefore, treatment for the DVT is compensable. Claimant relies upon the medical opinion of Katherine Elstun, M.D., in support of his contention. Claimant sustained time loss and incurred medical expenses related to hospitalization for treatment of the DVT.

Defendants contend that Claimant's industrial accident did not cause his subsequent DVT. Defendants cite to a number of discrepancies in Claimant's version of events surrounding the accident and the opinion of Claimant's treating physician, Scott Lossman, M.D., in support of their denial of benefits for treatment of the DVT.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Elizabeth Len Wai, Nevin LaBronte, Roger Hart, and Kemper Hampton taken at hearing;

2. Joint exhibits A through V admitted at hearing; and

3. The post-hearing depositions of Dr. Elstun, taken October 9, 2009, and Dr. Lossman, taken October 30, 2009.

After having considered all the above evidence and the briefs of the parties, the Referee

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was fifty-six years of age at the time of hearing, and resided with his wife, Elizabeth, in Nampa, Idaho.

2. Claimant was born and raised in Hawaii and at a young age began working with his extended family—all concrete finishers. Claimant started doing concrete work in the 1960s and was a journeyman by 1971. He continued to do concrete work in Hawaii until the early 1980s, when he started making jewelry. Claimant returned to concrete work when he came to the Mainland because he needed to work, he had experience, and concrete work was available.

3. Claimant went to work for Employer sometime in 2004 as a concrete finisher. In addition to finishing, Claimant would put up forms, tear down forms, and perform such other tasks as were needed.

4. After working for Employer for about a year, Claimant developed tingling and numbness in his right hand. Eventually William Lenzi, M.D., diagnosed carpal tunnel syndrome and ulnar nerve entrapment. Dr. Lenzi performed surgery in April 2005. Dr. Lenzi opined that Claimant's right upper extremity problems were work-related and constituted a compensable workers' compensation claim. Claimant refused to file a workers' compensation claim because he had stopped doing concrete years before because of the problem in his hands, and he did not think it was right to make Employer responsible for the recurrence of an old problem. Claimant made a full recovery and returned to work.

5. On October 9, 2006, Claimant was working with a number of other employees, pouring a sidewalk near the Edwards' theater complex on Overland Road in Boise. Claimant was using a trowel to remove excess wet concrete after it was poured and leveled. A co-worker,

Nevin LaBronte, was using a large power trowel to level concrete in the area near Claimant. Mr. LaBronte lost control of the power trowel, and the handle struck Claimant's left shoulder, neck, jaw, and face. The force of the blow knocked Claimant to the ground, where he landed on his right side.

6. Mr. LaBronte located the crew foreman elsewhere on the work site and advised him what had happened. The foreman insisted that Claimant seek medical treatment, though Claimant was reluctant to do so. Claimant declined further assistance and drove himself to the doctor.

MEDICAL CARE

7. Steven Eichelberger, M.D., saw Claimant on his initial visit. He took a history and examined Claimant. He observed a contusion with bruising on the left side of Claimant's face and observed reduced range-of-motion in the neck with tenderness over the lower half of the cervical spine. X-rays were negative. Dr. Eichelberger prescribed rest, ice, and medication, and prohibited Claimant from lifting more than twenty-five pounds. He directed Claimant to follow up with occupational medicine.

8. Claimant saw Dr. Lossman on October 17, 2006, for follow-up. Dr. Lossman took a history and performed an exam. He noted edema below the left eye, but no other facial injuries or pain. Claimant's neck was non-tender, but he had muscle spasm around the left trapezius and left sternocleidomastoid muscle. Dr. Lossman also noted soft tissue edema around the injury, which Claimant stated had occurred immediately following the injury. Dr. Lossman gave Claimant a steroid shot, and referred him to physical therapy for nine visits over three weeks.

9. Claimant had his first physical therapy session on October 24. At that time, he

reported that, in addition to his upper torso injuries, he had been experiencing some pain and cramping in his right calf.

