

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROSEMARY NORMINGTON,

Claimant,

v.

TEDDER INDUSTRIES, LLC,
Employer,

and

FEDERAL INSURANCE COMPANY,

Surety,
Defendants.

IC No. 2021-014372

**ORDER DECLINING TO APPROVE
SETTLEMENT AGREEMENT**

**FILED
AUGUST 24, 2023**

INTRODUCTION

Pursuant to Idaho Code § 72-404(4) and J.R.P. 18B, a remote videoconference hearing was conducted by all three Commissioners on August 3, 2023. The hearing was held to determine whether the proposed settlement agreement is in the best interests of the parties. Claimant is pro se. Employer / Surety is represented by Mark Peterson, Esq. The case came under advisement on August 15, 2023. This matter is now ready for decision pursuant to Idaho Code § 72-404(3).

ISSUES

Per the Notice of Hearing dated July 21, 2023, the following issues are before the Commission:

1. Is the Settlement Agreement in Claimant's best interest if Medicare may later subrogate its approximate \$68,000 interest against the \$10,000 settlement; and
2. Is the Settlement Agreement in Claimant's best interest when considering the extent to which the permanent effects of the alleged industrial accident or injurious exposure have reduced her past and probable future ability to engage in gainful activity.

CONTENTIONS OF THE PARTIES

Claimant has stated she prefers to consult with an attorney before moving forward with the settlement. Although she was willing to accept \$10,000, she stated she didn't "think that it [the settlement] would cover it [her claim for benefits]." She was willing to settle because she "really need[ed] the money. And ... thought it ... would be a quick way to get some extra money..." She knows she "need[s] more than that." Tr. 14:3 – 14.

Defense counsel argues that the divergent medical opinions of treaters and IME physicians place causation in dispute, that there is no evidence that either CMS or Claimant's non-occupational health insurance carrier has asserted a subrogation interest against the proceeds of settlement and that there is minimal evidence supporting a claim for disability. Tr. 17:8 – 21:2.

EVIDENCE CONSIDERED

The record in this case consists of:

1. Stipulation and Agreement of Lump Sum Discharge and Order of Approval and Discharge (Settlement Agreement/SA) executed by Claimant and Defense attorney Mark C. Peterson on July 5, 2023;
2. Stipulation and Order of Dismissal With Prejudice (SODWP) executed by Claimant and Defense counsel;
3. Ledger of All Benefits Paid and Disputed (Ledger) submitted in support of the Settlement Agreement;
4. Medical Records (MR) submitted in support of the Settlement Agreement;
5. Lump Sum Settlement Presentation (LSSP) by an Idaho Industrial Commission Analyst, dated July 6, 2023;
6. Lump Sum Settlement Questionnaire for Pro Se Claimants, (LSS Questionnaire) date July 10, 2023;
7. Oral testimony of Claimant and Defense attorney, Mark C. Peterson taken at hearing.
8. Idaho Industrial Commission legal file containing Claimant's Complaint filed December 5, 2023, Defendants' Answer filed December 22, 2022, and Notice of

FINDINGS OF FACT

1. Rosemary Normington (Claimant) is 71 years old and lives in Hauser, Idaho, near Post Falls. LSSP, p. 1. At the time of the accident giving rise to this matter she was employed by Tedder Industries. Her work involved sewing bindings on the back of gun holsters. In the past she has worked for a publishing company and as a sales clerk. She is a high school graduate. Tr. 6:2-23

2. The alleged accident occurred on May 26, 2021, when Claimant tripped over a pallet, hyperextended her left leg, and then fell on a concrete floor, landing on her right side. LSSP, p. 1. The claim was accepted by Employer/Surety and benefits were initiated.

3. The parties expressly dispute the extent of medical and indemnity benefits to which Claimant may be entitled. SA, p. 2. Claimant contends that she suffered a left hamstring strain/tear, a low back injury and a left hip injury. She further contends that her pre-existing right hip condition was aggravated during her recovery from left hip surgery and may be a compensable consequence of the accident. Tr. at 13-14. Dr. Greendyke, one of Claimant's treating physicians, endorsed a causal relationship between the subject accident and Claimant's hamstring injury, low back injury and left hip injury. *See* Greendyke 11/15/2021 (MR p. 56). Claimant underwent low back surgery on March 28, 2022, by Dr. Larson. *See* Larson Operative Report 3/28/22 (MR p. 72). This surgery was paid for by Surety. *See* Ledger.

