

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS R. MICK,)	
)	
Claimant,)	
)	
v.)	
)	IC 2005-003362
THE HOME DEPOT, INC.,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
)	AND ORDER
and)	
)	
)	Filed December 19, 2008
INSURANCE COMPANY OF THE)	
STATE OF PENNSYLVANIA,)	
)	
Surety,)	
Defendants.)	
_____)	

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’Alene on March 28, 2008. Claimant was present and represented by Louis Garbrecht of Coeur d’Alene. Thomas P. Baskin 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 came under advisement on July 18, 2008.

ISSUE

By agreement of the parties, the sole issue to be decided as the result of the hearing is whether Claimant is entitled to a lumbar fusion as recommended by his treating physician.

CONTENTIONS OF THE PARTIES

Claimant contends that Defendants should be liable for a surgery recommended by his treating physician. While conceding that Claimant has preexisting back problems consisting of degeneration and injuries, his treating physician's opinions regarding causation should carry the day. Claimant argues that his need for surgery is a result of the natural progression of the residual damages from the March 20, 2005 injury.

Defendants contend that prior to the need for the present surgery, Claimant had been declared at MMI by both his treating physician and their independent examiner. Defendants argue that Claimant has not proven his burden of showing that his need for the present surgery is causally related to the March 20, 2005 accident. Dr. Bret A. Dirks agreed that it was appropriate to consider Claimant for an impairment rating in June 2006. After Claimant's impairment rating, Dr. Dirks and Dr. J. Craig Stevens agree that there was a significant increase in Claimant's symptomology after Claimant lifted a table top weighing approximately 25 to 30 pounds. Claimant's need for surgery is related to a non-industrial superseding, intervening event.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Joint Exhibits 1-15.¹
3. The post-hearing deposition of J. Craig Stevens, M.D., taken by Defendants on April 30, 2008.

With the exception of Defendants' objection at page 72 of Dr. Dirks' deposition, all objections are overruled.

¹ The Commission appreciates the efforts of counsel in preparing joint exhibits.

FINDINGS OF FACT

1. Claimant was 62 years of age and resided in Coeur d'Alene at the time of the hearing.

2. Claimant had no significant back problems until March 10, 2000, at which time he injured his low back while installing track lighting for an employer other than Employer herein. On October 3, 2000, neurosurgeon Bret A. Dirks, M.D., performed lumbar laminectomies at L4 and L5, a partial laminectomy at L3, and a discectomy at L3-4. Although Claimant described his post-operative recovery as "1,000%", the medical records indicate a slow and gradual improvement. The parties agree that Claimant is not a particularly thorough and accurate historian.

3. Claimant next injured his back on November 9, 2001, when he threw a pallet while working for the same employer as the March 2000 injury. He was treated conservatively for this injury and suffered no long-term effects.

4. Claimant next injured his back on June 12, 2003, while working for Employer herein when he was helping a customer with an air conditioner. He was again treated conservatively.

5. Claimant next injured his back on March 20, 2005, while working for Employer. He was hurrying to the front of the store when he slipped and fell flat on his back on an area of a recently repaired concrete floor. Surety accepted Claimant's claim for this injury. Claimant again treated with Dr. Dirks, who brought him to surgery on October 20, 2005. Dr. Dirks performed a decompression and fusion from L4 to S1.

6. Claimant experienced a slow period of recovery and had episodes of increasing pain depending upon the activities he was undertaking. After each such episode, his pain would

eventually subside to pre-episode levels. By June 5, 2006, Dr. Dirks declared Claimant to be at Maximum Medical Improvement (MMI), which he described as intending to convey that Claimant did not need further surgical treatment or any further MRIs related to the industrial accident. Dr. Dirks does not give impairment ratings to patients he is treating. On July 12, 2006, Dr. Stevens examined Claimant and opined an impairment of 18% whole person, with 8% attributable to the 2005 accident. The impairment of 8% attributable to the 2005 accident was based on a belief that Claimant had been without symptoms between the accidents of 2000 and 2005. However, Stevens was not provided with all the pre-injury medical records. After receiving the pre-injury medical records, Stevens revised his ratings to 19% whole person with 5% attributable to the 2005 accident in accordance with the 5th Edition of the AMA, the range of motion method, and the information that Claimant had symptoms between the accidents of 2000 and 2005.

7. Claimant received treatment from the Joshua Tree Physical Therapy facility from around December 2005 to August 2006. On May 22, 2006, Claimant's physical therapy progress report notes that "there has been a significant decrease in complaints of radiating symptoms into the left lower extremity and numbness throughout the feet."

