BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EZRA RICHAN, Claimant, v. ARLO G. LOTT TRUCKING, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2007-027185** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** Filed February 7, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls on August 4, 2010. Dennis R. Petersen represented Claimant. Kimberly A. Doyle represented Defendants. The parties presented oral and documentary evidence. They took post-hearing depositions and submitted post-hearing briefs. The case came under advisement on November 30, 2010. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The parties stipulated to present a single issue:

> Whether Claimant is entitled to the medical treatment recommended by Dr. Joseph Verska or whether Claimant is medically stable and needs no further treatment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant asserts that he injured his neck while tarping a load of mint. He has persistent symptoms and needs an anterior removal of extruded disk at C4-5 as recommended by Joseph Verska, M.D. Dr. Verska performed an IME at Claimant's request.

Defendants contend Claimant is not a good candidate for surgery and his symptoms were not caused by the accident. Treating physicians and Defendants' IME doctors have opined Claimant is medically stable and surgery is not indicated here.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Hearing testimony of Claimant;
2. Claimant's Exhibits 1 through 13;
3. Defendants' Exhibits A through Q; and
4. Post hearing depositions of neurosurgeons Joseph M. Verska, M.D., and Michael Hajjar, M.D.

FINDINGS OF FACT

1. Claimant began employment with Employer about March 15, 2007. In the early morning on July 16, 2007, while tarping a load of mint, he felt a "pop" in his neck and his left arm began to go numb. By evening it was painful. His tailbone was also hurting.

2. He first sought medical attention on July 19, 2007, at St. Luke's Magic Valley emergency room (formerly Magic Valley Regional Medical Center "MVRMC"). Differential diagnosis was "cervical pain with radiculopathy" versus "viral syndrome."

3. David M. Christensen, M.D., provided treatment. X-rays taken August 8, 2007,

were negative except for mild degenerative changes. Dr. Christensen conducted a detailed examination. He prescribed conservative treatment including physical therapy. He imposed temporary restrictions. He relaxed some of these restrictions after an August 22 visit.

4. An August 11, 2007, Cervical MRI showed mild indentation of the spinal cord at C4-5. His cervical spine was otherwise negative except for mild degenerative changes throughout.

5. After an August 28, 2007 visit, Dr. Christensen referred Claimant to David Jensen, D.O.

6. A physical therapist noted non-anatomical complaints and findings during 12 therapy sessions in August and September of 2007.

7. On September 4, 2007, Dr. Jensen recorded Claimant exhibited "pain behaviors." Despite Claimant's protests, he did not restrict Claimant from light duty work including sweeping with a broom. A September 11 EMG/NCV showed no nerve problems in his neck or upper extremities. Chiropractic treatments provided only temporary palliative respite. Dr. Jensen suggested an epidural steroid injection, but changed his mind after further review of diagnostic imaging and Claimant's "unusual" symptoms.

8. In a November 9, 2007 note, Dr. Jensen opined, "I do not think any of his symptoms could be attributable to the degenerative change seen at one of the disk levels." He noted he planned to release Claimant to full work without restriction in one month.

9. On November 20, 2007, Claimant visited Dr. Jensen without an appointment claiming significant exacerbation. He displayed more "pain behaviors" with nonorganic symptoms.

10. On December 5, 2007, Richard W. Wilson, M.D., performed a neurological evaluation at Defendants' request. He found no clinically significant objective findings. He opined Claimant suffered a "mild cervical strain" on July 16, 2007. He opined Claimant was medically stable with no restrictions, PPI, or need for further treatment. He opined Claimant could return to full work.

11. Claimant visited nurse practitioner Patricia Carrick, NP, in Dillon, Montana, once in August and once in October 2008 with his continuing complaints. Records of these visits shed no significant additional light on the matter.

12. A November 6, 2008, Lumbar MRI showed changes at L4-5 and L5-S1.

13. A November 6, 2008, Cervical MRI showed the disk bulge mildly indenting the cord as before, but reported less degeneration than the August MRI.

14. A February 2009 visit to Steele Memorial Medical Center in Salmon appears related to an unrelated electrical shock and not to the subject accident. The treater was more concerned about Claimant's cardiac status.