10. Claimant returned to Dr. Lossman on October 26. Claimant's industrial injuries were much improved, but he reported to Dr. Lossman that he had been having pain in his right calf. Dr. Lossman palpated the area and detected no swelling. He performed other tests and found nothing abnormal. Dr. Lossman opined that Claimant's industrial accident caused his upper torso and head injuries, and anticipated releasing Claimant from care in three weeks when he had completed his physical therapy. Claimant attended nine sessions of physical therapy.

11. Claimant's right calf continued to swell intermittently and remained painful. Claimant started wrapping his right leg with a compression bandage to control the swelling, and would soak and massage the leg at the end of the workday. In November, Claimant went with a crew to Idaho Falls to work on a job. He was in Idaho Falls when he was due for his final visit with Dr. Lossman, so the appointment was rescheduled to December 7. During the time Claimant worked in Idaho Falls, his right calf became more painful and the swelling increased. Claimant had to purchase pants with wider legs to accommodate his right calf. When Claimant returned from Idaho Falls, he and his wife traveled to Twin Falls for the Thanksgiving holiday. Claimant's right leg became so painful that he purchased a cane to assist with ambulation.

12. Claimant saw Dr. Lossman on December 7 for his final check-up related to his industrial injuries. When Dr. Lossman saw Claimant's right leg, he insisted that he go straight to the emergency room for testing to rule out a DVT. Dr. Lossman released Claimant from care for his upper torso and head injuries with no restrictions and no permanent impairment. Dr. Lossman opined that Claimant's right leg edema was unrelated to Claimant's industrial injuries.

13. Claimant does not like doctors and is outspoken about his disaffection for the medical profession. He initially declined Dr. Lossman's directive to go to the ER. Claimant's reluctance was twofold—his general dislike for the medical profession, and the fact that treatment of his leg was not covered by workers' compensation because Dr. Lossman said it was unrelated to his industrial accident. Dr. Lossman explained that if Claimant had a DVT it was a life-threatening issue. After advising Claimant's wife of the situation, she directed Claimant to go to the ER, which he did.

14. Immediately upon arrival at the ER, Claimant underwent a lower extremity venous duplex examination, which found a blood clot extending from his right ankle to his thigh. A CAT scan, ordered because Claimant was experiencing shortness of breath associated with a cough, revealed multiple pulmonary emboli in Claimant's lungs. Claimant was immediately started on a regime of blood thinners and was admitted to the hospital while the blood clot was treated.

15. Dr. Elstun was responsible for Claimant's care while in the hospital. She took his history and physical. Claimant told Dr. Elstun about the industrial accident and how the swelling in the leg began a few days after the accident. He described the initial swelling as mild and intermittent, and discussed that he had mentioned it to Dr. Lossman during one of his visits and was told to keep an eye on the leg and follow-up if it worsened. In her assessment, Dr. Elstun noted:

The patient does not have a family history of clot and has no previous history of clotting. He does have a history of travel to Twin Falls, although states that the swelling was definitely present prior to that time. This makes the clot suspicious for initiation from the trauma of his recent accident at work.

Ex. F, p. 49. Dr. Elstun discharged Claimant from the hospital on December 12, 2006 on a year-long regime of anticoagulants, with regular blood tests to monitor the effectiveness of the medication.

16. By letter dated January 15, 2007, Dr. Elstun expressed her opinion as to the cause of Claimant's DVT and subsequent pulmonary emboli:

It is known and documented that deep vein thrombi can be caused by trauma. Given [Claimant's] history of swelling and pain in the leg after a trauma in the absence of a previous clotting disorder, it is clear that the trauma was the inciting factor leading to the development of the thrombosis.

Ex. G., p. 65.

17. In the spring of 2008, Dr. Elstun ordered additional blood work, including some genetic testing, to determine whether to discontinue Claimant's medication. The tests showed that Claimant had a mild genetic variation associated with an increased risk of clot formation. Dr. Elstun discussed these results with a pulmonologist, who advised that Claimant's genetic variation would increase his risk of clotting four or five percent compared to an individual without the gene variant, a very slight risk as compared with the lifetime risk of taking blood thinners.

