

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

REBECCA L. PERKINS,)
)
 Claimant,)
)
 v.)
)
 SUN HEALTHCARE,)
)
 Employer,)
)
 and)
)
 INSURANCE COMPANY OF THE)
 STATE OF PENNSYLVANIA,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-030688

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

Filed June 10, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on August 30, 2010. Claimant, Rebecca L. Perkins, was present in person and represented by Dennis R. Petersen, of Idaho Falls. Defendant Employer, Sun Healthcare, and Defendant Surety, Insurance Company of the State of Pennsylvania, were represented by David P. Gardner, of Pocatello. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 3, 2011. The undersigned Commissioners have chosen not to adopt the Referee’s recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

The issues presently to be decided are:¹

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident or whether her condition is due to a pre-existing and/or subsequent injury/condition.
2. Claimant's entitlement to additional medical care.
3. Claimant's entitlement to additional temporary partial and/or temporary total disability benefits.

CONTENTIONS OF THE PARTIES

Claimant asserts that she suffered an industrial accident on September 4, 2008, resulting in iliotibial band (IT band) syndrome, for which she is entitled to additional past and prospective medical treatment. She also claims additional temporary total disability benefits from January 1-14, 2009, and from April 28, 2009, to the present and continuing. In her post-hearing briefing, she requests a change of physician from Brian Johns, M.D., to Blake Johnson, M.D.

Defendants acknowledge Claimant's September 4, 2008 industrial accident and resulting IT band syndrome. They assert she became medically stable and was released to work without restrictions on January 15, 2009, and is not entitled to further medical or temporary disability benefits due to her industrial accident. Defendants deny responsibility for Claimant's treatment by Dr. Johnson, asserting he is outside the chain of referral.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken April 14, 2010;

¹ The issue of whether Claimant suffered an injury from an accident arising out of and in the course of employment was noticed for hearing, but is no longer in dispute.

3. The testimony of Claimant taken at the August 30, 2010 hearing;
4. Claimant's Exhibits 1 through 16 and Defendants' Exhibits 1 and 2, admitted at hearing;
5. The post-hearing deposition of Brian A. Johns, M.D., taken on behalf of Claimant on October 27, 2010;
6. The post-hearing deposition of Richard Knoebel, M.D., taken on behalf of Defendants on November 18, 2010; and
7. The post-hearing deposition of Blake G. Johnson, M.D., taken on behalf of Claimant on November 18, 2010.

The objections posed during Dr. Johns' deposition are overruled. The objections posed during Dr. Johnson's deposition are all overruled except the objection at page 7 thereof, which is sustained. The objections posed during Dr. Knoebel's deposition are all overruled except the objection posed at page 17 thereof, which is sustained.

After considering the above evidence and the arguments of the parties, the undersigned Commissioners make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born in 1956. She was 54 years old and had resided in Bangor, California for three weeks at the time of the hearing. Prior to moving to Bangor, Claimant lived in the Twin Falls area for several years.

2. In 1974, Claimant graduated from high school in Sacramento, California. She later began working, caring for the elderly in their own homes. In 1983, she moved to Idaho. In 1985, she obtained her CNA certification and thereafter worked at various care centers in Shoshone, Gooding, and Mountain Home.

3. In 1993, Claimant sustained an ACL tear in her right knee and underwent surgery. Her right knee improved. In 1994 and 1995, Claimant worked as a payroll clerk. Thereafter, she returned to CNA work.

4. In approximately 2005, Claimant sustained a right IT band injury. “This resolved after she was off work for four days. She was a dishwasher at the time.” Claimant’s Exhibit 14, p. 6.

5. In July 2008, Claimant began working as a CNA at Sun Healthcare, more commonly known as Twin Falls Care Center.

6. On September 4, 2008, Claimant was at work, transferring a resident from a wheelchair to a bed, when Claimant felt a pop and pain in her left hip. She reported the incident to her supervisor and left work early. Claimant was not scheduled to work the following day. On September 6, 2008, Claimant presented at the emergency room, reporting excruciating left hip pain. She was diagnosed with left IT band syndrome and treated with medications.

