

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN LUSSORO,
v.
JOE HALL/LEWISTON AUTOBODY,
and
EMPLOYERS COMPENSATION
INSURANCE FUND,
Claimant,
Employer,
Surety,
Defendants.

IC 2010-002980

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

Filed April 19, 2017

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 Coeur d’Alene¹ on January 22, 2016. Charles Bean of Coeur d’Alene represented Claimant. Eric Bailey of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter is now ready for decision.

ISSUES

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

1. Whether Claimant is entitled to total temporary disability (TTD) benefits from October 15, 2014 through February 3, 2016; and

¹ The Referee and defense counsel participated via teleconferencing from the Industrial Commission’s Boise location; Claimant, his attorney, and the court reporter participated from the Industrial Commission’s field office in Coeur d’Alene.

2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial of medical and TTD benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that Surety owes additional TTD benefits between the time Claimant's treating physician found him to be at MMI from his industrial injury and the time he was again taken off work in anticipation of another surgery. Claimant relies on his visits to various medical providers during this time frame for continuing back problems that demonstrate he was still within a period of recovery.

Claimant also contends that he is entitled to an award of attorney fees for Surety's wrongful denial of the above-mentioned TTD benefits as well as for the unreasonable delay in authorizing the surgery recommended by his treating physician.

Defendants argue that there is no medical evidence of record that supports Claimant's claim for TTD benefits during the time period in question and their denial of the same was reasonable. Further, Claimant himself questioned the need for a sixth back surgery and requested a second opinion that caused any delay. Defendants shared Claimant's concern and were reasonable in requesting additional medical opinions before approving the surgery.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits (CE) 1-17 admitted at the hearing.
2. Joint Exhibits (JE) 1 - 23 admitted at the hearing.
3. The post-hearing deposition of Bret A. Dirks, M.D., taken by Claimant on

April 12, 2016.²

The Referee is compelled to comment on Claimant's counsel's numerous references in his briefing to Defense counsel's ignoring his repeated e-mails, correspondence, and telephone calls regarding the status of this claim. While Claimant's counsel is understandably frustrated by the actions of Defense counsel in failing to answer his inquiries, the Referee is not inclined to intervene except to remind all counsel in workers' compensation proceedings that courtesy, at least, in this small bar, requires that opposing counsel confer with one another in good faith before calling on the Referee to mediate their disputes.

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

Claimant's hearing testimony

1. Claimant was 46 years of age and residing in Lewiston at the time of the hearing. He was employed as a technician at Lewiston Autobody at the time of his lifting injury on January 26, 2010. Claimant had undergone five surgical procedures at the L5-S1 level as of the date of the hearing. Claimant was rated for PPI and released to return to work on October 14, 2014. He later underwent L2-S1 fusion, performed by Dr. Dirks on July 13, 2016.

2. Claimant was unable to return to his time-of-injury employment due to the lifting and twisting involved. He conducted job searches at the Department of Labor

² The parties stipulated that the record remain open to include post-hearing treatment and/or treatment recommendations proffered by Dr. Dirks.

offices and worked with ICRD consultant Wade Beeler in his effort to find employment. He attempted a job at Hertz Rental Cars but only lasted about four hours of driving due to the pain. When he was unable to locate suitable employment, he enrolled at Lewis and Clark State College in the business division with Mr. Beeler's assistance. In March 2014 Claimant was diagnosed with kidney cancer resulting in a radical nephrectomy that removed Claimant's left kidney causing him to withdraw from school. He attempted to return post-surgery but due to his being so far behind and his physical issues he was forced to withdraw.

3. Claimant began to experience increasing lower extremity symptoms and he again saw his treating surgeon, Jeffery Larson, M.D., in April 2015. Following further MRI evaluation of May 29, 2015, and a course of epidural spinal injections, on July 27, 2015 Dr. Larson recommended further surgery, to include L2-L5 levels.

4. Due to concerns regarding the risks involved in a sixth extensive surgery and his losing faith in Dr. Larson, Claimant saw Bret Dirks, M.D., for a second opinion. Dr. Dirks recommended nerve conduction studies and a CT myelogram, which were not approved by Surety at that time.

5. At the time of the hearing, Claimant was still experiencing significant back and leg pain, has difficulty sleeping, and has constant headaches. He is seeking further medical treatment.³

6. Claimant had not, at the time of the hearing, received any TTD benefits since being released by Dr. Larson in October 2014.

³ Claimant underwent his sixth back surgery in July 2016 at Surety's expense; Dr. Dirks performed the surgery.

TTDs

7. Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

8. Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg, Id.*

9. Following his January 26, 2010 back injury, Claimant underwent five back surgeries, and related treatment, the last four of said surgeries were performed by neurosurgeon Jeff Larson, M.D. Surety paid for Claimant's treatment including

appropriate TTD benefits. On October 14, 2014, Dr. Larson saw Claimant in follow-up and recorded the following History of Present Illness:

The purpose of the patient's evaluation today is: a follow-up appointment.