15. On August 6, 2009, Claimant was evaluated for an "initial spine surgery consult" by Dr. Verska at Claimant's request. Dr. Verska opined Claimant was not medically stable, needed C4-5 disk surgery and that the problem was caused by the July 2007 accident. In deposition, he cited the diagnostic imaging which shows the C4-5 disk bulge, Claimant's continuing complaints of symptoms, and the fact that the symptoms did not subside with conservative treatment as the primary bases for his opinions.

16. On July 14, 2010, Michael V. Hajjar, M.D., evaluated Claimant at Defendants' request. He opined Claimant's diagnostic imaging showed only degenerative conditions, none traumatic. He opined Claimant's lingering right shoulder pain was more likely related

to a rotator cuff tear or other joint abnormality than to a cervical neuropathy. He opined Claimant could return to any work without restriction or PPI. He opined Claimant was medically stable and would not likely benefit from any further medical care. He opined that surgery would more likely than not "receive minimal if any benefit" from surgery and "may actually" be made worse by it. He opined Claimant's left upper extremity symptoms did not correlate with a C4-5 anomaly. In deposition, Dr. Hajjar well explained the bases for his opinions.

DISCUSSION AND FURTHER FINDINGS

17. The record does not disclose that Dr. Verska is anything but an expert retained solely for the purpose of examining Claimant, and offering his opinion on whether or not Claimant would benefit from additional surgical therapy. There is no evidence that Dr. Verska has treated Claimant. Nor has Claimant invited the Commission to conclude that Dr. Verska should be accepted as a treating physician pursuant to Idaho Code § 72-432(4). Doctors Christensen and Jensen are, on the other hand, physicians who have treated Claimant in connection with his work-related injury. They have been joined by doctors Wilson and Hajjar in opining that Claimant is medically stable, and would not benefit from additional surgical therapy.

18. Against this background, the Commission must make some judgment as to whether Claimant is entitled to the surgery that has been recommended by Claimant's expert, but decried by his treating physicians.

19. Idaho Code § 72-432(1) defines employer's obligation to provide an injured worker with medical treatment. That Section provides:

> Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other

> attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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.

It is to be noted that the Employer's obligation to provide medical treatment to an injured worker is stated in the disjunctive. The first sentence of Idaho Code § 72-432(1) obligates employer to provide "reasonable" treatment of two kinds: (1) that care required by an employee's physician, and (2) that care needed immediately following an injury, and for a reasonable time thereafter. (*See,* Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 [1989]).

20. Much of the case law discussing Idaho Code §72-432 has focused on that portion of the statute which obligates an employer to provide such reasonable care as may be required by the employee's physician. In Sprague, *supra*, the Supreme Court determined that it is for the employee's physician to ascertain what care is "required" for the injured worker, and it is for the Commission to determine whether the required care is "reasonable". However, as noted above, Dr. Verska is not Claimant's physician, at least in the sense that he is not a physician who has rendered any treatment to Claimant, other than the exam necessary to inform the expert opinion which he was retained to provide. In this case, Dr. Verska's role is very similar to that of a retained expert to whom Claimant must submit for examination at the request of Defendants pursuant to Idaho Code § 72-433. In both instances, the physician is a non-treater who has been retained solely for the purpose of providing an opinion on the nature of the injured worker's condition and/or his need for further treatment.

21. Since Dr. Verska is not properly characterized as "employee's physician" under the first portion of Idaho Code § 72-432(1), the employer's responsibility for the payment of the care recommended by Dr. Verska must be evaluated under the second portion of the statute. In

connection with the peculiar facts of this case, the question becomes whether the prospective care that has been recommended by Dr. Verska is "reasonable" care "needed" immediately following the injury, and for a reasonable time thereafter. This second portion of Idaho Code § 72-432(1) has received only minimal treatment by the Industrial Commission.

