

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SALLY J. WALKER,)
)
 Claimant,)
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 v.)
)
 ATK ALLIANT TECHSYSTEMS,)
)
 Employer,)
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 and)
)
 INSURANCE COMPANY OF THE)
 STATE OF PENNSYLVANIA,)
)
 Surety,)
)
 Defendants.)
)
 _____)

**IC 2007-013040
2007-011845**

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

Filed February 12, 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 Lewiston on July 16, 2009. Claimant was present and represented by Thomas W. Callery of Lewiston. Bentley G. Stromberg, also of Lewiston, represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on November 23, 2009.

ISSUES

As discussed at the hearing and further narrowed in the post-hearing briefing, the issues to be decided are:

1. Whether Claimant's industrial accident on April 2, 2007 resulted in the permanent aggravation of her preexisting cervical condition, thus necessitating the need for a cervical fusion. If so,
2. Claimant's entitlement to total temporary disability (TTD) benefits, and
3. Claimant's entitlement to permanent partial impairment (PPI) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that even though she suffered for years from cervical problems, nonetheless, her industrial accident caused either a new injury or a permanent aggravation of that condition to the extent that she required a cervical fusion. The pain she experienced as the result of her accident was in a different location and of a different nature than the pain she experienced prior thereto. She is entitled to the costs associated with her cervical fusion as well as TTD and PPI benefits.

Defendants contend that Claimant's industrial accident was nothing more than a temporary aggravation of her significant preexisting neck problems, just as she had temporarily aggravated that condition many times before. She would have needed surgery in any event due to her severe underlying cervical disk disease. She is not entitled to any workers' compensation benefits related to her April 2, 2007 accident, other than those already paid.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

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

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibits A-I admitted at the hearing.
3. Defendants' Exhibits 1-25 admitted at the hearing.
4. The post-hearing deposition of John M. McNulty, M.D., taken by Claimant on August 6, 2009.
5. The post-hearing deposition of Rodde D. Cox, M.D., taken by Defendants on August 14, 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 58 years of age and resided in Asotin, Washington, at the time of the hearing. She began her employment with Employer's predecessor in February 1998, about a year after she began treating regularly with a chiropractor for her neck pain. Employer manufactures ammunition. Claimant generally worked four days a week and between 10-11 hours per shift.
2. In 2002, Claimant was lifting a barrel at work when she injured her neck. She commenced a four-year regimen of chiropractic treatment, and physical and massage therapy. Claimant never told anyone about her accident until 2006 thinking that she had merely suffered a sprain that would eventually go away; it got worse.
3. On June 14, 2006, Donald Soloniuk, M.D., performed an anterior C3-4 cervical discectomy and fusion. The need for this surgery was related to Claimant's underlying cervical degenerative disk disease. He released Claimant to full-duty work in October 2006.

4. Claimant continued to work, albeit with progressing neck pain. She continued to treat with a family nurse practitioner, Robin Hight, her primary care giver, for neck pain.

5. On April 2, 2007, Claimant was attempting to free a small, lightweight basket from the machine she was operating by pulling on the basket. While doing so, she felt a strain in her neck. Claimant then went into the bathroom and vomited. She immediately reported the event to her supervisor and was sent to Employer's preferred provider. Claimant also visited with FNP Hight that same day.

6. Claimant saw Dr. Soloniuk on April 20, 2007 at which time he noted she was doing well after he operated on her in June 2006 until her April 2 accident. He further noted that her previous pain had been on the left side; now it was on the right. He diagnosed degenerative disk disease with a new injury. On June 8, 2007, Dr. Soloniuk determined that he had nothing left to offer Claimant from a surgical standpoint and recommended a conservative approach to her care.

7. From June 2007 through March 2008, Claimant was treated conservatively, primarily with physical therapy.

8. FNP Hight referred Claimant to Bret Dirks, M.D., a neurosurgeon practicing in Coeur d'Alene. On May 2, 2008, Dr. Dirks performed an anterior C2-C6 fusion. Claimant seeks reimbursement for this surgery as well as associated income benefits.