EXPERT MEDICAL OPINION

18. Both Drs. Lossman and Elstun were deposed post-hearing regarding their expert medical opinions as to the causation of Claimant's thrombosis. Dr. Lossman stated that Claimant had first complained about the right calf swelling at his October 26 appointment, but that he observed no swelling and that Claimant had a negative Homans sign bilaterally. Dr. Lossman testified that, in his experience, clots were most likely to appear at the site of a traumatic injury. Dr. Lossman thought it unlikely, though possible, that Claimant's left-side upper torso and head injuries could have caused the lower right extremity DVT. Dr. Lossman

believed that the DVT was a result of Claimant's vehicle trip and possibly some genetic predisposition to clotting.

19. Dr. Elstun was firmly of the opinion that Claimant's right lower extremity thrombosis was more likely than not the result of his industrial injury. She explained the process by which *any* trauma begins a cascade of physiological events that can lead to a clot. She also noted that such clots always occur in the lower extremities, regardless of where the trauma occurred. She noted that Claimant had no *prior* history of a clotting disorder (although tests two years later revealed that Claimant had a four to five percent higher risk of clotting due to a genetic variation). The history showed an industrial injury, followed by mild swelling, and extended travel by car. Dr. Elstun explained that, taken together, these events are the perfect set-up for a DVT. Dr. Elstun discounted the idea that the DVT was the result of the car travel alone, noting that Claimant had undertaken lengthy airline flights and vehicle trips for many years and had never developed a DVT as a result. She stated that it would be unlikely for a DVT to appear spontaneously with extended travel, absent an injury or some pre-existing blood disorder.

TTDs

20. Claimant was off work from December 8 through December 19, 2006 (one week and five days) due to the DVT. In the thirteen weeks preceding his industrial accident (pay period ending July 7, 2006 through October 6, 2006) Claimant earned \$6,975.00 in straight-time wages. This results in an average weekly wage (AWW) of \$536.54. The compensation rate is 67% of the average weekly wage (\$359.48).

PRE-EXISTING OR SUBSEQUENT INJURY

21. There is no credible evidence in the record that Claimant had a prior history of clotting or that he sustained a trauma to his right leg on or after the date of the industrial injury.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

22. There is no dispute that Claimant sustained head and upper torso injuries as a result of the October 9, 2006 accident. That portion of Claimant's workers' compensation claim has been accepted and paid. What remains at issue in this proceeding is whether the DVT and its sequelae were the result of the industrial accident.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

23. The Referee finds that Claimant has carried his burden of proving that the DVT, diagnosed on December 7, 2006, was more likely than not the result of the industrial injury that occurred on October 9 of the same year.

Medical Evidence

24. First, the Referee finds Dr. Elstun the more persuasive of the two medical experts. She spoke confidently regarding current medical scholarship on the etiology of the "clotting cascade," and how it applied to Claimant's situation. When presented with inconsistencies in the record, she was able to explain whether and why those inconsistencies were relevant to her

thinking and her opinion. Dr. Elstun refused to engage in speculation regarding a serious trauma that Claimant suffered in 1981 when no physician involved in his treatment for the industrial injury had seen any medical records from the incident.

25. Dr. Lossman's testimony was facile by comparison. He based his opinions, at least as stated in his deposition, solely on his own anecdotal experience, without reference to any current scholarship or study from the broader medical community. His statements that clots form at the site of the trauma, and seldom elsewhere, together with his failure to note that DVT's occur predominately in the large veins of the lower leg and thigh, indicates that his knowledge about DVTs is more general and with less depth than Dr. Elstun's. It is also interesting to note that Dr. Lossman based his opinion, in part, on the fact that Claimant did not complain about leg pain until his October 26 office visit. Yet, in his deposition, Dr. Lossman acknowledged that his October 26 office note did not include any mention of Claimant's right calf complaints on that date. Claimant asserts that he mentioned the right calf concerns to Dr. Lossman on his first visit, and in light of Dr. Lossman's own admission, he may have done so.

