

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAMMY ROBISON,)
)
 Claimant,)
)
 v.)
)
 BLAINE COUNTY,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-039560

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

Filed June 22, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. Claimant, who resides in Carey, appears *pro se*. Employer/Surety is represented by Paul J. Augustine of Boise. In lieu of a hearing, the parties submitted a Stipulation of Facts with attached exhibits A-G. No post-hearing depositions were taken, and the parties did not submit post-hearing briefs. Upon the filing of the Affidavit of Paul C. Collins, M.D., on May 23, 2011, this matter came under advisement.

ISSUE

The sole issue to be decided is whether the charges regarding the use of a Neurometrix-NC-Stat-Neurometer (NC-stat) nerve conduction testing system are reasonable and necessary within the context of Idaho Code § 72-432(1).

CONTENTIONS OF THE PARTIES

Claimant contends that Defendants should pay for the cost of nerve conduction studies using the NC-stat system ordered by her treating orthopedic surgeon, Glen Shapiro, M.D., in ruling out carpal tunnel syndrome.

Defendants contend that the charges for the NC-stat system nerve conduction study are not reasonable and necessary within the context of Idaho Code § 72-432(1). The NC-stat system is experimental and investigational and, thus, is not reasonable and necessary. Dr. Shapiro failed to inform Claimant that there were more traditional nerve conduction studies available, or that Surety had already informed him that they would not pay for such studies. Finally, in the event the Commission finds in favor of Claimant, Surety will pay the claim. On the other hand, should the Commission find in Defendants' favor, Dr. Shapiro should be specifically prohibited pursuant to Idaho Code § 72-432(6) from pursuing a collection against Claimant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Stipulation of Facts filed July 27, 2010;
3. Exhibits A-G attached to the above Stipulation of Facts;
4. Affidavit of Paul C. Collins, M.D., filed May 23, 2011; and
5. Exhibits 1-2 attached to the above affidavit.

FINDINGS OF FACT

The following findings of fact are taken *verbatim* from the Stipulation of Facts and are adopted as his own by the Referee:

1. Claimant, Tammy Robison, has been employed by the Blaine County Assessor's Office as an appraiser from March 9, 1988 through the present. In the fall of 2008 she developed progressively worsening numbness and tingling in her right hand. Ms. Robison is right hand dominate.

2. As part of her job at the Blaine County Assessor's Office, Ms. Robison is required to use a keyboard at least six hours each day. As a result she experienced numbness and tingling in her right hand since 2006.

3. Ms. Robison was diagnosed with right carpal tunnel syndrome which was caused by her work at the Blaine County Assessor's Office. Ms. Robison submitted a claim for this condition on or about December 11, 2008 and Defendants accepted liability therefore shortly thereafter.

4. On December 5, 2008 while attending physical therapy at Hailey Sport & Physical Therapy Clinic, Kim Mazik, PT, referred Ms. Robison to Glen Shapiro, M.D., for consultation due to two months of persistent tingling in Ms. Robison's right hand.

5. On December 5, 2008, Ms. Robison was seen by Dr. Shapiro for an initial orthopedic evaluation for her right hand numbness and tingling. Dr. Shapiro, after x-rays and physical examination, diagnosed Ms. Robison with Raynaud's Phenomenon and a moderate case of right carpal tunnel syndrome, which was exacerbated by her repetitive motions at work. A true and correct copy of Dr. Shapiro's December 5, 2008 office note is attached hereto as Exhibit "A."

6. On December 11, 2008, Ms. Robison followed up with Dr. Shapiro. Dr. Shapiro made arrangements for Ms. Robison to have a nerve conduction study at the time of the visit. A

true and correct copy of Dr. Shapiro's December 11, 2008 office note is attached hereto as Exhibit "B."

7. During her December 11, 2008 office visit, Dr. Shapiro used a device called the NC-Stat which is a nerve conduction testing system marketed as an alternative to conventional nerve conduction testing. According to the study results, Ms. Robison had a severe right median neuropathy at the wrist, which Dr. Shapiro interpreted to be evidence of severe right sided carpal tunnel syndrome. At that time he explained to Ms. Robison that her right symptomatic carpal tunnel syndrome was caused by many years of repetitive motion at work. A true and correct copy of the N-Stat "on call" report dated December 11, 2008 is attached hereto as Exhibit "C."