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). No “magic” words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician’s oral testimony is not required in every case, but his or her medical records may be utilized to provide “medical testimony.” *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

A pre-existing disease or infirmity of the employee does not disqualify a workers’ compensation claim if the employment permanently aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. An employer takes the employee as found. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983).

9. The crux of this matter is whether or not Claimant’s April 2, 2007 accident permanently aggravated Claimant’s admitted preexisting cervical disk disease to the extent that surgery was required, or whether the accident was merely a temporary aggravation. Claimant relies on the opinions expressed by Drs. Soloniuk, Dirks, and McNulty to support her position and Defendants rely on the opinions of Dr. Cox to support their position. Defendants also question the foundation for the opinions of Claimant’s physicians.

Dr. Soloniuk:

10. In his April 20, 2007 office note, Dr. Soloniuk indicated that he last saw Claimant in October 2006, and, “She states that she continued to do well and was working until April 4, [sic] 2007. At that time she was lifting and pulling a heavy object at work and developed the onset of significant pain in the posterior aspect of the neck on the right side. Her previous pain had been left sided but now her pain is on the right side and extends from the mastoid region down into the suprascapular region on the right.” Defendants’ Exhibit 7, p. 3. Dr. Soloniuk diagnosed cervical degenerative disk disease with new injury based on the different location of her symptoms from previously.

Dr. Dirks:

11. Dr. Dirks responded to an August 15, 2008 letter from Claimant’s counsel as follows:¹ 1) Did the accident of April 2, 2007 aggravate Ms. Walker’s pre-existing cervical degenerative disc disease? [Handwritten]: Yes. 2) Did the aggravating incident of April 2, 2007 necessitate the need for the interior [sic] cervical discectomy [sic] and fusion performed by yourself at C4-5 and C5-6? [Handwritten]: Yes.

Dr. McNulty:

12. John M. McNulty M.D., an orthopedic surgeon practicing in St. Maries, saw Claimant at her attorney’s request on April 4, 2009. Dr. McNulty’s practice consists of less than ten-percent workers’ compensation and personal injury IMEs and the remaining 90 percent is clinical/surgical. Dr. McNulty authored a report and was deposed. Dr. McNulty stated in his report: “After reviewing the medical records, the patient sustained a permanent aggravation of a

¹ Claimant’s counsel also provided Dr. Dirks a copy of the initial IME performed by Dr. Cox at Surety’s request.

preexisting condition, resulting in the need for surgery as a direct result of her work-related injury on 04/02/07. In particular she developed new right sided symptoms as a result of that accident.” Claimant’s Exhibit E, p. 159.

13. At his August 6, 2009 deposition, Dr. McNulty testified that upon preparing for his deposition, he discovered that the medical records regarding the area of Claimant’s prior to and immediately following her April 2, 2007 accident were “conflicting” in that “Some records say “left;” other records say “right;” some say both. So, in trying to sort out the exact location of the injury, it is somewhat challenging.”

* * *

Q. (By Mr. Callery): Doctor, after reviewing these additional notes,² that are immediately - - well, does that impact your opinion in this case, that conflicting left – and right – neck pain that’s contained in the medical records?

A. These two records by themselves, I would say, contribute. Going through some of the other records, which I’m sure we are going to do, also adds to the ambiguity and confusion of did she really have new right-sided pain, or was everything left, or are there errors here.

One of - - the primary basis for my report was the note from Dr. Soloniuk.³ I weighed his opinions and statement a little bit heavier than the family practice physician. He was the treating surgeon, neurosurgeon. He was familiar with her. He did her prior surgery, and he described new symptoms, new right-sided symptoms, and that weighed heavily in my opinion. He did not mention left-sided symptoms, and that certainly adds a little bit to the confusion.

Dr. McNulty Deposition. pp. 13, 15-16.

