

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNY BOSTOCK,

Claimant,

v.

GBR RESTAURANTS, LLC,

Employer,

and

EMPLOYERS COMPENSATION
INSURANCE COMPANY,

Surety,
Defendants.

IC 2018-008125

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

FILED

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INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Twin Falls on January 23, 2020. Claimant, Jenny Bostock, was present in person and represented by Matthew Vook of Idaho Falls. Defendant Employer, GBR Restaurants, LLC (restaurant) and Defendant Surety, Employers Compensation Insurance Company, were represented by Michael McPeck of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken, and briefs were later submitted. The matter came under advisement on August 25, 2020.

ISSUES

The issues to be decided were narrowed at hearing and are:

1. Whether Claimant is medically stable or is entitled to additional medical treatment due to her industrial accident;

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2. Whether Claimant is entitled to a change of physician to Benjamin Blair, M.D.;
3. Whether Claimant is entitled to additional temporary disability benefits; and
4. Whether Claimant is entitled to an award of attorney fees.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on February 5, 2018, when she fell down a flight of stairs at Employer's restaurant. Defendants accepted the claim and paid for conservative medical treatment and temporary disability benefits. Claimant asserts she sustained a T9 vertebral fracture and requires further medical treatment. Defendants assert that Claimant is medically stable, and her injuries require no further treatment. Claimant requests that Benjamin Blair, M.D., be designated as her treating physician. She also requests attorney fees for Defendants' unreasonable denial of additional temporary disability benefits and medical treatment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. The testimony of Claimant, Jenny Bostock, and Matthew Mann, taken at hearing.
3. Claimant's Exhibits A-L admitted at the hearing.
4. Defendants' Exhibits 5, 6, 11, 14, and 15, admitted at the hearing.
5. The post-hearing deposition testimony of Benjamin Blair, M.D., taken by Claimant on February 24, 2020.
6. The post-hearing deposition testimony of Scott Tintle, M.D., taken by Defendants on June 26, 2020.

All outstanding objections are overruled and motions to strike are denied.

After having considered the above evidence and the arguments of the parties, 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.

FINDINGS OF FACT

1. **Background.** Claimant was born in 1959. She was 60 years old and resided in Buhl at the time of the hearing. Claimant has legal custody of three of her grandchildren who live with her. She also helps care for her 80-year old mother who lives nearby.

2. Claimant has resided in California, Florida, New Hampshire, Utah, and Idaho. She did not graduate from high school and has not obtained a GED. Prior to 2018, Claimant worked in waitressing, babysitting, and advertising. For a time, she was a standup comedian and owned an advertising and design company that created logos and discount cards. In approximately 2010, Claimant experienced lumbar symptoms for which she received injections and her symptoms resolved. She had no prior thoracic spine problems.

3. On February 5, 2018, Claimant worked as a waitress at a bowling alley and had just accepted a job at Employer's restaurant.

4. **Industrial accident.** On February 5, 2018, Claimant began her first day of work at the restaurant. She testified of her experience as she started her first shift:

The lady that hired me said to follow me ... and, then, she turned and faced me and she put her arms out and said you can hang your purse here and there was it looked like a closet, like a little closet and it was pitch black, but there was a light from somewhere else shining on the 1st wall and you could see a couple purses hanging right there. So, I stepped in to hang my purse there and it turned out to be a straight drop off staircase And it happened so fast, ... my foot didn't touch the ground and so like it ... was a step down or something and ... there was nothing to grab onto and it was so dark that I couldn't see anything and so somehow I flipped around and went down backwards and ... when my head hit that I thought I'm not going to live through this. [w]hen I hit the bottom I didn't stop, I kept going clear across that basement floor and I landed in a pile of lumber and I think concrete.

Transcript, p. 21, l. 14 through p. 22, l. 18. Claimant was taken by ambulance to the emergency room. She has not worked since.

5. **Medical treatment.** On February 5, 2018, Claimant was examined at the emergency room by Heather Ellsworth, M.D., who noted Claimant had fallen down a flight of stairs and reported head and mid back complaints. X-rays revealed T9 vertebral body height loss which was initially considered to be from remote trauma. Claimant was released from work. On February 9, 2018, Devin Bowman, PA-C, examined Claimant and recorded acute thoracic pain and concussion symptoms. On February 14, 2018, Douglas Stagg, M.D., began treating Claimant. He diagnosed entire spine strain, thorax contusions, closed head injury and concussion. He restricted Claimant to lifting no more than five pounds and working no more than two hour shifts. On February 19 and again on March 6, 2018, Dr. Stagg requested an MRI.