7. On September 9, 2008, Claimant presented to Brian Johns, M.D., with complaints of a snap and pain in her proximal lateral left thigh. Claimant reported that she had similar symptoms one time, approximately three years earlier, on her right side. Dr. Johns recorded that Claimant’s range of motion and gait were normal; however, she had both right and left hip pain with internal hip rotation and right hip pain with external hip rotation. He diagnosed left IT band syndrome and prescribed anti-inflammatories, stretching, and narcotics. He limited Claimant’s walking and restricted her from all patient transfers, from repetitive bending, stooping, or twisting, and from lifting, pushing, or pulling more than 20 pounds.

8. On September 16, 2008, Dr. Johns examined Claimant again and prescribed physical therapy, continued medications, and work restrictions. On September 23, 2008, Dr. Johns noted that Claimant was not improving significantly and increased her restrictions. On

September 30, 2008, Claimant told Dr. Johns that her employer was not abiding by the work restrictions he imposed. Dr. Johns then took Claimant off of work. She commenced receiving total temporary disability benefits as of September 30, 2008.

9. On October 8, 2008, Claimant presented to Dr. Johns, reporting that she was doing better being off work. However, she reported that “she went to pay some bills and was on her feet quite a bit and by that afternoon she had quite a bit of pain and her right side popped.” Claimant’s Exhibit 5, p. 10 (emphasis supplied). Also on October 8, 2008, Dr. Johns telephoned the physical therapist and noted some question about the consistency of Claimant’s symptoms. Dr. Johns testified at his deposition that he was concerned about the discrepancy between what Claimant was reporting and the level of symptoms the therapist reported. Johns Deposition, p. 37.

10. On October 22, 2008, Claimant reported that she was doing no better; however, she reported that her left hip had only popped once in the two weeks since her October 8th appointment. Claimant told Dr. Johns that physical therapy on the treadmill caused increased pain. However, the physical therapist noted that Claimant only complained of fatigue from use of the treadmill, not pain. Dr. Johns recorded that Claimant had no pain with internal or external hip rotation and no greater trochanter tenderness. “In addition, she does admit to very few symptoms since I last saw her. She will occasionally get a ‘something’ or some sort of sensation in her hip that will last two or 3 seconds and then the one snapping episode mentioned above.” Claimant’s Exhibit 5, p. 11. Dr. Johns believed Claimant had reached maximum medical improvement. He refilled her prescriptions one more time, encouraged her to continue her home exercise program indefinitely, and released her to work without restrictions.

11. On November 7, 2008, Claimant presented to Dr. Johns reporting pain in both hips. Dr. Johns recorded: “She tells me ‘I think I’m done walking’. She says if she is walking for about 3 to 5 minutes it ‘feels like my thighs are going to pop.’ She has not had any of the

popping or snapping in the hip though.” Claimant’s Exhibit 5, p. 13. Dr. Johns considered Claimant’s reported symptoms unusual. He recorded: “This incident is not something that would lead to a requirement to perform sedentary work for the long term.” Claimant’s Exhibit 5, p. 14. He later testified that “typically, something like this would get better with the kind of treatment she was in–involved in.” Johns Deposition, p. 16, ll. 15-17. Dr. Johns last saw Claimant on November 21, 2008. He restricted Claimant from lifting, pushing, or pulling more than 20 pounds, and from repetitive bending, stooping, or twisting. He also limited her walking. Dr. Johns referred Claimant for a consultation with orthopedic surgeon Blake Johnson, M.D. Dr. Johns anticipated that Dr. Johnson would likely administer a steroid injection to Claimant’s lateral left hip at the greater trochanter. Dr. Johns expected to continue to manage Claimant’s care. However, Claimant never returned again to Dr. Johns. Claimant believed she had been referred to Dr. Johnson for treatment.

12. On November 26, 2008, Claimant presented to the emergency room complaining of right knee pain and was treated for right knee pain. The record of her visit indicates: “No hip pain.” Claimant’s Exhibit 6, p. 2.