14. Dr. McNulty also discussed a March 29, 2007 office note prepared by nurse practitioner Ziegeldorf wherein she indicated that, “Patient presents with concerns about ongoing pain in the cervical spine with muscle spasms; reports not controlled pain level, is on light duty

² The April 2, 2007 notes of FNP Hight and Dr. England, a physician with Employer’s preferred provider.

³ Dr. McNulty is referring to Dr. Soloniuk’s April 20, 2007 office note referred to in finding number 10 above.

since cervical fusion surgery ten months ago. She reports that she is not sleeping, is unable to function as she did previously. Requests evaluation and referral to spokane [sic] neurosurgeon for evaluation and treatment.” Defendants’ Exhibit 9 A, p. 128. Nurse Ziegeldorf also noted that Claimant had recently missed two days of work (March 28 and 29, 2007) due to neck pain. Dr. McNulty testified:

Q. (By Mr. Callery): Okay. Well, let me ask you this, what - - what does that note do, if anything, to your opinion in this case concerning whether or not the 4/2/07 incident was a permanent aggravation of her cervical condition or a temporary exacerbation?

A. Well, this definitely adds more confusion, more ambiguity. Unfortunately, this is a note by a nurse practitioner. Obviously, from the history section, she was having much more symptoms than she discussed with me at my [sic] time of the evaluation as well as Dr. Soloniuk at the time of his evaluation three weeks later.

Q. Does that note jive with Dr. - - what Dr. Soloniuk’s record were?

A. It conflicts with his.

Q. All right. I interrupted you. Go ahead.

A. Sure. And the best thing is - - I guess the best thing I can say is that I didn’t have this note at the time of my report. It is conflicting information from one of the main - - I should say, from what I was led to believe. And I really haven’t fully had time to digest the significance of this in fifteen minutes prior to the deposition.

Q. Okay. Do you feel you can render - - you can continue to render an opinion concerning whether or not the incident with the bucket on 4/2/07 was a permanent aggravation, or a - - some type of a temporary waxing and waning? Do you have an opinion on that now?

A. I guess I went through the records, and there’s a lot of conflicting information, rights and lefts, conflicting symptom information.⁴ And with a lot less certainty than was noted in my original report, I would say that there is, oh, maybe a fifty-one percent probability that it was a permanent aggravation of the previous condition of her symptoms. And that would be based on – a lot of that’s based on Dr. Soloniuk’s record. However, you know, the medical record is

⁴ Claimant told Dr. McNulty that she felt immediate pain in her neck that radiated to the trapezius area of her right shoulder. Unbeknownst to Dr. McNulty, Claimant testified at hearing that she experienced pain on both sides of her neck and so informed her physicians. She also testified that the pain was in the same area of her neck as she was experiencing before her accident. *See*, Hearing Transcript, p. 83.

ambiguous, and I'm not saying - - you know, the original report, I was a lot more confidant.

Id., pp. 18-19.

15. Dr. McNulty disagrees with Dr. Cox regarding the natural progression of Claimant's underlying cervical disk disease as being the cause for Claimant's second surgery because such progression takes years, not less than the year that elapsed between her accident and second surgery. Dr. McNulty does not believe the need for Claimant's second surgery was caused by her first surgery. Even though Dr. Soloniuk stated that Claimant's symptoms at the time of her accident were "new," Dr. McNulty could not state whether he, Dr. Soloniuk, had reviewed Ms. Ziegeldorf's March 29, 2007 office note. Dr. McNulty admitted that the crux of his original opinion was that Claimant developed new symptoms on the right at the time of her accident and that his opinion in that regard is "undermined" by the fact that she was exhibiting symptoms on the right just four days before.