6. On March 13, 2018, Claimant underwent a thoracic MRI that revealed: “acute/subacute fracture of the T9 vertebral body with anterior wedging deformity and approximately 25% height loss. There is reactive edema involving the pedicles without posterior element fracture or retropulsion. No associated central canal or foraminal stenosis.” Exhibit C, p. 72. Claimant was taken off work and Dr. Stagg referred her to David Verst, M.D.

7. On April 4, 2018, Dr. Verst examined Claimant and recorded her credible complaints of mid thoracic and right arm pain. He found Claimant suffered an acute closed vertebral fracture, prescribed physical therapy, referred her for management of her right frozen shoulder, and continued her off work. Dr. Verst examined Claimant on May 16, 2018, continued her off work and ordered additional physical therapy. On August 8, 2018, Dr. Verst recorded Claimant’s complaints of continuing credible mid back pain, noting that she had failed to improve

with conservative care. He ordered additional physical therapy, an MRI, and continued Claimant off work.

8. On October 10, 2018, Claimant underwent another thoracic MRI that revealed:

1. Now chronic compression of the T9 vertebral body with 50% loss of the normal vertebral body height.

2. T2 hyperintensity in the left T8 and T9 pedicles and facet. There is a suggestion of a linear T1 hypointensity in the left T9 pedicle which may represent a fracture. Alternatively, this may represent stress reaction edema from altered mechanics due to the compression fracture.

Exhibit C, p. 80.

9. Dr. Verst ordered additional physical therapy and continued Claimant off work.

10. On October 25, 2018, Scott Tintle, M.D., examined Claimant at Defendants' request. Dr. Tintle recorded:

Diagnosis

1. T9 compression fracture, arising in and out of the occupation due to the industrial accident.
2. Right shoulder mild AC joint arthritis unrelated to the industrial injury and not aggravated by the injury

....

The true only objective findings are the imaging studies to include the MRI that has recently been performed, which I have seen a report of but I am unable to evaluate the images. The examinee has a worsening of her compression, now 50% of the T9 with some edema at adjacent levels concerning for a worsening of her thoracic compression fracture.

....

While I do again believe that there are some pain behaviors present on my examination, I do believe that the examinee does need further treatment necessary to resolve the residual effects of the industrial injury. I do believe that the examinee should follow up with a spine surgeon and be evaluated for the possibility of kyphoplasty or vertebroplasty, or other surgical management if necessary to improve the symptoms.

....

I do not believe that this examinee will ever return to pre-accident/injury status.

....

I do not believe that the examinee's condition has reached maximum medical improvement.

....

No impairment rating is currently warranted.

....

I do believe that she will have a permanent lifting resolving [sic] as a result of her industrial injury. I do not believe that she will be able to lift more than 10 pounds in any work status after this injury.

Exhibit E, pp. 174-176.

11. On November 7, 2018, Surety inquired of Dr. Verst: "Dr. Tintle is suggesting the possibility of kyphoplasty or vertebroplasty, or other surgical management if necessary to improve symptoms. What are your recommendations related to Ms. Bostock's treatment?" On November 15, 2018, Dr. Verst responded: "At this time, I am recommending to continue conservative care. If her pain does not resolve, then I would recommend kyphoplasty." Exhibit B, p. 56.

12. On December 19, 2018, and March 7, 2019, Dr. Verst examined Claimant and each time recorded credible complaints of back pain, prescribed additional physical therapy, and continued Claimant off work.

13. From March 25-27, 2019, Defendants' retained a private investigator, Matthew Mann, who performed approximately 30 hours of sub rosa surveillance of Claimant and videotaped approximately 25 minutes of her activities. Over the course of three days, the surveillance documented Claimant driving to Walgreen's, the courthouse, her daughter's house, and her 80-year old mother's house; entering or exiting her vehicle approximately 15 times, walking from her vehicle into each of those locations, and carrying items, most commonly a few 8.5x11 inch documents and on approximately three occasions larger items. The largest and heaviest items

Claimant carried were a gallon of milk and a two-liter bottle of soda from her car into her mother's house on one occasion. Exhibit 15.