8. On or about July 17, 2006, Claimant, along with a friend, lifted a 25 to 30 pound 36 inch diameter glass table top (hereinafter the table top lifting incident). Claimant, generally a poor historian, testified in detail about the table top lifting incident. Claimant testified that he instantly felt pain when he started lifting the table top, and that it felt like something had torn loose in his back and he felt "incredible pain" in his back "out of nowhere." Claimant testified that he felt pain immediately while lifting the table top.

9. Claimant's physical therapy notes document the impact of the table top lifting incident. The July 28, 2006 physical therapy progress report states that "patient stated that when he lifted a glass table top with assistance he noted a sharp intense pain in the low back. Since that date it has been difficult to bring his pain back down to where it was previously." While Claimant believes that physical therapy relieved his immediate pain from lifting the table top, the record shows that Claimant had some persisting problems after the table top lifting incident.

* * *

Q. (By Mr. Garbrecht) Why don't you tell us about the problems that you had that still persisted after lifting the table top that you didn't have before you lifted the table top?

A. It was kind of a setback for me. Now I have . . . like sitting here I couldn't even begin to imagine walk [sic] around a city block, I would be sorry if I even started that job. I sit . . . I'm very uncomfortable as we speak, I can't sit for more than 20 minutes, or so. Basically all . . . pretty much all normal activities that I had been doing forever, I just have to watch it, I can't do them because it becomes very painful.

* * *

[March 28, 2000 Hearing, at 45-46]

10. Claimant continued with physical therapy until mid-August, and then returned to Dr. Dirks on August 17, 2006. Dr. Dirks requested another lumbar MRI. Prior to the table top lifting incident, Dr. Dirks did not anticipate any further surgeries or additional MRIs. Upon review of the MRI and nerve conduction studies, Dr. Dirks commenced a series of three epidural steroid injections, which proved ineffectual.

11. Claimant last saw Dr. Dirks on December 12, 2007, at which time he was recommending an L2 through L4 fusion with re-incorporation into the old fusion site. Dr. Dirks considers this necessary as the result of the prior fusion weakening the vertebral segment above the first fused vertebra. Surety has denied the request for surgery based on an IME identifying

the table top lifting incident, other superseding, intervening events, and/or the natural progression of Claimant's documented spondylolisthesis as the cause for the need for the proposed surgery.

DISCUSSION AND FURTHER FINDINGS

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). "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). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, *Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217-218 (2001). An employee may be compensated for the aggravation or acceleration of a pre-existing condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(17). See, *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

12. The record reflects uncertainty in medical opinion regarding the cause for the recommended extension of Claimant's lumbar fusion between Claimant's treating physician, a neurosurgeon, and Defendants' IME physician, a physiatrist. This case presents a difficult question of causation. Pertinent excerpts from their respective deposition testimony are set out below.

Bret A. Dirks, M.D.:

13. Dr. Dirks is a board certified neurosurgeon who has been treating Claimant since June of 2000. He performed back surgeries on Claimant in 2000 and 2005. He was deposed on

March 25 and 26, 2008. Dr. Dirks' records identify the table top lifting incident as a significant event which worsened Claimant's symptomatology.

Q. And if that's the case, and if we correlate the clinical findings and his history with what we see on the MRI, isn't that (the table top lifting incident) the most likely culprit as to what tipped him over the edge (regarding the need for extending the fusion)?

A. Well, again, I'd say it's a **combination** of the previous fusion at L4 at S1 with the subsequent traumatic event. Again. It's kind of like my answer from about 20 minutes ago. It's a **combination of things**. I don't know that you can specifically say the traumatic event caused the problem. I think it's a **combination of both**.

* * *

Q. Okay. Doctor, you've alluded to another thing I wanted to chat with you about, which is this - - and I see this from time to time about - - **if you do a multilevel fusion, as was done here in this case, L4 through S1, that that creates additional problems for the motion segments above the fusion.**

A. Yes, it can.

Q. And tell me - - again, I see this all the time. But is this something that is supported in the literature, that if you do a fusion at one or more levels, you are increasing the likelihood of problems at other motion segments?

A. Yes.

Q. And it is not merely anecdotal; it's something that appears in the literature and is widely known?

A. Yes.

Q. Okay. And as I understand it, from a layman's person (sic), if you're flexible throughout your spine, each motion segment bears a certain amount of stress. But if you're not flexible through your whole spine, the motion segments that you do have necessarily bear more stress than they otherwise would?

A. Intuitively that makes sense. I don't know that that's true or not, but intuitively that makes sense.

Q. Okay. Is that the supposed mechanism by which you would think that the . . .

A. Again, I haven't reviewed . . . **I know the literature and that, yes, there's increased adjacent level degeneration related to a fusion site. Yes, I do know that literature . . . at least I know it exists. I have not reviewed it in detail.** So I would way, biomechanically, it certainly makes sense that what you're saying is true.