13. On December 2, 2008, Claimant presented to Dr. Johnson, who recorded her complaints of left hip pain and difficulty walking. Dr. Johnson noted that Claimant was five feet six inches tall and weighed 220 pounds. He detected no significant IT band subluxation with normal hip range of motion and also found that the IT band was not excessively tight. X-rays revealed significant bilateral hip joint space narrowing with an osteophyte of the inferior aspect of the hip joint. Dr. Johnson’s impressions included degenerative hip joint disease, radiographically documented, and some lateral hip pain that may be consistent with IT band syndrome. He recommended an intra-articular cortisone injection.

14. On December 5, 2008, radiologist Michael Dixon, M.D., administered a cortisone injection to Claimant's left hip and her condition improved somewhat.

15. On December 23, 2008, Claimant presented again to Dr. Johnson, who assessed IT band syndrome and degenerative hip joint disease. He provided a steroid injection in the greater trochanter of Claimant's left hip. Dr. Johns testified in his post-hearing deposition that he did not disagree with this procedure, considering it diagnostic and potentially therapeutic.

16. On January 15, 2009, Claimant returned to Dr. Johnson, reporting significant improvement and that she was very happy with her pain relief overall. She desired to return to work. Dr. Johnson released Claimant to full work duties.

17. On March 24, 2009, Claimant returned to Dr. Johnson, reporting that she had difficulty walking following a trip to San Antonio. Dr. Johnson injected Claimant's left IT band.

18. On April 28, 2009, Claimant returned to Dr. Johnson, reporting difficulty walking during her eight-hour day and catching or popping over her hip. Dr. Johnson again noted that Claimant's hip x-rays revealed bilateral degenerative hip joint disease. He recommended a bone scan to rule out arthritis as a source of Claimant's complaints. Dr. Johnson restricted Claimant to sedentary work. He also recommended an MRI arthrogram of Claimant's hip to evaluate labral pathology as a possible source of Claimant's hip symptoms.

19. Claimant did not work and sought no medical treatment between April 28, 2009, and June 2010.

20. On June 10, 2010, Claimant was examined by orthopedist Richard Knoebel, M.D., at Defendants' request. During the physical examination, Dr. Knoebel noted inconsistent left hip ranges of motion, including improved range of motion with distraction. He also observed differences on Patrick's test, with and without distraction. Dr. Knoebel concluded: "The patient's presentation is not credible. The patient has marked pain complaints but no significant objective

findings. The patient has inconsistencies on range of motion and strength testing.” Claimant’s Exhibit 10, p. 6. Dr. Knoebel diagnosed non-specific chronic lateral left hip pain without significant objective findings. He found that Claimant reached maximum medical improvement by January 15, 2009, and had no permanent impairment due to her industrial accident.

21. On July 8, 2010, Claimant returned to Dr. Johnson with left hip complaints.

22. Claimant subsequently moved to California and, at the time of hearing, had lived in California for about three weeks. When asked at hearing whether she was “planning to look for work down there at all”, she answered: “Hasn’t entered my mind.” Transcript, p. 67 ll. 23-25. Claimant has not worked since leaving Twin Falls Care Center in approximately October 2008.

23. At hearing, Claimant denied having hip symptoms prior to her September 4, 2008 industrial accident. However, as previously stated, on September 9, 2008, she reported to Dr. Johns that she had similar symptoms on her right side approximately three years earlier. Physical therapy notes from September 18, 2008, reflect that Claimant told the therapist that her hip popped and hurt very bad approximately two years earlier. Claimant also reported to an Industrial Commission rehabilitation consultant on October 1, 2008, that she had right IT band syndrome a few years earlier, which resolved after she was off work for four days.

24. After reviewing the evidence, observing Claimant at hearing, and considering the inconsistencies in her reported symptoms, the Referee found that Claimant was not an entirely credible witness. We see no reason to disturb this finding.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

25. The provisions of the Idaho Workers’ Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

26. **Change of physician.** Although this issue was not noticed for hearing, Claimant requests that the Commission recognize Dr. Johnson as her treating physician, or that the Commission order a change of physician to Dr. Johnson. Idaho Code § 72-432 does not prohibit a post-treatment change of physician. However, Claimant requests this change of physician for the first time in her post-hearing briefing. The change of physician issue was not previously requested or noticed for hearing and the Commission is precluded from addressing it herein pursuant to Idaho Code § 72-713, which requires the Commission to “give at least ten (10) days’ written notice of the time and place of hearing and of the issues to be heard.”