14. At hearing Claimant testified that during the time of the surveillance she was making many short drives related to representing herself and seeking to obtain legal custody of some of her grandchildren that were about to be placed in foster care. She also testified that she assisted and retrieved groceries for her 80-year old mother who was on oxygen and could not drive.

Claimant further testified regarding another activity documented by the surveillance video:

Q. (by Mr. Vook) One of the things I noticed also is detailed on page 289. It's time stamped 3:45 and it says that the claimant exited the Walgreens with one of the workers pushing a cart. The other woman loaded the purchases in the rear of the car. Do you know who this other woman was?

A. No.

Q. OK. How did she come about loading your—the groceries in your car?

A. Because I was in the store and I was hurting so bad they put everything in the cart and, then, she brought it out for me.

Q. OK. The other thing is that I would—I would note as it did not appear there was sound, but it looks like you said something to her when she went to open the back of your car.

A. Yeah. I can't—I can't lift stuff out of there. It's too hard. So, I put it in the back seat.

Q. OK. And it looked like she put it on—in the back seat or the floor in the back seat?

....

Q. Is that correct?

A. Yeah.

Transcript, p. 36, l. 24 through p. 37, l. 21.

15. On or about April 10, 2019, after receiving from Surety's adjustor a copy of the surveillance report and video, Dr. Verst responded to Surety's inquiry, recommending an IME and

stating: "I agree has reached MMI." Exhibit B, p. 64. Defendants ceased paying temporary disability benefits after April 10, 2019. Exhibit I, p. 220.

16. On May 1, 2019, Dr. Verst examined Claimant and recorded complaints of mid back pain, and credible responses. He prescribed weekly physical therapy but recorded: "Patient is scheduled for IME. I feel patient has reached MMI." Exhibit B, p. 67.

17. On May 16, 2019, Dr. Tintle examined Claimant again at Defendants' request. His examination reports:

Motion is tested. She flexes to approximately 80 degrees and then stands up. She extends 10 degrees and has almost collapsing like pain.

....

An MRI of the thoracic spine dated March 13, 2018, is present. There is appearance of the T9 vertebra that does demonstrate edema within it. As previously noted, there is a small amount of height loss and interior wedging deformity consistent with a compression fracture.

....

1. T9 compression fracture arising in and out of the fall, on a more-probable-then-not basis. I would indicate that this is now fixed and stable.

....

There are no objective findings on physical examination today. The subjective complaints are not substantiated by the objective findings on the examination.

....

No further corrective treatment measures are necessary to resolve any residual effects of the industrial injury.

....

The examinee is at preinjury status now. No further treatment is necessary.

....

She is at maximum medical improvement.

....

Impairment rating is warranted for T9 compression fracture using the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. I would indicate that there are no modifiers present to this diagnosis—impairment rating, as I believe that the physical examination findings and the descriptions are exaggerated. According to Table 17-3, this

is a fracture of the spine. Is a Class 1 diagnosis. I would indicate there is a 4% impairment rating for a single level fracture with less than 25% compression of the vertebral body.

....

Ms. Bostock has no permanent restrictions.

I have reviewed a disc with 25 minutes of surveillance video. The video demonstrates the claimant getting in and out of her car on many occasions. She flexes at her lumbar spine and reaches into her car on multiple occasions. She moves fluidly, ambulating briskly and carrying items on many occasions.

Exhibit E, pp. 187-190.

18. On June 11, 2019, James Bates, M.D., examined Claimant at her counsel's request. Dr. Bates recorded Claimant's area of greatest pain was her mid back. He also recorded complaints of head and neck pain with episodes of visual disturbance, intermittent upper extremity numbness, and low back aching. Upon physical examination he noted: "lumbosacral spine: Moderate restriction in flexion. Severe restriction in extension. Areas of tenderness along the spinous processes, middle third of the thoracic region being more prominent." Exhibit F, pp. 199-200. Dr. Bates noted Claimant's thoracic back pain with T9 compression fracture deteriorating and continuing to progress. He found she had not reached medical stability and needed evaluation of the thoracic spine, and further evaluation of her neck, low back, and right shoulder.

19. On July 31, 2019, Benjamin Blair, M.D., examined Claimant at her counsel's request and reviewed her prior medical records and all her thoracic imaging. Dr. Blair observed that her repeat MRI showed further loss of vertebral height at T9 with continued marrow edema, consistent with subacute injury and lack of healing. During physical examination Dr. Blair noted "Moderate tenderness to palpation in the midthoracic spine" and reported:

Ms. Bostock sustained a compression fracture of T9 which was directly due to work related injury 02/05/18.