Credibility

26. Much of the testimony offered by Defendants at hearing, and much of the argument in their post-hearing briefing, centers on differing versions of events on the date of injury and differences in what Claimant reported to various medical providers, including, but not limited to:

- the lay of the land where Claimant and Mr. LaBronte were working;
- whether Claimant was bleeding immediately after the accident;
- whether Claimant was knocked unconscious as a result of the accident;
- if Claimant had a blood clot following a trauma in 1981; and

➤ whether Claimant was kickboxing or teaching kickboxing around the time of the injury.

The Referee agrees that the record in this proceeding is full of discrepancies. However, those differences, ultimately, do not bear on the question before the Commission.

27. First, one only need read the hearing transcript to discern that Claimant does not communicate clearly. His answers to questions are rambling, disorganized, internally inconsistent, and difficult to parse. Much misunderstanding, miscommunication, and misdirection in this proceeding was the result of Claimant's inability to communicate clearly (or conversely, to listen carefully). Claimant's lack of brevity and clarity in his speech should not be confused with a lack of credibility. Claimant was so concerned that his answers were truthful that his interpretation of questions and his responses were often hyper-technical.

28. Second, many of the discrepancies that Defendants' focus on are not relevant to the issue before the Commission. The fact of the accident and the initial injuries was not in dispute as Defendants accepted the claim and paid benefits. Inconsistencies about where Claimant was standing in relation to Mr. LaBronte, or whether he was bleeding after the injury, or whether he lost consciousness, have no bearing on the medical causation of the DVT.

29. Finally, as set out by both parties in their opening remarks and in their briefs, this dispute turns on expert medical testimony. Thus, Claimant's credibility has relevance only with regard to the information that he provided the physicians who treated him. There is nothing in the record that suggests that Claimant intentionally withheld relevant information or provided information intended to mislead any of the doctors who cared for him following his industrial accident. Defendants can speculate about Claimant's prior medical history, but neither Drs. Lossman, Elstun, nor Lenzi (whose chart note ignited the speculation that Claimant had a history of a prior DVT) actually saw any records related to that long-ago event. Dr. Elstun testified that

she has treated Claimant for five years, and found him to be a good patient—responsible, compliant with her directives, and truthful.

30. For all of the reasons discussed herein, Defendants are responsible for Claimant's care related to his DVT from December 7, 2006, until Dr. Elstun took him off his medical regime of blood thinners in April 2008.

TTDs

31. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Claimant has established that he was totally disabled from work from December 8 through December 19, 2006, a period of one week and five days. Claimant is entitled to TTD benefits of \$616.25 (359.48 x 1.714285).

PRE-EXISTING OR SUBSEQUENT INJURIES OR CONDITIONS

32. There is no credible evidence in the record that Claimant had a prior history of clotting that caused his DVT or that he sustained a trauma on or after the date of the industrial injury that could have caused his DVT.

CONCLUSIONS OF LAW

1. Claimant has proven that it is more likely than not that his DVT was the result of his industrial accident and not the result of a pre-existing or subsequent injury or condition.

2. Claimant is entitled to medical care related to treatment of his DVT from December 7, 2006 until Dr. Elstun released him from care in April 2008.

3. Claimant is entitled to TTD benefits of \$616.25.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 12

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 14 day of July, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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IC 2006-524520

ORDER

Filed: July 19, 2010

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed 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 proven that it is more likely than not that his DVT was the result of his industrial accident and not the result of a pre-existing or subsequent injury or condition.
2. Claimant is entitled to medical care related to treatment of his DVT from December 7, 2006 until Dr. Elstun released him from care in April 2008.

3. Claimant is entitled to TTD benefits of \$616.25.

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

DATED this 19 day of July, 2010.

INDUSTRIAL COMMISSION

/s/ _____
R.D. Maynard, Chairman

/s/ _____
Thomas E. Limbaugh, Commissioner

/s/ _____
Thomas P. Baskin, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of July, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS**, and **ORDER** were served by regular United States Mail upon each of the following persons:

RICK TUHA
1006 W SANETTA ST
NAMPA ID 83651

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

djb

/s/ _____