Dr. Dirks' Deposition, pp. 64-65; 66; 67-68 (emphases added).

J. Craig Stevens, M.D.:

14. Dr. Stevens is board certified in physical medicine and rehabilitation as well as in independent medical examinations. His practice consists of 50% IMEs, (mostly for the defense) and 50% treating patients. He examined Claimant on July 12, 2006 at Surety's request. Initially, he was only provided with medical records generated after the March 2005 slip and fall to determine impairment ratings. He was subsequently provided with more records but did not have them at the time of his deposition as they had been "misfiled." However, Dr. Stevens has revised his June 2006 impairment rating based on the additional medical information and documentation. While acknowledging that a L4-S1 fusion can put greater stresses on motion levels above, Dr. Stevens noted that Claimant's situation provides a difficult causation analysis as there are "multiple factors coming into this, all of which interrelate with each other." Certainly, the L4-S1 fusion is not the only factor in this case, given Claimant's immediate pain during the table top lifting incident and his increased symptomology after the event. Stevens expressed the following causation opinions at his April 30, 2008 deposition:

Q. (By Mr. Baskin): Dr. Dirks, of course, has been asked about whether he thinks that there is a cause for the need for fusion, and to paraphrase Dr. Dirks, I will represent to you that he has stated that in his view Mr. Mick did have a preexisting problem, did have a preexisting surgery, and did have a preexisting degenerative disease, did have a progressive anterolisthesis. But he proposes that the fall on the work surface at Home Depot led to the L4-S1 fusion and that because Mr. Mick is now fused at L4-S1 he is now more susceptible to injury at disk levels above that because greater stress is placed on those motion segments above the level of the fusion.

Let me ask you about that theory. Is that something that makes sense to you from an orthopedic standpoint, i.e., that a fusion at L4-S1 places greater stresses on motion segment levels above such that those motion segment levels are more susceptible to further injury?

A. Yes, a fusion puts greater stresses on the levels above; however, there are multiple other factors that can predispose to stresses and disk protrusions at the

level above. There are **multiple factors** in what caused that protrusion at the level above. And certainly one could say if that previous fusion had not been performed, maybe he would have been likely to have had the subsequent problem, but at the same time I don't know if one could really isolate all these factors independently because they all interact.

The lumbar degenerative disk disease that caused the original injury from 2000, it may have been a factor in that, as well as this injury here as well as the injury that this I-M-E addressed of 2005 may also have been a factor in lowering the threshold for what caused the protrusion in 2007.

It is - - **I don't know if you can actually isolate one.** I know that's the crux of this whole thing.

Q. I think the point Mr. Garbrecht is trying to make is that this table top lifting incident was nothing out of the ordinary, it was just [*sic*] blip, one of the a number of blips that occurred during this post-surgical course and that you shouldn't attach much significance to it.

Doctor, again if the history is that this is the one that sticks out in Mr. Mick's mind as being a watershed event and the one that he relates his down turn to per his testimony, would that persuade you that it was a significant event?

A. Yes. As I believe I said earlier, though, I went on his statement of increase in symptoms to cause me to attribute the right-sided protrusion as relating to that lifting, but then with the proviso that, yes, but there are **multiple other factors**. It is very difficult to separate them all out.

Dr. Stevens' Deposition, pp. 25-28; 39-40; 54-55 (emphasis added).

While Dr. Dirks and Dr. Stevens agree that it is possible for a fusion to create instability in the adjacent levels, both doctors identify multiple factors contributing to Claimant's current need for physical treatment.

15. Claimant bears the burden of proving that his need for medical treatment is causally related to his industrial injury. While Dr. Dirks and Dr. Stevens are both unable to identify a single event that entirely caused Claimant's need for further surgery, it appears that Claimant was medically stable prior to the table top lifting incident. Prior to the table top lifting incident, Dr. Dirks reported that Claimant was MMI in the sense that Claimant did not require any further surgeries or MRIs related to the March 20, 2005 accident. Claimant was progressing in his physical therapy treatment, and reported a "significant decrease in complaints of radiating

symptoms into the left lower extremity and numbness throughout the feet.” After the table top lifting incident, the physical therapy report notes that since that date [table top lifting event] it has been difficult to bring his pain back down to where it was previously.