....

An MRI which was obtained five weeks post-injury and reveals that the compression fracture was acute, representing a new injury.

....

Ms. Bostock has not reached medical stability for said injuries. Ms. Bostock remains markedly symptomatic despite almost a year and a half of conservative therapy. Her most recent MRI revealed continued signal change [sic] within the T9 vertebral body extending to the pedicles, consistent with delayed healing of the fracture. In addition, there was increase in the vertebral body compression from the initial 25% to 50% between the two exams. My recommendation currently is a CT scan of the thoracic spine to determine if she has sustained further loss of height of the T9 vertebral body at the level of the fracture and evaluate for possible progressive kyphotic deformity during the interim, nine months from her last MRI. If there has been further loss of height at T9, greater than 50% total and/or significant kyphotic deformity, Ms. Bostock may necessitate major reconstructive spine surgery to correct the deformity. In addition, I believe an MRI of the thoracic spine is warranted to determine if there is still signal change within the vertebral body of T9. If, in fact, there remains continued edematous changes in the body of T9, this would be consistent with a nonunion and I believe Ms. Bostock would be a candidate for kyphoplasty at the T9 level.

....

If Ms. Bostock does not obtain any additional medical evaluation or treatment for said injury, she does suffer from a permanent partial impairment According to the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition, I believe she would fall under "single... level fractures with 25%-50% compression at any vertebral body".... For a final whole person impairment, Class 2, Grade D, **13%**.

....

If Ms. Bostock does not obtain further medical evaluation and/or treatment, I do believe she has significant permanent restrictions that she should observe. These include no lifting greater than 15 pounds on an occasional basis and 5 pounds on a continuous basis. No sitting greater than 30 minutes without a 5 minute change in position. No driving greater than 30 minutes without a 5 minute change in position. No repetitive bending. Please note, these restrictions are directly related to her underlying diagnosis of a compression fracture at T9 with probable nonunion.

Exhibit G, pp. 213-215 (emphasis in original).

20. At hearing, private investigator Matthew Mann, testified that during the approximately 25 minutes of his videotaped surveillance, he observed Claimant to generally walk smoothly, bend over without external evidence of pain, and have no visible difficulty carrying objects. Transcript, pp. 59-60.

21. **Condition at the time of hearing.** At the time of hearing in January 2020, Claimant continued to report thoracic, head, lumbar, and shoulder pain with lifting, sitting, and driving, rendering her unable to work.

22. **Credibility.** Defendants correctly observe that Claimant's hearing testimony that she fell to the floor at one point while being examined by Dr. Blair is not supported by his records or testimony. In describing this encounter, it appears Claimant significantly overstated the experience. However, her thoracic MRIs are objective documentation of actual T9 pathology and are consistent with her testimony of continuing pain and limitation. Moreover, the surveillance video corroborates her asserted ongoing thoracic symptoms by documenting a female Walgreen's employee pushing Claimant's grocery cart to her car and loading her purchases into the backseat of Claimant's car.

23. The surveillance video also provides additional important corroboration. Defendants observe that on the video Claimant appears to walk smoothly and bend (not repetitively) without apparent discomfort. However, Defendants' briefing also states: "The referee will recall that during her testimony, Claimant was extremely emotional, and knelt on both knees at the table in the hearing room and bent forward with her forearms on the table. She alleged that she has constant pain in the mid back, her legs cramp, and she can't sit back in a chair." Defendants' Post Hearing Brief, p. 7. Claimant indeed testified that because of back pain she "can't sit back in a chair." Transcript, p. 41, l. 20. Thus, she always leans forward when sitting. Consistent with Defendants' description, the Referee recalled that Claimant, who is five feet five inches tall, knelt on both knees upon her chair at hearing and, leaning forward, rested both forearms on the table in front of her. Claimant's posture as she testified at hearing was very similar to her posture documented on the surveillance video when she sat on a bench low enough for her feet to

touch the ground, leaned forward and rested both elbows and forearms on her thighs while she smoked a cigarette for several minutes. Exhibit 15.