4. For her left hip pain, Claimant was referred to Dr. Dewing. On June 16, 2022, he, too, related Claimant's need for a total hip arthroplasty to the subject accident. Dewing Chart Note of 6/16/2022 (MR p.96).

5. Before that surgery could be performed, Claimant was evaluated by Dr. Bauer at the instance of Surety pursuant to Idaho Code § 72-433. Dr. Bauer only related Claimant's hamstring tear to the subject accident. He opined that Claimant's low back and left hip injuries were entirely unrelated to the subject accident. He felt that Claimant was entitled to a 7% PPI rating for her low back, but from a non-industrial cause. He felt she might benefit from bilateral hip replacement, but that the need for such treatment was not accident related. *See generally* IME of Dr. Bauer on 11/18/22 (MR pp. 112-130).

6. Based on Dr. Bauer's report, Surety denied further responsibility for medical treatment, and did not pay the 7% rating proposed by Dr. Bauer for Claimant's low back. *See* LSS, p.2.

7. Claimant eventually underwent left hip replacement performed by Dr. Dewing on January 20, 2023. Tr. 17:10-11; LSS Questionnaire, 4. She underwent right hip replacement surgery on May 3, 2023. Tr. 12:8-9; LSSP, p 2.; LSS Questionnaire, 3. She is still recovering from her hip procedures, and still dealing with physical limitations that she hopes will not be permanent. Tr. at 12-13. She does not know what level of physical activity she will be able to return to, but she does hope to go back to work at a sitting job, if she can find one. Her permanent restrictions have not yet been addressed by a physician. Tr. at 12-13.

8. Claimant's left hip surgery was paid for by Medicare and Claimant's supplemental Medicare coverage through United Health Care. The invoiced amount of the medical bills associated with the left hip replacement is unknown. The amount Medicare and United Health Care paid in satisfaction of the bills is not clear. Tr. 14:25 – 15:14. Per Defense counsel, Medicare has not identified the payments it made as "conditional payments" but Claimant has not advised

Medicare of the proposed settlement and has not inquired of either Medicare or the supplemental carrier whether they intend to pursue subrogation against the proceeds of settlement. Tr. 20:8-24.

9. On July 5, 2023, the parties signed a Settlement Agreement. In exchange for amounts previously paid and a lump sum of \$10,000, the settlement provides that “the disputes of the parties are fully and forever settled...” SA, p. 3. According to the Settlement Agreement, subrogation claims are to be paid by Claimant. The settlement anticipates that claims for past denied care, future care and indemnity benefits are resolved. *Id.*

DISCUSSION

10. Former Idaho Code § 72-404 was repealed in 2022 and replaced with a new version of the statute that substantially modifies the Commission’s responsibilities regarding the settlement of workers’ compensation claims. Under the current Idaho Code § 72-404, most settlement agreements do not require approval by the Industrial Commission. However, the Commission is still required to conduct a review of all settlement agreements entered into by non-represented persons, minor children, or legally incompetent persons. The Commission shall approve such agreements if it determines that the approval is in the best interests of the parties. One significant change in the current statute for best interests reviews is the requirement that if the Commission decides that a proposed settlement is not in the best interests of the parties it must issue a written decision, to include findings of fact, conclusions of law and an order, explaining its decision. Such decisions are immediately appealable to the Supreme Court. Idaho Code § 72-404(3).

11. Under the former statute, best interests determinations were made in the presence of a tension between the need to learn enough about the underlying merits of a claim to make a judgment about whether the settlement was in the party’s best interests, and the need to avoid the

appearance of developing a bias about a case that might taint the decision-making process should the Commission later hear the case on its merits. *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455 (2005). The current statute compounds this difficulty by requiring that the Commission make specific factual and legal findings to justify a decision not to approve.