22. In Bell v. Super 8 Lodge, 1992 IIC 0211(1992), Claimant suffered a work-related knee injury. Her treating physician eventually found Claimant to be medically stable, and in need of no further surgical therapy. Specifically, he counseled against a diagnostic arthroscopy. However, two other non-treating physicians recommended that it was reasonable for Claimant to undergo a diagnostic arthroscopy and possible meniscus repair in view of her unrelenting symptoms. On the question of whether or not Claimant was entitled to the diagnostic arthroscopy, the Commission reviewed the provisions of Idaho Code § 72-432(1), concluding that the resolution of the question was governed by the language of the statute following the disjunctive "or". In this regard, the Commission stated:

> As noted in the emphasized portion of the statute, Idaho Code, § 72-432(1) may require the employer to provide reasonable medical treatment even if not required by the employee's physician, if such medical treatment is "needed." This was recognized in Sprague v. Caldwell Transportation Inc., 116 Idaho 720, 779 P.2d 395 (1989), wherein the court noted that the statute "categorizes treatment into two kinds: (1) that required by an employee's physician, and (b) [sic] that needed immediately after an injury … and for a reasonable time thereafter."
>
> Sprague 116 Idaho at 721 n.1. The Sprague decision also instructed that where the employee's physician determined that a treatment was required, "The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable," id. at 722. However, this aspect of Sprague has little application to the present case where a course of treatment not required by the employee's treating physician must be evaluated prospectively.[1] Idaho Code, § 72-432(1) is sufficiently clear that where a claimant's treating physician does not prescribe a particular treatment the inquiry is whether the treatment is "needed" and also whether the treatment is reasonable. Where, as here, there exists a conflict of medical opinion over whether the treatment is needed, the Commission must determine whether the treatment is needed, as well as whether it is reasonable.

. . .

[1] In Sprague v. Caldwell Transportation Inc., 116 Idaho 720, 779 P.2d 395 (1989), the court evaluated the reasonableness of treatment required by claimant's treating physician after the treatment was given. The court fashioned a three-part test to determine whether the treatment given was reasonable. The three-parts were whether: "a) the claimant made gradual improvement from the treatment received; b) the treatment was required by the claimant's physician; and c) the treatment received was within the physician's standard of practice the charges for which were fair, reasonable and similar to charges in the same profession." Id. At 722-723. However, the test has limitations which render it largely inapposite here. By its very terms, the three-part test applies only where claimant's physician requires the treatment; a condition not satisfied in the present case. Furthermore, the Sprague test cannot be applied when evaluating proposed treatment. It is difficult to know whether a claimant will improve from treatment not yet given. It is also difficult to predict if treatment not yet provided will be within the claimant's physician's standard of practice and if the charges therefor will be fair and reasonable. For these reasons, Sprague does not control resolution of the instant case.

23. To summarize, where the care at issue has been recommended by the "employee's physician," the question is whether the physician "requires" the care, and whether the required care is "reasonable." Where the care at issue has not been recommended by the employee's physician, the question is whether the care is "needed," and whether the needed care is "reasonable." Where care has been recommended by an employee's physician, it is up to that physician to determine whether the care is "required." The Commission is only empowered to review the required care for reasonableness. Where the care at issue is other than care required by the employee's physician, the Commission is empowered to determine whether the medical evidence establishes that the care is "needed," and whether the needed care is "reasonable." Bennett v. K-Mart Corporation, 1993 IIC 0338 (1993).

24. It remains to be determined what is meant by the term "needed." It is a long-standing axiom of Idaho Workers' Compensation Law that the employer is obligated to provide an injured worker with that care necessary to effect a cure of the injured worker's injury or disease and restore the worker's earning capacity. *See,* Koegler v. C. F. Davidson Company, 69 Idaho 416, 209 P.2d 728 (1949); Clevenger v. Potlatch Forest, Inc., 85 Idaho 193, 377 P.2d 794 (1963); Reese v. V-1 Oil Company, 141 Idaho 630, 115 P.3d 721 (2005); Dilulo v. Anderson and

Wood Company, Inc., 143 Idaho 829, 153 P.3d 1175 (2007). Therefore, the care that is "needed" is that care necessary to effect a cure of the injured worker's injury or disease and restore the injured worker's ability to engage in gainful activity.

25. What is meant by the term "reasonable" was addressed by the Court in Sprague, *supra.* In Sprague the care at issue had already been rendered by the time the Industrial Commission heard the case. Under the peculiar facts of that case, the Supreme Court noted that the following facts supported the conclusion that the care in question was reasonable:

1) The treatment was required by Claimant's physician;
2) Claimant made a gradual improvement from the treatment that he received;
3) The treatment which had been provided was within the physician's standard of practice, the charges for which were fair, reasonable and similar to charges in the same profession.