24. Having observed both Claimant and Matthew Mann at hearing and compared their testimony with other evidence in the record, the Referee found that both are generally credible witnesses. Specifically, the Referee found that while Claimant may overstate some symptoms, her complaints of persisting mid back pain are credible. The Commission finds no reason to disturb the Referee's findings and observations on the presentation or credibility of either witness.

DISCUSSION AND FURTHER FINDINGS

25. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

26. **Stability or additional medical treatment.** The first issue is whether Claimant is medically stable or is entitled to additional medical treatment due to her industrial accident. Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, 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. Claims for medical treatment must be supported by medical evidence establishing causation. 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, 785, 890 P.2d 732, 736 (1995). The reasonableness of prospective medical treatment is determined by the totality of the circumstances. Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015).

27. In the present case, Claimant asserts Defendants are liable for additional medical treatment including but not limited to thoracic imaging to evaluate the present condition of her T9 compression fracture and further treatment as may then be indicated. Four physicians have opined regarding her need for further medical treatment.

28. Dr. Verst. Dr. Verst is a spine surgeon and treated Claimant for several months after her industrial injury. He did not encourage or pursue kyphoplasty when Claimant's T9 vertebral height collapse increased from 25% in March to 50% in October 2018, but continued to prescribe physical therapy. With no explanation on April 10 and May 1, 2019, he opined Claimant was at maximum medical improvement, although he also ordered weekly physical therapy.

29. Dr. Tintle. Dr. Tintle is an orthopedic hand surgeon. He acknowledged that he had not performed spine surgery since his residency which ended in 2012, and that during those surgeries he acted only as the assisting surgeon. Dr. Tintle acknowledged that he did not review the actual MRI films of Claimant's spine, the deposition of Dr. Blair, or the hearing transcript.

30. Dr. Tintle's October 25, 2018 and May 16, 2019 IME opinions are highly contradictory. In his deposition, he attempted to reconcile prominent contradictory statements between his two IME reports:

Q. (by Mr. Vook) So staying with this October 25, 2018, MRI [sic]—and you kind of went over this with counsel—you stated on page 12:

“I do believe that she will have a permanent lifting resolving [sic] as a result of her industrial injury. I do not believe that she will be able to lift more than 10 pounds in any work status after this injury.”

Is that correct?

A. Yes.

Q. And you testified that the “permanent” should not have been included in that statement?

A. Correct.

Q. When you were responding to the question, the question says:

“Does Ms. Bostock have any permanent restrictions as a result of her 2/5/2018 industrial injury?”

You responded by indicating she will have a permanent lifting restriction. Were both of those in error or just your response?

A. If you read the statement—I am not sure what happened. There was a transcription problem here. The statement, as written, doesn't make sense, as I read it now.

Tittle Deposition, p. 33, l. 7 through p. 34, l. 6.

31. On recross-examination, Dr. Tittle further testified:

Q. (by Mr. Vook) You testified earlier that, in your 2018 report, in response to a question, you stated:

“I do not believe this examinee will ever return to pre-accident injury status.”

Is that correct?

A. Right.

Q. In your May of 2019 report, you stated in response to a question:

“The examinee is at pre-injury status now. No further treatment is necessary.”

Is that correct?

A. Correct.

Tittle Deposition, p. 41, ll. 14-25. Dr. Tittle then attempted to reconcile the obvious contradiction but agreed that both of his responses were given in answer to the same question.

28. Dr. Tittle acknowledged that if Claimant's vertebral collapse continued or worsened it could impact the degree of impairment and make things worse. He affirmed:

Q. Based on your statement that the MRI is an objective finding, would you consider it reasonable to determine whether her compression fracture healed, by obtaining an MRI?

A. Yes. That is a very reasonable way to determine the status of the vertebral body, correct. I would have recommended that if—had there been concordant pain at the level of the

compression fracture and objective findings on my exam, without the exaggerated lower lumbar findings that I had, that would be something that I would have recommended.

Tintle Deposition, p. 43, ll. 3-13.

29. Dr. Tintle considered the surveillance videotape of Claimant which he testified:

The video strengthened my opinion, in that the video was not consistent with the strength exam that she provided to me, nor was it consistent with the subjective complaints that she made and/or the written complaints that she wrote out and provided to me at the time of the IME. There were many things she listed that she couldn't do. The video really demonstrated her moving fluidly, carrying items, and bending over on a number of occasions without any obvious distress.