27. **Causation and additional medical care.** The first noticed issues concern the cause of Claimant’s left hip complaints and whether she is entitled to additional medical care. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee’s physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997). Hence, claimant must prove not only that she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). 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).

28. In the present case, Defendants paid for Claimant's medical care, including treatment by Dr. Johns and the one time consultation by Dr. Johnson, through and including the December 5, 2008 injection performed by Dr. Dixon at Dr. Johnson's recommendation. Defendants declined to pay for additional medical treatment thereafter. Claimant seeks additional medical care for her IT band syndrome. She requests reimbursement for all treatment provided by Dr. Johnson after December 5, 2008, as well as future medical treatment recommended by Dr. Johnson.

29. Treatment provided by Dr. Johnson. Claimant asserts that Defendants are responsible for medical treatment provided by Dr. Johnson from December 6, 2008, through the time of hearing. Defendants maintain that Dr. Johnson is outside of the chain of referral.

30. The record establishes that Dr. Johns referred Claimant to Dr. Johnson in November 2008 for a one-time consultation, not intending for Dr. Johnson to take over Claimant's treatment. Claimant first presented to Dr. Johnson on December 2, 2008, and thereafter returned repeatedly to Dr. Johnson for treatment. Claimant did not notify Defendants of her request for a change of physician prior to hearing.

31. Idaho Code § 72-432(4)(a) provides:

The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer.

32. Inasmuch as Claimant did not give Defendants prior written notice of her request for a change of physician to Dr. Johnson to allow Defendants the opportunity to fulfill their statutory obligations, Defendants are not liable for most of the additional services and care

provided by Dr. Johnson through the time of hearing. However, it is evident from the testimony of both Claimant and Dr. Johnson that they were confused by the nature of the referral. Both believed that Claimant had been referred for treatment, and Dr. Johns could not remember clarifying to Claimant that she was being referred for a single consultation only. Because Dr. Johns did not clearly define the scope of the referral, we find that Claimant should be compensated for the treatment provided by Dr. Johnson from December 6, 2008 through January 15, 2009. This treatment was limited in nature, and its reasonableness is not disputed by Dr. Johns.

33. Future medical treatment recommended by Dr. Johnson. Claimant requests future medical benefits for a bone scan and hip MRI arthrogram recommended by Dr. Johnson. Claimant alleges that she continues to suffer IT band syndrome resulting in left hip pain due to her industrial accident. Claimant does not assert that her degenerative hip joint disease and hip arthritis are related to her industrial accident. Defendants assert that they are not responsible for medical treatment not related to Claimant's industrial accident and argue that Dr. Johnson has recommended a bone scan to determine whether Claimant's ongoing hip pain is due to her degenerative hip joint disease.

34. Dr. Johnson opined that Claimant's reported ongoing hip pain is related to her industrial accident. However, Dr. Johnson also testified that the purpose of the bone scan was to help diagnose arthritis, which may be contributing to Claimant's hip pain. Johnson Deposition, p. 16.

35. There is no dispute that the treatment Dr. Johns provided to Claimant through November 8, 2008, was related to the industrial accident. However, Dr. Johns noted in his initial examination of Claimant on September 9, 2008, that she reported pain in both hips. Claimant complained of pain and the feeling that both of her hips were going to "pop" when he examined

her on October 8 and November 7, 2008. On October 8, 2008, Dr. Johns questioned the consistency of Claimant's reported symptoms. On November 7, 2008, Dr. Johns recorded his concern with Claimant's conclusion that she was "done walking." Johns Deposition, p. 37. Dr. Johns testified that IT band syndrome usually resolves with rest and icing. He opined that Claimant's symptoms due to IT band syndrome should have resolved with the treatment she received. In contrast, he testified that arthritis in the hips is a chronic condition.

