

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE M. PERRY,)
)
 Claimant,)
)
 v.)
)
 KELLER SUPPLY COMPANY, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO INSURANCE GUARANTY)
 ASSOCIATION, as successor in interest)
 to FREMONT INDEMNITY COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 1998-022572
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

Filed January 2010

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 April 28, 2009. Claimant was present and represented by Clinton E. Miner of Boise. Glenna M. Christensen of Boise represented Employer and the Idaho Insurance Guarantee Association as successor in interest to Fremont Indemnity Company at hearing. Due to Ms. Christensen's retirement, Mark C. Peterson and Andrew J. Waldera, also of Boise, represented Defendants in post-hearing matters. The parties presented oral and documentary evidence and one post-hearing

deposition was taken. Defendants then submitted a post-hearing brief¹ and this matter came under advisement on November 17, 2009.

ISSUES

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

1. Whether and to what extent Claimant's condition is due to an underlying, preexisting condition.
2. Whether and to what extent Claimant is entitled to additional medical care, including reimbursement for an artificial disc replacement (ADR) surgery.
3. Whether Claimant is entitled to an award of attorney fees.

CONTENTION OF THE PARTIES

Claimant contends that as a result of two failed back surgeries, he conducted internet research into the viability of ADR surgery as a means of lessening or eliminating his debilitating back and leg pain. Claimant discussed the procedure with various local physicians and was encouraged by some of them to consult with experts regarding that procedure in Los Angeles and Germany, where the procedure was eventually performed. While he concedes that he had some preexisting back problems, Claimant contends that his pain symptomatology changed after his 1998 accident and he is entitled to continuing medical treatment. Claimant further contends that he is entitled to an award of attorney fees for Defendants' unreasonable denial of that treatment.

Defendants contend that Claimant has a long and substantial documented history of back problems and his recent complaints stem from his underlying lumbar degenerative disk disease, not from his 1998 industrial accident. Defendants are not liable for the experimental artificial disk replacement surgery under the *Sprague* criteria because Claimant did not improve after the

¹ Claimant did not timely file either an initial post-hearing brief or reply brief.

procedure; the procedure was not required (or even recommended) by any of his treating physicians; and the multi-level disk replacement was not within the standard of practice. Finally, Defendants are not liable for attorney fees because their denial of further medical treatment after Claimant was declared at MMI was based on sound and unrebutted medical evidence.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and R. Tyler Frizzell, M.D., taken at the hearing.
2. Claimant's Exhibits 1-25 and 27-43 admitted at the hearing.
3. Defendants' Exhibits 1-25 admitted at the hearing.
4. The post-hearing deposition of Howard A. King, M.D., taken by Claimant on June 18, 2009.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 57 years of age and resided in the Treasure Valley at the time of the hearing.
2. Claimant has primarily worked in wholesale plumbing equipment and fixture sales during his work life. He was unemployed at the time of the hearing.
3. On July 4, 1998, during an Employer-sponsored golfing event, Claimant injured his low back while swinging a golf club. Defendants accepted his workers' compensation claim.
4. Claimant underwent a regimen of conservative treatment without success. On January 26, 1999, Peter Reedy M.D., a neurosurgeon, performed a right L4-5 partial

hemilaminectomy, L4 diskectomy, left L4-5 partial laminectomy, and L3 diskectomy. Dr. Reedy found at surgery, “A very tight and irritable L5 nerve root on the right.” Claimant’s Exhibit 6, p. 55.

5. Unfortunately, Claimant’s symptoms returned post-surgery. Therefore, on March 21, 2000, Dr. Reedy performed a redo right L4-5 partial hemilaminectomy and L4 foraminotomy and a right L5-S1 partial hemilaminectomy with L5 foraminotomy.

6. Claimant’s post-operative course saw Claimant’s symptoms return. Claimant testified that his back pain increased beyond its first surgery level. Several physicians, including Dr. Reedy, advised against further surgery due to the severity of Claimant’s multi-level degenerative disk disease.

7. On November 29, 2000,² Robert Friedman, M.D., a physiatrist, opined that Claimant was at MMI regarding his industrial accident and resultant surgeries. Claimant was released to work an 8-hour work day with certain restrictions consistent with light to moderate work. Dr. Friedman assigned a 10% whole person PPI rating with 50% apportioned to Claimant’s preexisting back condition. Dr. Friedman advised against any further back surgeries.

8. Claimant continued to experience back and leg pain. A January 31, 2005 diskogram revealed five-level degenerative changes in Claimant’s back and concluded: “Every disk space is degenerated and macerated with anular [sic] tears.” Defendants’ Exhibit 10, p. 127. Treatment options consisted of a multi-level fusion or a spinal cord stimulator. Claimant expressed interest in a new technique called artificial disk replacement surgery wherein damaged discs are removed and replaced with artificial discs. Claimant and his wife began researching that procedure on the internet and discussed the same with his treaters, most of which were either

² Claimant had just successfully completed the Life-Fit program that is directed by Dr. Friedman.

unfamiliar with the procedure, advised against it, or referred Claimant to more knowledgeable sources.