Tintle Deposition, p. 23, ll. 7-16. Nevertheless, when specifically questioned about the video,

Dr. Tintle responded:

Q. (by Mr. Vook) Does anything in that surveillance demonstrate that Ms. Bostock does not suffer from thoracic pain?

A. No. I can't state, from the video, that she doesn't have pain.

Q. Does anything in the surveillance, from your recollection, demonstrate her lifting significantly more than 10 pounds?

A. I think she lifted a bag or two. But, no, there is nothing that says she was lifting more than 10 pounds.

Q. Is there anything in the surveillance that would demonstrate, by itself, that she no longer has a T9 fracture?

A. No.

Tintle Deposition, p. 34, l. 23 through p. 35, l. 11.

30. Dr. Tintle seemingly discounted all of Claimant's complaints, including those related to her thoracic spine, because of other pain complaints which he considered overstated and/or unrelated to her thoracic spine.

31. Dr. Tintle had access to Claimant's March and October 2018 MRIs showing 25% and 50% T9 vertebral height loss respectively, and yet mischaracterized it in his 2019 report as

less than 25% and assigned a correspondingly lower permanent impairment rating. During his deposition Dr. Tintle admitted that his impairment rating of 4% was based upon the March 2018 MRI showing T9 compression fracture with 25% vertebral body loss of height, and that the appropriate rating would be 13% of the whole person, as determined by Dr. Blair based upon the October 2018 MRI.

32. Dr. Tintle's IME reports are contradictory and conspicuously inconsistent with Claimant's most recent thoracic imaging, undermining any confidence in his conclusions.

33. Dr. Bates. Dr. Bates examined Claimant on June 11, 2019 and reported:

Ms. Bostock has injuries that are causally related to the accident of February 5, 2018. They include a closed head injury, neck or cervical strain, thoracic back pain with T9 compression fracture which is now deteriorating and continuing to progress and lumbar pain/strain. Injury to right shoulder with restricted range of motion.

....

Ms. Bostock has not reached medical stability for the injuries. Most important evaluation and treatment needs to be pursued as soon as possible is evaluation of the thoracic spine. She has had progression or deterioration of the spine. On March 13, 2018, the T9 vertebral body had wedge deformity of approximately 25% height loss. By October 10, 2018, the T9 vertebral body had a 50% height loss. There are also signal changes or abnormalities and edema around the pedicles of T7, which may represent a fracture. I believe that this structural deterioration of the spine is responsible for the majority of Ms. Bostock's symptoms. After this has been addressed, then she needs further evaluation of the neck and low back as well as the right shoulder.

....

Ms. Bostock is not at maximum medical improvement and currently is not appropriate for permanent partial impairment. It is difficult to determine what her impairment would be if she receives no treatment because she has evidence of structural deterioration of the spine. She had such prominent destruction from March to October 2018. She may have just as much deterioration of the spine from October 2018 to present. Therefore, it must be evaluated.

....

Current restrictions would be activity as tolerated until the thoracic spine has been further evaluated and treatment initiated.

Exhibit F, pp. 205-206. Dr. Bates' opinion is consistent with the MRI imaging.

34. Dr. Blair. Dr. Blair is a spine surgeon. He reviewed not only the report but also the actual March and October 2018 MRI films and testified Claimant had an acute T9 fracture. He explained how the fracture caused the loss of vertebral height:

The vertebrae are the bones that make up the back. They are rectangular. So the back of the vertebrae is almost the same height as the front. So if the front is compressed down, you basically measure it as a percentage compared to the back. If there is 0 percent loss of height, the front is the same as the back. If there is 10% loss of height, the front is 10% less height wise than the back.

....

What happens is when the vertebrae breaks it's not like a leg bone, a thigh bone, where it just cracks through. It's a whole bunch of spongy bone that breaks and makes it weaker. And so because it's weaker, then it can collapse down.

Blair Deposition, p. 7, l. 15 though p. 7, l. 10.

35. Dr. Blair testified that Claimant's October 2018 thoracic MRI documented that the T9 vertebral compression fracture had not healed because the MRI showed swelling in the bone: "the swelling on the bone shows that it hasn't healed. The MRI is the best test to be able to show if the fracture has healed. If all the swelling has gone away, then the fracture is healed." Blair Deposition, p. 9, ll. 19-23. He testified that since the bone had not healed it can continue to collapse and become worse, leading to more pain. Ultimately Dr. Blair diagnosed a nonunion non-healed T9 fracture.