8. Prior to the [sic -that] time, via a letter dated May 29, 2007 the Idaho State Insurance Fund notified Dr. Shapiro that it would deny payment for the use of the NC-Stat testing procedure because it was considered experimental and not medically necessary. A true and correct copy of the letter is attached hereto as Exhibit "D." As a result, at all times pertinent hereto, Dr. Shapiro was aware, or should have been aware that any billings to the State Insurance Fund for this procedure would be disputed.

9. Even though he told Ms. Robison that her right-sided carpal tunnel syndrome was caused by repetitive motion at work, Dr. Shapiro billed Ms. Robison's private insurer, Regence Blue Shield of Idaho, for her December 5 and December 11, 2008 visits, including the NC-Stat testing. A true and correct copy of the direct billings to Regence are [sic] attached hereto as Exhibit "E."

10. Regence Blue Shield of Idaho denied these billings because they were for a work-related condition. A true and correct copy of Regence Blue shield's [sic] denial of the billings is attached hereto as Exhibit "F."

11. After these bills were denied by Regence Blue Shield of Idaho, Dr. Shapiro submitted them to the Idaho State Insurance Fund for payment. The Idaho State Insurance Fund has refused to pay Dr. Shapiro for the NC-Stat testing procedure on the same grounds stated in the Fund's previous letter of May 29, 2007 (Exhibit D) with respect to all other charges included in that billing, the Fund has paid all such charges in accord with the Commission fee schedule and applicable rules.

12. The NC Stat [sic] was the subject of a Motion for Approval of Disputed Charges filed by the [sic] Dr. Shapiro on or about July 27, 2009. Dr. Shapiro's motion, and the Fund's response are believed to be on file with the Industrial Commission and the parties incorporate those documents by reference herein. In an order dated November 19, 2009, the Commission staff declined to address charge [sic] on the grounds that it involved issues as to the reasonableness and necessity of medical treatment, and was therefore excluded from the med fee dispute process, pursuant to Comment 2, to Rule 19 JRP. A true and correct copy of the order is attached hereto as Exhibit "G."

13. At some point, at or about the same time the [sic] Dr. Shapiro filed his Motion for Approval of Disputed Charges, Dr. Shapiro also attempted to directly bill Ms. Robison for the charge in question, resulting in Ms. Robison's complaint filed on or about August 3, 2009.

14. Ms. Robison relied on Dr. Shapiro to provide her with reasonable and necessary medical treatment.

15. Dr. Shapiro did not give Ms. Robison the option of obtaining standard nerve conduction studies at the time of her December 2008 office visits. Dr. Shapiro administered an NC-Stat test to Ms. Robison at his sole discretion. He did not explain to Ms. Robison that other nerve conduction tests were available.

16. Similarly, Dr. Shapiro did not inform Ms. Robison that he had previously been notified the State Insurance Fund would deny payment for the NC-Stat test.

[While not technically “facts” or “findings,” for completeness of the record, the Referee includes the final two paragraphs from the Stipulation of Facts]:

17. The sole issue to be determined by the Industrial Commission is whether Dr. Shapiro’s charges for the NC-Stat procedure are reasonable and necessary within the context of Idaho Code § 72-432(1).

18. The parties further agree that, in the event the Commission finds this procedure constitutes reasonable and necessary treatment within the context of Idaho Code § 72-432(1), then the State Insurance Fund should assume responsibility of payment thereof. On the other hand, should the Commission find that such charge falls outside the parameters of Idaho Code § 72-432(1), the parties respectfully request that this commission [sic] issue its order stating that Dr. Shapiro is not entitled to payment for that [sic] same and is precluded pursuant, [sic] to Idaho Code § 72-432(6) from pursuing any further collection action against Ms. Robison for such charge.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) provides that an employer shall provide for an injured employee such reasonable medical care as may be reasonably required by the employee’s physician immediately after an injury and for a reasonable time thereafter. It is for the physician to decide what treatment is required. The only review the Commission is entitled to make is of the reasonableness of the physician’s decision. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395(1989).

19. Defendants retained Paul C. Collins, M.D., a board-certified orthopedic surgeon, to investigate the legitimacy of the NC-stat nerve conduction testing system. Exhibit 1 to Dr. Collins' affidavit is a June 8, 2006 Technology Assessment of the NC-Stat system prepared by Josh Morse of the Office of Medical Director for the Washington Department of Labor and Industries. Mr. Morse described the NC-stat as an automated "non-invasive" nerve conduction testing system marketed as an alternative to conventional nerve conduction studies. The testing system itself is a hand-held device and offers results within minutes. As of 2004, the FDA allowed the device to be marketed for use in assessing nerves of the upper and lower extremities¹ including sensory responses in the median and ulnar nerves.