16. The Idaho Industrial Commission has adopted the “compensable consequence” doctrine discussed in Professor Larson’s treatise on workers’ compensation. This doctrine provides that when the primary injury (and resultant surgery) is shown to have arisen out of and in the course of employment (Surety accepted the 2005 claim), every natural consequence that flows from the injury and surgery (predisposition for further disk injury at levels beyond the original fusion) likewise arises out of and in the course of employment, unless it is the result of an independent intervening cause attributable to the claimant’s own intentional conduct (not applicable here).

The Commission has applied the compensable consequence doctrine in several cases to justify extending medical treatment. These cases involved finding an overuse injury of the left-arm related as a compensable consequence to a right-hand carpal tunnel industrial injury that restricted Claimant to left-hand work only (*Schafer v. Smith Group Int.* 2006 IIC 0120); a left shoulder injury related to a right shoulder injury arising from an industrial accident of lifting a 33-pound trash can (*Offer v. Clearwater Forest Industries*, 2000 IIC 0956 (October 2000)); and finding a right elbow injury related to a closed fracture of the humeral neck injury in the right shoulder when the Claimant “could not use her shoulder in a normal fashion” during the recovery of the original injury. (*Castaneda v. Idaho Home Health, Inc.*, 1999 IIC 0857, 0862 (July 1999)). In the preceding cases, no documented intervening events occurred that affected the Claimant’s recovery.

The application of the compensable consequence doctrine has not been applied to cases where an intervening event affects Claimant's recovery from the original injury. The Commission found a subsequent intervening event existed to limit liability under the compensable consequence doctrine in the case of *Jackson v. Diamante Enterprise, LLC.*, 2005 IIC 0173 (April 2005). In *Jackson*, the Claimant injured his right shoulder in an industrial accident on February 26, 2001, and received treatment and pain medication. Claimant had shoulder surgery on September 4, 2001. In October 2002, Dr. Rheim B. Jones conducted an IME on Claimant. The IME results stated that Claimant was medically stable and released Claimant to work, but noted that heavy manual labor or demanding sports would cause a flare-up in the impingement in both the shoulder and the elbow and further medical or surgical treatment may be necessary at that time. Around December 2002, Claimant moved furniture and found himself in great pain the next day. Claimant had another MRI in October 2003, and sought arthroscopic surgery to treat a rotator cuff tear. The Surety denied any further care. At the hearing, Claimant's spouse testified that the Claimant would periodically experience a flare-up in shoulder pain for no apparent reason. However, Claimant appeared to have stabilized prior to the furniture moving incident. The Commission concluded that Claimant's current need for surgery was not causally related to his industrial accident, and that the furniture moving incident limited Surety's liability.

17. In the facts of this case, the compensable consequence doctrine cannot be applied. This doctrine does not allow for additional surgery on a Claimant when a subsequent intervening event substantially affects a Claimant's medical recovery or treatment. Like the Claimant in *Jackson*, Claimant was rated as being medically stable prior to the intervening event by an IME. While Claimant's treating physician, like many treating physicians, does not give impairment

ratings to patients he is treating, Dr. Dirks opined that Claimant was at MMI, meaning that Claimant was not in need of further surgery or MRIs. Dr. Stevens agreed that Claimant was at MMI and gave Claimant impairment ratings. The intervening events in the circumstances of this case and *Jackson* immediately triggered regressive and identifiable consequences to the physical condition of the respective Claimants. The Claimant in *Jackson* reported increased shoulder pain on the day following lifting furniture. Mr. Mick reported pain immediately while lifting the table top, and there is no indication from the physical therapy reports or Claimant's testimony that pain from the table top lifting incident completely resolved. In fact, Claimant's medical condition seemed to worsen after the table top lifting incident. Dr. Dirks did not anticipate Claimant needing any additional surgery or MRIs after his statement that Claimant was at MMI until after the table top lifting incident. While Dr. Stevens and Dr. Dirks identified that there were a multiple of factors involved in Claimant's current need for surgery, it is clear that the table top lifting incident was a significant event. Under the circumstances of this case, the table top lifting incident is an intervening event that limits Defendants' liability.

18. The Commission finds that Claimant has not proven that the surgery currently recommended by Dr. Dirks is casually related to his industrial accident on March 20, 2005.

CONCLUSION OF LAW

Claimant has not proven his entitlement to the lumbar surgery recommended by his treating physician.

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

- 1. Claimant has not proven his entitlement to the lumbar surgery recommended by his treating physician.
- 2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 19th day of December , 2008.

INDUSTRIAL COMMISSION

 Participated but did not sign
R.D. Maynard, Chairman

 /s/
Thomas E. Limbaugh, Commissioner

 /s/
James F. Kile, Commissioner

ATTEST:

 /s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of Dec. , 2008, a true and correct copy of the **FINDINGS, CONCLUSION AND ORDER** was served by regular United States Mail upon each of the following:

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