36. Consistent with his report, at his deposition Dr. Blair continued to recommend obtaining new thoracic MRI and CAT scans. He noted that almost a year had passed since the previous MRI and he wanted to see if the fracture had healed, and whether healed or not, if there had been further collapse at the fracture site. Dr. Blair reaffirmed the permanent restrictions described in his report, including no lifting more than 15 pounds occasionally, 5 pounds continuously; no sitting more than 30 minutes without a 5 minute break; no driving for 30 minutes without a 5 minute break; and no repetitive bending.

37. Dr. Blair reviewed the 25 minute surveillance video of Claimant offered by Defendants and testified:

Q. (by Mr. Vook) Is there anything in the surveillance video that would change your recommendation for the additional imaging?

A. No.

Q. Why is that?

A. Because I don't know that that changes her underlying diagnosis at all. I saw her lift, I think, at most 15 pounds, probably less, which was within these limitations. And these limitations are based on an 8 hour day, five days a week, not a single snapshot in time. So, this, I'd let her do if she were to go back to, again, doing this—a number of times a day, day in and day out.

....

Q. ... Did you see anything in the surveillance video that shows Ms. Bostock violating the physical restrictions that you assigned?

A. No.

Blair Deposition, p. 15, l. 14 through p. 16, l. 8.¹

38. Dr. Blair testified that Claimant was in pain when he examined her, and he did not see behavior that was beyond reasonable for someone who had a thoracic spine fracture that might not have healed. He also testified that he did not see anything in Claimant's behavior or pain reports that was completely out of the ordinary. Dr. Blair disagreed with Dr. Tintle's May 2019 report that Claimant had returned to preinjury status because there was no way to ascertain whether her T9 fracture had healed or collapsed further. Dr. Blair could not agree or disagree with Dr. Tintle's opinion that Claimant needed no further medical treatment because new MRI and CT scans were required to determine whether Claimant's T9 fracture had healed, not healed, and/or collapsed further.

¹ Having reviewed the surveillance video as well, the Referee agreed with Dr. Blair's assessment that it does not show Claimant exceeding any of the restrictions he imposed.

39. Dr. Blair opined that with a 50% loss of T9 vertebral height Claimant would not have normal back biomechanics and would suffer increased pain particularly with activity. He reaffirmed his finding of moderate tenderness to palpation in the mid thoracic spine.² Blair Deposition, p. 26, ll. 20-24.

40. Dr. Blair's opinion is consistent with both thoracic MRIs in evidence, recognizes the progression of Claimant's T9 compression revealed by the MRIs, and reflects an accurate interpretation of the surveillance video. His opinion is the most persuasive.

41. Considering the totality of the circumstances, the Commission concludes that Claimant met her original burden of establishing that she entered a period of recovery following the occurrence of the work accident. Defendants assert that Claimant reached medical stability on or about April 10, 2019, and that she is not entitled to time loss benefits after that date. In response Claimant argues that the October 10, 2018 MRI shows a progression of her T9 compression fracture as compared to the March 13, 2018 study, and that Dr. Blair and Dr. Bates have persuasively testified that it is impossible to comment on the question of Claimant's medical stability without the benefit of further radiological studies to assess whether Claimant's T9 injury has healed, not healed or worsened. The Commission is more persuaded by the testimony of Dr.'s Blair and Bates. At present, Claimant is presumed to be in a period of recovery and will so remain until medical evidence establishes a date of medical stability.

42. **Change of physician.** The next issue is whether Claimant is entitled to a change of physician to Benjamin Blair, M.D. Idaho Code § 72-432(4)(a) provides in part:

The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a change of physicians to afford the

² The very finding Dr. Tittle denied observing but testified would have prompted him to request an MRI.

employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained.

43. Claimant filed her Request for Calendaring which set forth as an issue for hearing her request for Dr. Blair to be designated as her treating physician. Defendants have recognized Dr. Verst as Claimant's treating physician. However, he has offered her no further treatment, opining she has reached maximum medical improvement. As determined above, his opinion is not persuasive.