36. Dr. Knoebel testified that IT band syndrome is often seen in runners and is an inflammatory response of a muscle-tendon complex extending from the hip down the lateral thigh to the knee resulting from overuse. He testified that IT band syndrome usually resolves with icing and stretching and that he was not aware of any documented case where IT band syndrome permanently prevented a person from walking. Dr. Knoebel observed that Dr. Johnson diagnosed not only IT band syndrome, but bilateral degenerative hip joint disease. Dr. Knoebel testified that at the time he examined Claimant on June 10, 2010, she did not suffer from IT band syndrome and had no objectively identifiable injury due to her industrial accident. He noted that her subjective complaints were not specific to IT band syndrome and that she was stable from IT band syndrome by January 15, 2009. Dr. Knoebel opined that Claimant's bilateral hip arthritis was not related to her work accident, but was a longstanding, progressive, congenital condition. He noted there was some overlap in symptoms of IT band syndrome and degenerative hip joint disease.

37. Claimant's inconsistent complaints and her radiographically confirmed degenerative hip joint disease cast serious doubt upon the assertion that her hip complaints after January 15, 2009, are related to her industrial accident.

38. We find Dr. Knoebel's opinion persuasive and conclude that Claimant has not proven that her reported hip complaints after January 15, 2009, are related to her industrial

accident. Claimant has not proven her entitlement to additional medical benefits for her industrial accident after January 15, 2009.

39. **Additional temporary disability benefits.** The final issue is whether Claimant is entitled to additional temporary total disability benefits. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that she is still within the period of recovery from the original industrial accident, she is entitled to temporary disability benefits unless and until such evidence is presented that she has been released for light duty work and that (1) her former employer has made a reasonable and legitimate offer of employment to her which she is capable of performing under the terms of her light work release and which employment is likely to continue throughout the period of recovery or that (2) there is employment available in the general labor market which she has a reasonable opportunity of securing and which employment is consistent with the terms of her light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219 (1986).

40. In the present case, Defendants paid total temporary disability benefits until December 31, 2008. Claimant requests total temporary disability benefits from January 1-14, 2009, and from April 28, 2009, through the time of hearing.

41. Dr. Johns released Claimant to return to work on October 22, 2008, but on November 7, 2008, he imposed work restrictions due to Claimant’s renewed complaints and referred her to Dr. Johnson for a one-time consultation. On January 15, 2009, Dr. Johnson released Claimant to full work duties. On April 28, 2009, Dr. Johnson restricted Claimant to

sedentary work based upon her renewed complaints. However, as previously noted, Claimant has not proven that her complaints after January 15, 2009, are related to her industrial accident. Dr. Knoebel concluded that Claimant was capable of sedentary work after December 23, 2008, and by January 15, 2009, had recovered from her IT band syndrome and was capable of full-duty work. His opinion on this issue is persuasive.

42. Defendants have not shown that Employer made a reasonable offer of employment to Claimant which she was capable of performing under the terms of her work restrictions or that there was employment available in the general labor market which Claimant had a reasonable opportunity of securing and which was consistent with the terms of her work restrictions during the period of January 1-14, 2009. Pursuant to Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986), Claimant is entitled to total temporary disability benefits from January 1 through 14, 2009.

43. Claimant has proven her entitlement to total temporary disability benefits for the period January 1-14, 2009. She has not proven her entitlement to any additional temporary disability benefits after January 14, 2009.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. The Commission is precluded from considering Claimant's request for a change of physician in this proceeding.

2. Claimant is entitled to additional medical benefits for treatment provided by Dr. Johnson from December 6, 2008 through January 15, 2009. Claimant has not proven her entitlement to additional medical benefits following January 15, 2009.

3. Claimant has not proven her entitlement to additional medical benefits for prospective treatment recommended by Dr. Johnson.

4. Claimant has proven her entitlement to total temporary disability benefits for the period of January 1-14, 2009. She has not proven her entitlement to any additional temporary disability benefits after January 14, 2009.

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

DATED this 10th day of June, 2011.

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 10th day of June, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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