20. In order to assess the diagnostic accuracy of the NC-stat, Mr. Morse located six peer-reviewed articles regarding the device which are summarized in Exhibit 1. Mr. Morse concludes:

At this time there is not adequate scientific evidence to conclude that the use of the NC-stat is equivalent to traditional nerve conduction study methods for use in evaluating the functioning of the median, ulnar, peroneal, sural or tibial nerves. The diagnostic accuracy of NC-stat is not yet demonstrated in the scientific literature to be equivalent to traditional or gold-standard testing methods. **NC-stat is therefore considered experimental and investigational.**

Exhibit 1, page 11 attached to Dr. Collins' affidavit. (Emphasis added).

21. Exhibit 2 attached to Dr. Collins' affidavit is an American Association of Neuromuscular & Electrodiagnostic Medicine (AANEM) Position Statement approved in September 2006. The position statement was prepared in response to inquiries regarding (1) physicians interpreting nerve conduction study (NCS) data without any direct patient contact and without providing direct oversight over the performance of the NCS and (2) NCSs being utilized

¹ There is no indication that the NC-stat system is used for lower extremity testing; it has mainly been used in diagnosing wrist problems.

to diagnose patients without a complimentary electromyography (EMG) study. The position statement concluded:

The AANEM believes that electrodiagnostic studies should be performed by physicians properly trained in electrodiagnostic medicine, that interpretation of NCS data alone absent face-to-face patient interaction and control over the process provides **substandard care**, and that the performance of NCSs without needle EMG has the potential of compromising patient care. It is the AANEM's opinion that it is in the best interest of patients, in the majority of situations, for the needle EMG and the NCS examination to be conducted and interpreted at the same time.

Exhibit 2 attached to Dr. Collins' affidavit, p. 1. (Emphasis added).

22. Dr. Collins opined, based on the above referenced studies as well as a review of Dr. Shapiro's medical records indicating that he did not conduct a needle EMG study on Claimant, that Dr. Shapiro's use of the NC-stat device was neither medically reasonable nor necessary.

23. Based on the uncontroverted evidence before him, the Referee is constrained to find Dr. Shapiro's use of the NC-stat Neurometer was neither reasonable nor necessary pursuant to Idaho Code § 72-432(1), and neither Claimant nor the Idaho State Insurance Fund is responsible for the payment of its use. Further, Dr. Shapiro was forewarned by the Idaho State Insurance Fund that they would not be paying for NC-stat testing because such tests were considered experimental and investigational and were not performed by physicians trained and certified according to AANEM standards, yet he proceeded with the NC-stat testing nonetheless. See Exhibit D.

24. The Referee further finds that Dr. Shapiro is precluded from pursuing a collection action against Claimant pursuant to the balanced billing prohibition contained within Idaho Code § 72-432(6). This decision does not address the case where an injured worker knows that the surety has declined to provide experimental treatment, yet nevertheless elects to proceed with

such treatment against the chance that the Commission will ultimately find such treatment compensable.

CONCLUSIONS OF LAW

1. Dr. Shapiro's use of the NC-stat Neurometer to conduct nerve conduction studies in this matter was not necessary or reasonable, and he is not entitled to the costs for the same from either Claimant or the Idaho State Insurance Fund.

2. Dr. Shapiro is precluded from instituting any collection action against Claimant pursuant to Idaho Code § 72-432(6).

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 __3rd__ day of June, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __22nd__ day of June, 2011, 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:

TAMMY ROBISON
20377 S MAIN ST
CAREY ID 83320

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TAMMY ROBISON,)
)
 Claimant,)
)
 v.)
)
 BLAINE COUNTY,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-039560

ORDER

Filed June 22, 2011

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. Dr. Shapiro’s use of the NC-stat Neurometer to conduct nerve conduction studies in this matter was not necessary or reasonable and he is not entitled to the costs for the same from either Claimant or the Idaho State Insurance Fund.
2. Dr. Shapiro is precluded from instituting any collection action against Claimant pursuant to Idaho Code § 72-432(6).

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

DATED this 22nd 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 22nd day of June 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

TAMMY ROBISON
20377 S MAIN ST
CAREY ID 83320

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ge

/s/