Dr. Rodde Cox:

16. Dr. Cox is a physiatrist who examined Claimant twice at Surety's request; once on May 24, 2007 and again on June 12, 2009. At the time of the first IME, Claimant's chief complaint was pain on both sides of her neck extending down into the middle of her shoulders. Dr. Cox concluded that Claimant's cervical symptoms stem from the natural progression of her underlying cervical disk disease that was temporarily aggravated by her April 2, 2007 accident. Although Dr. Cox found Claimant's condition to be unrelated to her accident, he did recommend further diagnostic testing to rule out a pseudoarthrosis. Surety terminated ongoing medical and TTD benefits based on this IME.

17. In Dr. Cox's second IME on June 12, 2009, he noted that Claimant's chief complaint was constant right neck pain and upper trapezius pain. Dr. Cox diagnosed degenerative disk disease of the cervical spine with chronic pain. Dr. Cox agreed with Dr. Dirks that a fusion of the levels above and below the site of the first surgery was reasonable due to next-segment degeneration. He continued to adhere to his original opinion that Claimant's April 2, 2007 accident was nothing more than a temporary aggravation of her preexisting degenerative disk disease similar to other episodic flare ups of her neck pain.

18. Dr. Cox's causation opinions were fleshed out in a bit more detail at his deposition:

Q. (By Mr. Stromberg): And what's the basis for your concluding at that time [the April 2, 2007 accident] that she just had a temporary exacerbation of her previous problems?

A. Well, I think there's several things. I think number one, that she had ongoing neck pain complaints after the C3-4 injury. And, it looked to me as if her history was such that she would have these recurrent flare-ups of her neck pain. Additionally, I don't believe there was anything, any objective findings on the diagnostic studies or on her exam that would suggest that she had a material worsening of her condition as a result of the 4 of '07 injury.

Dr. Cox Deposition, p. 11.

19. Regarding the impact of the March 29, 2007 note of nurse Ziegeldorf, Dr. Cox testified:

Q. By Mr. Stromberg): And how did this 3-29-07 document, Exhibit 2, affect your, you opinion regarding temporary exacerbation?

A. Well, first of all, this is before the injury of record, and it looked like she was having fairly significant complaints of neck pain at that time. Pain in her neck which she had noted had been ongoing for a couple of months, also pain in both of her shoulders, and to the point where she actually was requesting an evaluation by a neurosurgeon, that her pain was not well controlled. She was having difficulty sleeping. So, it appears that she, again, this is one of those examples of her having these kind of chronic neck pain with flare-ups prior to the injury of record.

* * *

Q. Okay. Now, some physicians have suggested that the 4-2-07 incident led to a new cervical injury, because prior to the 4-2-07 incident her symptoms were on the left, but after the 4-2-07 incident her symptoms were on the right. Are you aware of records which contradict that position?

A. Well, I think the one we just reviewed, the 3-29-07 entry references symptoms into both shoulders, which to me would imply both sides, because it's listed as plural. So that would suggest to me she at least at that time had symptoms on both the left and the right.

Q. And did you review the 4-2-07 records from Clearwater Valley Medical Center, which indicated that she was pointing - - reporting pain on the left?

A. Yes. I do have those as well.

Q. And did you have Dr. England's 4-9-07 Valley Medical Center record indicating that she was reporting pain on the left?

A. I believe I recall seeing that. Yeah. I see that 4-2-07, Clearwater Medical Center - - Clearwater Medical Clinic Records had indicated that she had some right-sided symptoms as well as left-sided symptoms. And, Valley Medical Center, sorry, the date you said on that?

Q. 4-9-07.

A. Yeah. That indicated now the left side.

Q. Okay. And, the pain that she had prior to the first surgery was on the left side, wasn't it?

A. That's correct.

Dr. Cox Deposition, pp. 12, 15-16.

20. Dr. Cox places the need for Claimant's May 2, 2008 surgery on "next segment degeneration" stemming from Claimant's first surgery. In response to a question regarding Dr. McNulty's opinion that segmental degeneration could not take place in the approximate ten months between her first surgery and her April 2, 2007 accident, Dr. Cox testified:

Well, I think one factor is that the level at C5-6 we knew wasn't, was not normal to begin with. She already had some wear and tear changes at that level. And so, I think it was fairly vulnerable to additional deterioration, you know, her activity level, you know, what activities she's doing. There's other factors that could have contributed to that.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 11

Dr. Cox Deposition, p. 18.

