

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARTIN NINO,)	
)	
Claimant,)	
)	
v.)	IC 2007-005052
)	
LAND VIEW FERTILIZER, INC.,)	
)	
Employer,)	
)	
and)	ORDER DENYING
)	RECONSIDERATION
)	
LIBERTY NORTHWEST)	October 10, 2008
INSURANCE CORPORATION,)	
)	
Surety,)	
Defendants.)	
_____)	

On August 27, 2008, Defendants timely filed a request for reconsideration of the Commission decision dated August 12, 2008. Claimant responded on September 11, 2008. Defendants filed no reply.

Defendants raise two issues on reconsideration. First, Defense reasserts its position that Dr. Saurey’s January 23, 2008, post-hearing deposition testimony on causation should be excluded from the record because his opinion is based on evidence manufactured after the hearing in violation of JRP Rule 10(E)(4). Dr. Saurey was allegedly unaware of the January 13, 2007, industrial accident until December 24, 2007, during a post-hearing consultation with Claimant. The fact that his deposition opinion regards evidence at least consistent with evidence previously submitted at hearing is irrelevant as to whether or not the evidence was developed following the hearing.

Claimant points out that evidence of the January 13, 2007, industrial accident was not new evidence to the record; it was only new to Dr. Saurey. With an understanding of the mechanism of the accident, which is consistent with Claimant's testimony at hearing and with other exhibits, Dr. Saurey's opinion in support of medical causation does not violate Rule 10(E)(4).

The Commission agrees with Claimant. Defendants' approach to Rule 10(E)(4) is overly-technical and contradicts the statutory call for summary and simple procedures under Idaho Code § 72-708. Rule 10(E)(4) states:

Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing but not on evidence developed following hearing, except. . . .

Claimant's post-hearing expert based his opinion on evidence already in the record. Claimant had testified of the January 13, 2007, event and the physical consequences. Dr. Saurey opined – in legally sufficient, but less than precise terms - that the activities Claimant described could result in Claimant's back condition. Defendants' objections did bring to light the fact that Dr. Saurey did not himself know of Claimant's January 13, 2007, lifting activities at work until December 24, 2007 – well after the hearing. It is easy to understand Defendants' alarm since Claimant had not linked the accident facts with a medical expert opinion. But Defendants were not unjustly surprised. The facts of the accident were already in evidence. During the deposition, the foundation of Dr. Saurey's causation opinion was premised on Claimant's testimony at hearing, rather than the consultation on December 24, 2007. Going back to Rule 10(E)(4) language, the Commission perceives the evidence upon which Dr. Saurey founded his causation

opinion as “known by or available to the party at the time of the hearing”; not “developed, manufactured, or discovered following the hearing.” Defendants’ request to reconsider the admissibility of Dr. Saurey’s post-hearing deposition testimony on causation is DENIED.

Defendants’ second issue on reconsideration pertains to the Commission’s determination that Claimant is a credible witness. Defendants contend the “. . . fact that the Commission did not address claimant’s demeanor, because they couldn’t [since they did not hold the hearing], makes the credibility finding rendered by the Commission in this case clearly incomplete, inequitable, and not supported by substantial and competent evidence.” Defense Brief, p. 8. Defendants contend substantive credibility findings by the Commission violate the principles set forth in Wheaton v. ISIF, 129 Idaho 538, 540, 928 P.2d 42, 44 (1996), and Simpson v. Louisiana-Pacific Corp., 134 Idaho 209, 998 P.2d 1122 (2000) when issued without including the Referee’s observational credibility findings.

Claimant refutes Defendants’ credibility argument with the simple assertion that observational credibility issues are independent from, and not a necessary prerequisite to, substantive credibility issues. This is supported by case law in which the Idaho Supreme Court has upheld the Commission’s credibility finding by sustaining the Commission’s substantive credibility determination while also overruling an observational credibility determination. *See: Darner v. Southeast Idaho In-Home Services*, 122 Idaho 897, 841 P.2d 427 (1992). Substantive credibility determinations alone are sufficient to make a credibility determination. *See: Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008).

Again, Defendants' arguments are not persuasive. Credibility was a "vital" issue in this case. However, credibility analysis in such a case does not function any differently than usual. As Claimant's research points out, precedent clearly distinguishes observational from substantive credibility. Substantive findings can be independent from observational findings.

Furthermore, and contrary to Defendants' position, Wheaton and Simpson, are not applicable here. Those cases involved defining a procedure by which parties may seek a Commission ruling on a matter decided by a referee but not confirmed or adopted by the Commission. There is no referee determination to review since the Commission issued its decision independent of the Referee's recommendation. The Commission's credibility findings are well explained in the August 12, 2008, decision, and we remain convinced that they were appropriate in the case.

For the above reasons, Defendants' Motion for Reconsideration is hereby DENIED.

DATED this 10th day of October, 2008.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R. D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October 2008, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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_____/s/_____