BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIA E. RANGEL, Claimant, v. SORRENTO LACTALIS, INC., Employer, and TRAVELERS PROPERTY & CASUALTY CO. OF AMERICA, Surety, Defendants.	**IC 2015-005565** **IC 2016-031069** **ORDER DENYING RECONSIDERATION** **Filed November 30, 2018**

On September 17, 2018[1], Claimant timely filed a motion for reconsideration, asking the Commission to reverse Referee Harper's recommendation, which found that Claimant failed to prove a causal relationship between her industrial accidents of 2013 and 2014 and her subsequent development of snapping scapula syndrome; Claimant failed to prove her entitlement to additional medical care after November 2015; Claimant failed to prove her entitlement to TTDs associated with her 2013 and 2014 accidents; and Claimant failed to prove her entitlement to any permanent partial impairment or permanent disability benefits as a result of the accidents of 2013 and 2014. Claimant argues that the Referee should not have relied on the opinion of Roman Schwartsman, M.D., because Dr. Schwartsman was not a credible witness. Claimant argues that the Referee erred when he found that Dr. Schwartsman's testimony unrebutted that there was no inflammation in the Claimant's right shoulder, because Dr. Schwartsman contradicted that

[1] Claimant's motion for reconsideration requested an extension of time to file his brief. The Commission received Claimant's supporting brief on October 2, 2018.

finding. Claimant also contends that the Referee failed to consider aspects of Dr. Schwartsman's testimony that indicated a lack of objectivity and credibility. Finally, the Referee failed to consider previous Commission decisions which have found Dr. Schwartsman's opinions to be less persuasive and less credible than those of other medical providers, including Dr. Bates.

Claimant requests that the Commission reverse its findings, and or offer the parties a rehearing because Claimant wishes to investigate whether Claimant's snapping scapula syndrome was caused, or aggravated, or both, by the repetitious above-shoulder lifting required in her work. Claimant argues that Dr. Schwartsman's testimony introduced this theory late in the case, thereby preventing her from developing this theory at hearing. Claimant requests the opportunity to depose Dr. Lynch, who "hopefully, could clarify the Referee's doubts concerning Dr. Bates' opinion and the question of whether the Claimant's overhead work activities caused or aggravated her snapping scapula syndrome."

On October 15, 2018, Defendants filed a response. Defendants argue that Claimant's motion offers no persuasive reason to change the result, because there is ample support for the Commission's decision. Defendants argue that the Referee gave ample consideration to Claimant's evidence; Claimant simply failed to supply persuasive medical evidence supporting a causal relationship between the industrial accident and the condition for which she sought benefits. The causation opinion Claimant provided from Dr. Bates did not offer any explanation as to why she suffers from the condition bilaterally, if Claimant's right shoulder condition was caused by the industrial accident. It also offers no specific explanation of how lifting a pallet (the alleged industrial accident) would cause snapping scapula syndrome or how the myofascial injury that allegedly progressed to snapping scapula syndrome. Because Dr. Bates did not explain his conclusions, the Commission could not adopt his opinion. Finally, Defendants deny

that Dr. Schwartsman's reading of the MRI scans in November 2016 was incorrect. Defendants insist that Dr. Schwartsman's acknowledgement that Dr. Lynch reported inflammation in his operative report does not create a conflict with Dr. Schwartsman's testimony. Defendants argue that Claimant is not entitled to a new hearing to allow her to bring the deposition testimony of Dr. Lynch; she had ample opportunity to present Dr. Lynch's testimony, but failed to do so. Defendants argue that Claimant motion for rehearing and reconsideration should be denied.

On October 25, 2018, Claimant filed a reply brief. Claimant argues that she would have deposed Drs. Lynch and Bates if she had been aware of Dr. Schwartsman's testimony that repetitive, forceful overhead motion can cause snapping scapula syndrome.

DISCUSSION

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "[i]t is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005).