Had Claimant had healthy disks at the adjacent levels at the time of her first surgery, Dr. Cox would agree with Dr. McNulty that ten months would not be enough time to lead to the degeneration found at the time of Claimant's second surgery; however, she did not.

21. It must be remembered that the burden of proof regarding entitlement to benefits rests with Claimant. It is not up to the Defendants to establish the causative link between an industrial accident and any resultant medical treatment; it is up to Claimant. She can do so by showing by plain and unequivocal medical evidence or testimony that the events are related. This Claimant has failed to do in this case.

22. Dr. McNulty was anything but "plain and unequivocal" in his causation opinion once he reviewed nurse Ziegeldorf's March 29, 2007 office note.⁵ There is no question that Claimant has underlying cervical degenerative disk disease and has been treated for that condition in one way or another since at least 1996. Included in such treatment was Claimant's June 14, 2006 C3-4 surgery that both Drs. Cox and McNulty opined was due to her cervical disk disease rather than her work. Claimant continued to have significant cervical problems after her surgery with frequent flare-ups before the April 2, 2007 accident. After Dr. McNulty became aware of the location and severity of Claimant's pre-April 2 symptomatology, he testified, "And with a lot less certainty than was noted in my original report, I would say there is, oh, **maybe** a fifty-one percent probability that it was a permanent aggravation of the previous condition of her symptoms." Dr. McNulty Deposition, p. 19, emphasis added. Dr. McNulty's testimony is certainly not **plain and unequivocal** regarding causation.

⁵ It is unclear from the record why Dr. McNulty did not have this note prior to his deposition.

23. While Dr. Soloniuk reported that Claimant's April 2, 2007 accident resulted in a new injury, there is no indication that he was aware of the full extent of Claimant's cervical problems in the week before that injury. Further, the foundation for Dr. Soloniuk's opinion regarding a "new" injury was not tested. In the April 20, 2007 letter wherein Dr. Soloniuk mentions the new injury, he also indicated that per Claimant's history, she continued to do well since he last saw in October 2006. In a May 11, 2007 office note, Dr. Soloniuk indicated, ". . . continued cervical discomfort secondary to degenerative cervical disease." Defendants' Exhibit 7, p. 2. Dr. Soloniuk did not mention Claimant's April 2, 2007 injury as being the cause of her continued discomfort. Further, there is no indication that Dr. Soloniuk had ever seen nurse Ziegeldorf's March 29, 2007 office note or any of the records immediately following Claimant's April 2 accident; he was certainly never questioned about them.

24. Dr. Dirks also indicated in two "yes" answers that Claimant's April 2, 2007 accident accelerated the need for her second surgery. However, the record does not reflect that Dr. Dirks ever reviewed nurse Ziegeldorf's March 29 note or was otherwise aware of the difficulties Claimant was experiencing between the time of Dr. Soloniuk's surgery and April 2, 2007. Therefore, Dr. Dirk's causation opinion is given little weight.

25. The Referee finds that Claimant has failed to prove her accident of April 2, 2007 permanently aggravated her preexisting degenerative disk disease thus creating the need for her May 2, 2008 surgery.

26. Based on the foregoing, all other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove the need for her May 2, 2008 surgery was caused by her accident of April 2, 2007.

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 __3rd__ day of February, 2010.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __12th__ day of __February__, 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:

THOMAS W CALLERY
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LEWISTON ID 83501

BENTLEY G STROMBERG
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Gene Espinosa

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**IC 2007-013040
2007-011845**

ORDER

Filed February 12, 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 the need for her May 2, 2008 surgery was caused by her accident of April 2, 2007.
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 __12th__ day of __February__, 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 __12th__ day of __February__ 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

BENTLEY G STROMBERG
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/s/