44. At this time Claimant is yet presumed to be in a period of recovery and has proven her entitlement to additional medical treatment as recommended by Dr. Blair. Claimant has complied with the requirements of I.C. § 72-432(4). She has notified Defendants of her request to change physicians and petitioned the Commission. Claimant's symptoms have continued, and prior MRI imaging revealed increasing T9 vertebral body height loss which has not been fully evaluated. Recommended follow up thoracic imaging has never been performed. Claimant's proven need for additional medical evaluation/treatment of her thoracic injury provides reasonable grounds for the change of physician. Dr. Blair indicated in his deposition his willingness to assume care of Claimant's thoracic injuries and should be designated Claimant's treating physician. Claimant has proven she is entitled to a change of physician to Benjamin Blair, M.D.

45. **Temporary disability benefits.** The next issue is whether Claimant is entitled to additional temporary disability benefits due to the industrial accident. Disability for the purpose of determining temporary disability income benefits, is a decrease in wage-earning capacity due to injury or occupational disease. Idaho Code § 72-408 provides that "Income benefits for total and partial disability during the period of recovery ... shall be paid to the disabled employee" Claimant bears the initial burden of presenting medical 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, 605 P.2d 939 (1980). Entitlement to time loss benefits comes with statutory constraints specified by Idaho Code § 72-403. “[I]njured workers who receive total or partial temporary disability income benefits during a period of recovery have an obligation to seek or accept suitable employment consistent with their restrictions. Employer bears the burden of proving that an injured worker has failed to satisfy this statutory obligation.” Soderling v. West Ada School District, 2020 WL 1957678, at 11 (Idaho Ind. Com. Mar. 19, 2020)

46. Here, we are presently unable to conclude that Claimant reached a point of medical stability in April of 2019. Claimant has demonstrated that further medical evaluation is necessary to address this issue. Whether Claimant remains in a period of recovery after that date, and if so, for how long, depends on evidence to be developed. Pursuant to Idaho Code § 72-408, Claimant is entitled to temporary disability benefits until she reaches medical stability, or until the provisions of Idaho Code § 72-403 are deemed to apply.

47. **Attorney fees.** The final issue is whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers’ Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130,

1133 (1976). Defendants have a continuing duty to investigate and correct denials that hindsight reveals were in error. Unreasonably maintaining a denial of a claim shown in hindsight to be legitimate may result in an award of attorney fees. Zielinski v. U.S. Crisis Inc., 2011 WL 2199791, at 5-6 (Idaho Ind. Com. May 16, 2011). Thus, Defendants' grounds for denial must be reasonable both at the time of denial and in hindsight.

48. In the present case, Claimant asserts entitlement to attorney fees for Defendants' allegedly unreasonable denial of temporary disability benefits and further medical treatment. Defendants have principally relied upon the surveillance video and the opinions of Drs. Tintle and Verst to support their denial of temporary disability benefits. Dr. Tintle's opinions are contradictory and his explanation of his contradictions unpersuasive. Dr. Verst's opinion is not persuasive in large part because it is conclusory and unexplained. However, Defendants' reliance thereon was not unreasonable.

49. Claimant has not proven Defendants are liable for attorney fees for unreasonable denial of additional medical treatment or temporary disability benefits.³

CONCLUSION OF LAW AND ORDER

1. Claimant is in a period of recovery following the subject injury. Defendants have failed to prove that Claimant has reached medical stability. Claimant is entitled to such additional medical evaluation as may be necessary to assess her current condition, in particular, whether she remains in a period of recovery, and if so, whether she is in need of further treatment.

2. Claimant has proven she is entitled to a change of physician to Benjamin Blair,

³ Claimant's briefing asserts entitlement to attorney fees for Defendants' denial of permanent partial impairment benefits, given Defendants' position that Claimant has reached medical stability. As Claimant's briefing correctly notes, permanent impairment was not a noticed issue at the January 23, 2020 hearing; thus, attorney fees for denial thereof is not addressed in nor precluded by this decision.

M.D.

3. Claimant is entitled to time loss benefits payable pursuant to Idaho Code § 72-408 until she is deemed medically stable or until Idaho Code § 72-403 is shown to apply.

4. Claimant has not proven Defendants are liable for attorney fees for unreasonable denial of additional medical care or temporary disability benefits.

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

DATED this 6th day of November, 2020.

INDUSTRIAL COMMISSION


Thomas P. Baskin, Chairman


Aaron White, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2020, 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:

MATTHEW VOOK
PO BOX 1645
IDAHO FALLS ID 83403-1645

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

A handwritten signature in blue ink, appearing to be "Eric S. Bailey", written over a horizontal line.