9. In March 19, 2005, without Surety's knowledge or approval, Claimant traveled to Germany and underwent an ADR surgery with Charite devices at L3-4 and L4-5. It is primarily for this procedure that Claimant seeks reimbursement.

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).

In *Sprague*, the following factors were found to be relevant to the determination of whether the particular care at issue in that case was reasonable: (1). A claimant should benefit from gradual improvement from the treatment rendered. (2). The treatment was required by a claimant's treating physician. (3). The treatment was within the physician's standard of practice and the charges were fair and reasonable.

Gradual improvement:

10. The medical records in evidence demonstrate that Claimant has failed to improve in any meaningful way from any treatment received for his back subsequent to being declared at MMI in November 2000. Without referencing each of the voluminous medical records supporting Claimant's lack of improvement, a brief summary follows.

Claimant's testimony:

11. While certainly not medical evidence, Claimant's testimony is nonetheless revealing regarding his gradual improvement, or lack thereof, following November 2000. He testified that the ADR surgery relieved some, but not all, of his back pain and nerve pain and he was able to cut down on his pre-ADR medications and increase his activity level. The surgery took away most of his right leg pain, but not his left leg pain. Claimant uses a walking stick at times for support, but he can walk without one. He has trouble sitting for any length of time. Claimant's pain has never completely gone away since 1998, and he is still on pain medications and muscle relaxers. Claimant quit working in November of 2005 due to the necessity of taking pain medication and the effect that had on his driving. Claimant is still receiving nerve ablation treatment. He described his current symptoms as, "I have, like, left SI joint, left buttock, tailbone, hip pain, burning all the way down to my left foot to my left leg [sic], sometimes right leg, but not very often since I had the surgery in Germany." Hearing Transcript, pp. 68-69.

Medical records:

12. Claimant began seeing Michael O. Sant, M.D., a physiatrist in the same clinic as Dr. Friedman, on April 22, 2005 as a referral from orthopedic surgeon Howard King, M.D. Dr. Sant noted that Claimant had a long history of low back and discogenic disease. Even though

Claimant informed him that he had a “near complete” resolution of his back pain since the ADR surgery, Dr. Sant still noted left hip and thigh pain and residual low back aching and some persistent numbness in the plantar surface of his left foot. Over the course of the next few months, Dr. Sant noted increased pain in Claimant’s low back and increasing radicular pain.

13. On November 17, 2005, Dr. Sant noted, “Since his last visit he reports his symptoms have returned and he is having severe pain whenever he sits for any length of time. He is describing pain in his buttock with radiation up into the low back and SI joint region, as well as down into his thigh with some burning sensation there.” Defendants’ Exhibit 23, p. 223. Claimant left his job due to this problem. Dr. Sant was concerned enough to order a lumbar MRI.

14. At Dr. Sant’s request, Claimant saw Michael Hajjar, M.D., a neurosurgeon, on November 29, 2006. Dr. Hajjar noted that Claimant had been suffering from back pain and lower extremity pain, numbness, and tingling since his July 4, 1998 accident. Dr. Hajjar further noted that while his two lumbar surgeries (pre-ADR) relieved some of Claimant’s leg pain, they did not alleviate his low back pain. According to Dr. Hajjar, after the ADR procedure, Claimant continued to have severe back pain as well as lower extremity pain, numbness, tingling, and weakness. Further, “At the present time, Bruce states his back pain is worse than his leg pain and rates as high as an 8 or 9 on a scale of 1-10.” Defendants’ Exhibit 24, p. 244. Dr. Hajjar referred to Claimant as a “salvage case” given his “severe and intractable” symptoms. He also referred to each of Claimant’s conditions as degenerative in nature.

15. In an April 18, 2008 letter to Surety, Dr. Sant reported that Claimant obtained “significant improvement” in his symptoms temporarily from the ADR surgery, but as time went

on, he continued to have problems with debilitating pain in his lower back and buttocks. Dr. Sant's treatments for these symptoms provided minimal to moderate temporary relief. Claimant does not want a fusion surgery as recommended by Dr. Hajjar, but, based on his own research, is seeking a referral to Gannon Randolph, M.D., a Boise orthopedic surgeon who apparently has some knowledge of ADR procedures. Dr. Sant honored Claimant's request in that regard.

16. R. Tyler Frizzell, M.D., a board certified neurosurgeon, testified at hearing. He first saw Claimant on September 8, 2004 for an IME at Surety's request. He was also requested to perform a medical records review after Claimant's ADR surgery which he accomplished on August 25, 2008. Dr. Frizzell expressed the following opinion:

Q. (By Ms. Christensen): Based on your review of the records and his ongoing complaints and medical treatment, do you have an opinion as to the cause of his current complaints and his need for medical treatment?