12. Here, to assess the best interests of the parties while also guarding the Parties' right to a fair hearing by this Commission in the future, the Commission will provide a preliminary review of the merits of the claim as prescribed in *Owsley*. We look to the information submitted with the settlement agreement. These supporting documents are generated in compliance with Rule 18 of the Judicial Rules of Practice and Procedure. We also base our best interests evaluation upon the information gathered at hearing, the work product of our claims analysts, and the Commission legal file which is already established. These documents provide the Commission with some grounds for its determination in this case. At the same time, the Commission recognizes that it has reviewed only part of the evidence that might eventually come before the Commission at a hearing on the merits, and that the nature of the case may change entirely should it eventually go to hearing.

13. It is easy to estimate Defendants' low-end exposure on this case. If Defendants prevail on the medical causation question, i.e. if Dr. Bauer is found persuasive, then this case has minimal to no value. In fact, if Dr. Bauer is believed, Defendants have made a significant overpayment in the form of medical and indemnity benefits associated with the low back surgery. It is harder to estimate the high-end exposure on the claim. Two of Claimant's treating physicians have opined that Claimant's hamstring, low back and left hip injuries were caused or aggravated by the subject accident. These physicians have also related the need for the low back and left hip surgeries to the accident. Surety has paid for the low back surgery, but not for the hip. If Claimant

prevails on establishing medical causation for her hip injury, she will be entitled to recover the full invoiced amount of the medical bills associated with that denied surgery. *Neel v. Western Const., Inc.*, 147 Idaho 146, 206 P.3d 852 (2009). The invoiced amount of the bills is unknown, but the amount paid by Medicare may have been in the range of \$59,000 -\$68,000. The invoiced amount will be significantly higher. She would also recover temporary disability benefits during her period(s) of recovery. Claimant will be entitled to PPI for her hip arthroplasty, and to the 7% PPI rating issued by Dr. Bauer for her low back injury. Claimant's permanent restrictions are unknown, as she may still be in a period of recovery. However, if she is given permanent restrictions following her multiple surgeries, as seems likely, Surety has exposure for permanent disability in excess of PPI for this 71-year-old woman. Finally, Claimant's right hip condition and surgery may be compensable, which would implicate consideration of her entitlement to additional medical and indemnity benefits. Suffice it to say that if Claimant prevails on the threshold issue of medical causation, Surety's high-end exposure is likely well in excess of \$200,000. Based on what the Commission can glean from the limited materials before us, we cannot say that it is obvious that Dr. Bauer's opinion should be elevated above the opinions of Claimant's treaters. We are not persuaded that it is in Claimant's best interest to accept \$10,000 to resolve her claim. The sum of \$10,000 does not seem to fairly compromise the low-end and high-end valuations of the case.

14. Moreover, even if the Commission was inclined to support the proposed settlement, there is no guarantee that Claimant would have the benefit of such an award. Claimant has not notified Medicare or her supplemental carrier of the settlement, and it is likely that those payors are subrogated to her recovery since they paid for the left hip surgery, responsibility for which would be resolved by the settlement. Claimant's primary impetus to enter into this settlement is

to obtain \$10,000 that she can apply to personal use. Without assurance that a subrogation claim will not arise to thwart Claimant's expectations, we cannot say that the settlement is in Claimant's best interests.

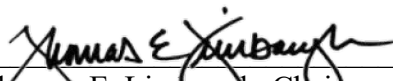
CONCLUSIONS OF LAW AND ORDER

1. The proposed \$10,000 settlement is not in Claimant's best interests if Medicare and Claimant's supplemental carrier assert a right of subrogation against settlement proceeds.
2. The potential value of the case and the possibility that Claimant might succeed on the merits is not properly reflected in the low settlement amount.
3. The Commission declines to approve the settlement agreement in this case.
4. Pursuant to Idaho Code § 72-404(3) this decision is immediately appealable to the Idaho Supreme Court.

DATED this 24th day of August, 2023.

INDUSTRIAL COMMISSION




Thomas E. Limsaugh, Chairman


Thomas P. Baskin, Commissioner


Aaron White, Commissioner

ATTEST:


Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th of August, 2023, a true and correct copy of the foregoing **ORDER DECLINING TO APPROVE SETTLEMENT AGREEMENT** was served by email upon each of the following:

Rosemary Normington
17568 W. Santiago Cir., #26
Hauser, ID 83854
cbnrjn@frontier.com

Mark Peterson
877 W. Main St., Ste 200
Boise, Idaho 83702
MPeterson@hawleytroxell.com
DErickson@hawleytroxell.com

Kamerron Slay