Since the last evaluation,⁴ or in anticipation of this evaluation the patient has had: no change in symptoms. He complains of low back pain. The pain is not specifically in his back but rather in his buttocks and hips. This pain has persisted despite non-operative management, prior surgeries, and lumbar fusion surgery including most recently re-exploration, decompression, and fusion which verified the stability of the construct. Of note he has not worked full time in years and uses narcotic pain medications chronically. He does not have a primary care provider. He does not have any new problems since his prior visit.

JE 9, p. 000380.

10. Dr. Larson also noted that, "Despite full decompression and fusion at L5-S1 he continues to have low back pain, buttock pain, and hip pain." *Id.*, p. 000382. Dr. Larson recommended no further treatment, that Claimant select a primary care physician, wean off of opiates, and stay more active.

11. Dr. Larson agreed with Claimant that he cannot return to his time-of-injury employment. Claimant should limit his lifting and pushing/pulling to 50 pounds. He should also be able to change positions frequently. Dr. Larson assigned a 9% whole person PPI rating inclusive of the 8% whole person PPI assigned by Surety's IME examiner James Harris, M. D., on October 24, 2011.⁵

12. Claimant refers to two visits to Valley Medical Center Express Care and five visits to Dr. Larson for continuing back problems. As noted, in April of 2015

⁴ Claimant last saw Dr. Larson on September 2, 2014.

⁵ Dr. Harris reported that Claimant's back condition was a result of Claimant's accident and permanently aggravating his pre-existing lumbar degeneration. He authored another report dated January 3, 2013 wherein he had reviewed additional medical records and opined that Claimant may need another back surgery and was no longer at MMI.

Claimant presented to Dr. Larson with signs of possible neurogenic claudication and complaints of anterior thigh numbness with standing/walking. These findings caused NP Moore, of Dr. Larson's office, to opine that Claimant needed "further attention." MRI evaluation was recommended. Claimant was next seen by Dr. Larson on May 29, 2015 at which time it was noted that Claimant presented with increasing pain and numbness radiating into his anterior thighs and buttocks. Dr. Larson recommended epidural steroid injections, and speculated that surgery might be entertained for Claimant depending on his response to the injections. Injections offered no long term relief and on July 27, 2015 Dr. Larson recommended multi-level surgery to treat Claimant's progressive lower extremity complaints.

13. From the foregoing, the Referee concludes that as of July 27, 2015, Claimant was no longer medically stable; that he had reverted to the status of one in a period of recovery. Where Claimant's treating physician eventually came to the conclusion that further surgery was indicated for treatment of Claimant's work injury, it follows that Claimant was no longer medically stable. Further, during this new period of medical instability, there is no evidence that Claimant's limitations/restrictions were not at least as onerous as those given by Dr. Larson in October of 2014. Finally, Dr. Larson's opinion that Claimant was in need of further surgical intervention was later validated by Dr. Dirks. Therefore, as of July 27, 2015, Claimant met his burden of establishing entitlement to TTD benefits under *Maleug*, and the burden shifted to Defendants to demonstrate that Claimant was no longer entitled to TTD benefits. This, Defendants failed to do. Claimant is entitled to TTD benefits from July 27, 2015 to February 3,

2015.

Attorney fees

14 Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

15. Claimant requests an award of attorney fees for Surety's unreasonable delay in paying **TTD benefits** from October 15, 2014 through February 3, 2016.

16. The Referee finds that Claimant has failed to prove his entitlement to attorney fees for Surety's wrongful denial of TTD benefits.

17. Claimant also requests an award of attorney fees for Surety's unreasonable denial of certain **medical benefits** including the surgery performed by Dr. Dirks.

The surgery

18. On July 27, 2015, Dr. Larson recommended, "Laminectomy and foraminotomy, Posterior fusion possible interbody fusion L4-5 depending on intraoperative findings." CE 8, p. 4. Dr. Larson indicated that the surgical levels include L2-3, L3-4, and L4-5.

19. On or about August 10, 2015, Claimant was informed that Surety had not authorized the surgery as recommended by Dr. Larson.

20. On September 22, 2015, Claimant saw Dr. Dirks, a neurosurgeon, for a second opinion. At that time, Dr. Dirks recommended EMG and nerve conduction studies as well as a CT myelogram of Claimant's lumbar spine. Those tests were not approved by Surety until January 21, 2016, the day before the hearing.

Dr. Dirks' deposition testimony

21. Claimant deposed Dr. Dirks on April 12, 2016. He is a board certified neurosurgeon practicing in Coeur d'Alene. Dr. Dirks now limits his practice to primarily back surgeries; he has performed "Thousands, tens of thousands" of back surgeries in his career. Dirks' Depo., p. 6.