A. Yes.

Q. And what is that opinion?

A. It would be three-fold. He has a chronic L5 radiculopathy, which is an old nerve injury, and then he has a back pain related to the surgery that he had at L3-4 and L4-5, and then he has other complaints related to the degeneration at L2-3, L5-S1, the foraminal narrowing at L5-S1, and then the sacroiliac problems.

Q. Okay. Is he in need of further treatment for the complications related to the L3-4, L4-5 injuries from 1998?

A. No.

Hearing Transcript, pp. 101-102.

17. Without discussing every medical record in existence regarding Claimant's failure to gradually improve both before and after the ADR surgery, suffice it to say the evidentiary record in this matter is replete with such references. The Referee finds that Claimant has failed to establish the first criterion of *Sprague*.

Treatment is required:

18. Although it must be supposed that the ADR surgery was “required” by the surgeon who performed the procedure, in the sense that the physician recommended the procedure for Claimant, the evidence establishes that the majority of medical experts who were asked to consider the question deemed Claimant a poor candidate for the procedure. Howard King, M.D., an orthopedic surgeon with some knowledge of ADR surgeries, first saw Claimant on March 26, 2004, as a surgical referral from William Binegar, M.D., a pain specialist who had been treating Claimant. Dr. King told Claimant that a fusion surgery would be a 50/50 proposition regarding outcome. The subject of ADR surgery came up and Dr. King informed Claimant that he did not perform that procedure, but that he was aware of physicians who did. Dr. King testified in his deposition that the ADR procedure was a reasonable option for Claimant to explore. Dr. King explained that the ADR surgery’s goal is spine mobilization, whereas a fusion’s goal is immobilization. Dr. King further explained that if Claimant had problems at multiple levels, he would not be a good candidate for ADR surgery.³ Dr. King testified that he did not refer Claimant to the German surgeon who performed the ADR surgery, nor did he recommend that procedure.

19. Dr. King referred Claimant to John Regan, M.D., the director of Cedars-Sinai Medical Center’s Institute for Spinal Disorders in Los Angeles, who has performed the ADR procedure. Initially, Dr. Regan found Claimant to be a suitable surgical candidate pending the results of a repeat CT scan. After the CT scan revealed disc disease at five levels, Dr. Regan refused to proceed as the ADR procedure is not intended for five levels.

³ A CT diskogram revealed Claimant had problems at five levels. Dr. King was not aware of the results of the diskogram at the time of his deposition, nor was he aware of Claimant’s pre-1998 back problems.

20. On January 11, 2005, Claimant saw Jeffrey Larson, M.D., a spine surgeon in Coeur d'Alene who has performed the ADR procedure. Dr. Larson was aware that Dr. Regan was contemplating the procedure, but had not yet completed the recommended work-up. Dr. Larson ordered a lumbar MRI to address whether the ADR procedure would be suitable for Claimant. Based on the results of the MRI and other studies, Dr. Larson concluded Claimant was not a suitable candidate for ADR surgery. He recommended a fusion instead.

21. In this case, unlike *Sprague*, the fact that Claimant may have one champion, in the person of the physician who performed the procedure, is less significant than the great weight of the medical opinion arguing against the suitability of the ADR surgery for Claimant, an opinion later validated by Claimant's poor outcome. The Referee finds, based on overwhelming medical evidence, that the ADR surgery Claimant underwent was not required by any of his treating or consulting physicians.

Standard of practice:

22. The third prong of *Sprague* is that the procedure at issue must be within the standard of practice and the charges, therefore, must be fair and reasonable. There is nothing in the record that addresses this issue one way or the other. Such a procedure at multiple levels was not the standard of practice in the United States at the time it was performed, but may well have been the standard of practice in Germany. According to Claimant, the charges for the procedure in Germany were less than in the United States. It is unknown how Claimant came to that conclusion as no one in the United States was performing multi-level ADR surgeries at the time. In any event, it is Claimant's burden of proof to show the third prong has been met and he has not done so.

23. The Referee finds that Claimant was medically stable from the two industrially related surgeries performed by Dr. Reedy by November 29, 2000, per Drs. Friedman and Frizzell. Defendants are not liable for any treatment beyond that date.

24. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his entitlement to medical treatment beyond November 29, 2000.

2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 10th day of January, 2010.

INDUSTRIAL COMMISSION

/s/ _____
Michael E. Powers, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2010, 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:

CLINTON E MINER
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Gina Espinosa

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IC 1998-022572

ORDER

Filed January 29, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee’s proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove his entitlement to medical treatment beyond November 29, 2000.

2. All other issues are moot.

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

DATED this __29th__ day of __January__, 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 __29th__ day of __January__ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLINTON E MINER
4850 N ROSEPOINT WAY STE 104
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Gina Espinosa

ORDER - 2