26. The circumstances which the Supreme Court found important to determining the reasonableness of care in Sprague are not before the Commission in this matter, since the care at issue is entirely prospective in nature. To be sure, Dr. Verska could be said to "require" the treatment in question, since he has proposed it. However, since the treatment has not been rendered, we do not have before us for consideration any evidence on whether the charges for the proposed surgery are reasonable, much less whether Claimant has made any improvement from the procedure. Whether the surgery proposed by Dr. Verska is "reasonable" must be based on consideration of other factors, e.g., whether the proposed care is likely to be efficacious, and is of a type that finds support and acceptance in the medical community.

27. Here, Drs. Christensen and Jensen, Claimant's treating physicians, as well as two retained defense experts, Drs. Wilson and Hajjar, are in essential agreement that Claimant is

stable, and in need of no further care. Dr. Verska, on the other hand, has proposed that Claimant's C4-5 lesion is of a kind that warrants surgery.

28. Claimant was seen by Dr. Verska at the insistence of Claimant's attorney on August 6, 2009. Dr. Verska had the opportunity to review radiological studies of Claimant's cervical spine. He noted that Claimant's left arm pain was reproduced by putting Claimant through a Spurlings maneuver. Dr. Verska though that this finding correlated well with the MRI study, and suggested that surgical treatment was warranted to decompress the nerve roots and spinal cord at the C4-5 level.

29. Claimant was seen by Dr. Hajjar for evaluation on July 14, 2010. Interestingly, at the time of that evaluation, Dr. Hajjar reported that Claimant's symptoms were almost entirely right-sided, though he did complain of some minor left-sided shoulder pain. Dr. Hajjar, as well, had the opportunity to review MRI studies of Claimant's cervical spine. As did Dr. Verska, Dr. Hajjar noted that the area of concern was the C4-5 disk level. At that level, Claimant had evidence of an eccentric left-sided disk bulge without any compression to the spinal canal, but with some narrowing of the space for the exiting C5 nerve root on the left. Because Claimant's complaints were predominantly right-sided, and because these complaints did not correlate well with a left-sided disk bulge, Dr. Hajjar concluded that Claimant was not a good candidate for surgery at this level. (*See*, Hajjar Depo., pp. 8/8-9/15). On cross-examination, Dr. Hajjar was reminded that at the time of the August 4, 2010 hearing, Claimant described a somewhat different constellation of symptoms. At hearing, Claimant complained of numbness going down the left arm and into the left index finger. Dr. Hajjar testified that this confused matters even more, since the C5 nerve root, the only nerve root that might be implicated in connection with the MRI findings, ennervates only the left deltoid musculature, and does <u>not</u> ennervate the left

arm. The complaints with which Claimant presented at hearing would be more consistent with a C6 nerve root involvement. However, the relevant MRI studies do not identify any area of compromise to the left C6 nerve root. Based on the representations made to him about Claimant's hearing testimony, Dr. Hajjar remained unswerving in his opposition to the proposed C4-5 surgery.

30. It is also notable that the other physicians who have considered Claimant's cervical spine condition, have, like Dr. Hajjar, been unwilling to endorse a surgical procedure at C4-5. Dr. Wilson, for example, felt that Claimant's subjective diffuse complaints did not correlate well with any of the imaging studies, and for this reason, among others, he declined to recommend surgical intervention.

31. On balance, the more persuasive medical testimony establishes that there is no objective evidence warranting surgical intervention at the C4-5 level, and that the Claimant's subjective complaints cannot be correlated with any of the minimal objective findings. We find, therefore, that Claimant has failed to meet his burden of proving that the care proposed by Dr. Verska is reasonable or needed to restore Claimant to health and productivity. In making the determination on whether the recommended care is "reasonable" and "needed," the Commission does not decide the matter on the basis of whether there are more opinions favoring one position or another. Rather, the conclusion derives from qualitative analysis of the various medical opinions before the Commission.

CONCLUSION OF LAW

Claimant is not entitled to the surgery proposed by Dr. Verska.

ORDER

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

1. Claimant is not entitled to the surgery proposed by Dr. Verska.

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

DATED this __7th____ day of February, 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 __7th____ day of February, 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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