22. Dr. Dirks first saw Claimant on September 22, 2015 as mentioned above. He next saw Claimant on February 4, 2016 at which time he noted that the nerve conduction study previously ordered showed a superimposed diabetic neuropathy and probable radiculopathy. The radiologist noted that the severity of the diabetic neuropathy would mask a radiculopathy and Dr. Dirks found that to be significant:

Well, basically his polyneuropathy - - some of his symptoms are coming from the diabetes, I think, so that's significant in that case. But he [the radiologist] also couldn't say to me, no, it's not a radiculopathy or it's not - - in other words, not caused from the lower back. And, in fact, he was of suggestive in his report that maybe it was, but he couldn't prove that based on the testing.

Id., p. 9.

23. Dr. Dirks explained why he recommended surgery:

I just feel that this poor man has kind of been through the ringer for the last five, six years. And I think he's been through nonsurgical therapy over that period of time to the point where it really doesn't make a whole lot of sense. I think his option is to do nothing and live with the pain and probably never return to work, or take a chance with surgery, a salvage surgery if you will, to get him back to work and hopefully help with his pain.

And again, and as I told him, the likelihood that he's going to be pain-free after surgery with me is minimal. His hope is that - - and my expectation, is that we can control some of his pain so he can be more active with less pain and allow him to do some sort of - - work in some sort of work environment at some level.

Id., p. 11.

24. Dr. Dirks agrees with Dr. Harris that Claimant's January 6, 2010 industrial accident permanently aggravated his pre-existing lumbar condition and created the need for his recommended surgery.

25. Dr. Dirks testified that Claimant's diabetic polyneuropathy was a complicating factor in his care and treatment and can sometimes mask, or be confused with, lumbar radiculopathy. While back surgery will not "cure" a polyneuropathy, such a condition should not prevent Claimant from working if his back surgery is successful, although while back surgery may help Claimant's leg pain, it probably will not help his back pain.

Denial of 6th back surgery

26. At the time Surety denied the surgery recommended by Dr. Dirks, they relied on a report generated as the result of a medical records review performed by board certified orthopedic surgeon Charles F. Xeller, M.D., on August 6, 2015. As pointed out by Defendants, "the reasonableness of an adjusting decision can only be based on information known or available at the time the adjusting decision is made." See *Skrudland v. Supervalu, Inc.*, 2014 IIC 0048 (June 9, 2014), Order Denying Motion for Reconsideration.

27. Dr. Xeller listed the records he reviewed on page one of his report (JE 16, p. 529). Dr. Xeller concluded that because there was no evidence of instability or overt neurological deficits that would lend support for a surgery from L2-L5 or a back brace and/or bone stimulator. In other words, such a surgery is not medically necessary.

28. Dr. Xeller's report was forwarded to Dr. Larson for his response; however, by that time Claimant had lost faith in Dr. Larson and sought out Dr. Dirks for a second

opinion. In any event, Surety had approved the diagnostic testing recommended by Dr. Xeller and ultimately approved the surgery recommended by Dr. Dirks after his deposition.⁶

29. The Referee finds that Surety herein had valid concerns regarding the reasonableness of Claimant's 6th back surgery and understandably hesitant to quickly approve such a surgery. As noted by Dr. Dirks, "This patient is a 45-year-old male who has a very complex history." JE 17, p. 535. This claim presented challenges not only because it involved a 6th back surgery, but also because of Claimant's underlying diabetes. Also, it appears that Claimant himself questioned the need for a 6th surgery by requesting a second opinion from Dr. Dirks. Based on the present record, the Referee is unable to find that Surety acted unreasonably in its handling of this claim so as to justify an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proved his entitlement to TTD benefits between July 27, 2015 and February 3, 2016.

2. Claimant has failed to prove his entitlement to attorney fees for Surety's unreasonable denial of TTD benefits.

3. Claimant has failed to prove his entitlement to attorney fees for Surety's unreasonable delay in authorizing his July 2016 surgery.

⁶ There was no request for surgery at the time of the hearing.

RECOMMENDATION

Based on 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 30th day of March, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2017, 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:

CHARLES F BEAN
2005 IRONWOOD PARKWAY STE 201
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ERIC S BAILEY
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_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEVIN LUSSORO,

Claimant,

v.

JOE HALL/LEWISTON AUTOBODY,

Employer,

and

EMPLOYERS COMPENSATION
INSURANCE FUND,

Surety,

Defendants.

IC 2010-002980

ORDER

Filed April 19, 2017

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 these recommendations. 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 to proved his entitlement to TTD benefits between July 27, 2015 and February 3, 2016.
2. Claimant has failed to prove his entitlement to attorney fees for Surety's unreasonable denial of TTD benefits.

3. Claimant has failed to prove his entitlement to attorney fees for Surety's unreasonable delay in authorizing his July 2016 surgery.

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

DATED this 19th day of April, 2017.

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 19th day of April, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CHARLES F BEAN
2005 IRONWOOD PARKWAY STE 201
COEUR D'ALENE ID 83814

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g e

_____/s/_____