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during reconsideration. Davidson v. H.H. Keim Co., Ltd., 110 Idaho 758, 718 P.2d 1196 (1986). The Commission may reverse its decision upon a motion for reconsideration, or rehear the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. See, Dennis v. School District No. 91, 135 Idaho 94, 15

P.3d 329 (2000) (citing Kindred v. Amalgamated Sugar Co., 114 Idaho 284, 756 P.2d 410 (1988)). A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

"Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." Curtis v. M.H. King Co., 142 Idaho 383, 385, 128 P.3d 920, 922 (2005), citing Uhl v. Ballard Medical Products, Inc., 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The burden on a workers' compensation claimant is to establish by the weight of the evidence that his injury was the result of a compensable accident or occupational disease to "a reasonable degree of medical probability." Furthermore, "a worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery." Evans v. O'Hara's, Inc., 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

Did the Referee err in relying on Dr. Schwartsman's Testimony?

The parties disputed causation at hearing. Claimant presented the opinion of James Bates, M.D., who opined that Claimant suffered a myofascial soft tissue injury in the accident, which progressed to snapping scapula syndrome. (Decision, 14). Dr. Bates opined that the surgery performed by Joseph Lynch, M.D., was reasonable and necessary.

Claimant contends that the Referee erred in assigning significant weight to Dr. Schwartzman's opinion that there was no inflammation in the area of Claimant's right scapula. It will be recalled that on or about November 12, 2016, Claimant underwent MRI evaluation of the right upper extremity. That study was read by Shane McGonegle, M.D. (See Defendants' Exhibit 8 at 122). Dr. McGonegle read the study as normal, showing no abnormalities of the right

scapula or related structures. Specifically, no soft tissue mass or regional fluid collection was noted, nor was muscle edema, atrophy, or effusion noted.

Dr. Lynch's February 22, 2017 report reflects that he independently reviewed the November MRI and concluded that, to his eye, there did appear to be some "subtle hyperintensity" seen about the superior and medial border of the scapula. Defendants' Exhibit 8 at 125.

Dr. Schwartzman, too, independently reviewed the November 2016 films, and also conferred with Dr. McGonegle concerning this study. Dr. Schwartzman concurred with the radiologist that the study showed no shoulder abnormalities. Schwartzman Depo., pp. ll. 31/11-32/11. He did not speculate on what Dr. Lynch may have meant by the term "subtle hyperintensity." Elsewhere in his testimony, he stated that if inflammation were extant in the area of Claimant's right scapula, it would have been visualized on the November 2016 MRI. Again, he testified that that study was negative for inflammation.

Against this background, Claimant asserts that Dr. Schwartzman's testimony is contradictory because of the following exchange between defense counsel and Dr. Schwartzman:

> Q: [By Mr. Wigle] Well, I'm getting ahead of myself. You understand she did go on to have surgery by Dr. Lynch to address the snapping scapula on the right?
>
> A: I am aware of that from a letter that I received. I believe it was from you. I have not - - I don't believe I saw Dr. Lynch's report. I take that back. I do have an operative report from Dr. Lynch, dated April 11, 2017. So that would have been subsequent to my IME. My IME was performed on March 21, 2017, and the operative report is from April 11, 2017. So at the time that I examined her and prepared this IME I would not have seen his report. I do have a copy of the report in my chart at this point.
>
> Q: What's the nature of that surgery; what do they do?
>
> A: I have to look at his report. I'm sorry. So in this report authored by Dr. Lynch, for April 11, 2017, he describes an "open excision/partial scapulectomy of the superior medial border of the scapula as well as an open bursectomy

> infrascapular and suprascapular region." In lay terms, Dr. Lynch took out a piece of bone from the upper border from the top - - top medial border of the scapula. So he literally excised a piece of bone from the shoulder blade.
>
> Q: So that the scapula would be able to move past the - -
>
> A: The edges of the scapula are thick. Sorry, it's hard to explain. So the edges of the scapula are thick, while the main body of the scapula is very thin. The reason the edges are thick is because muscle attach primarily at the edges, and that's where the pull of the muscle is exerted, and over the years the bone becomes thicker in response to the pull of the muscles. Does that make sense?
>
> Q: Yeah.
>
> A: So he excised that thickened edge of bone. And he also excised some bursal tissue underneath the scapula, <u>those inflamed fluid sacs underneath the scapula.</u>

Schwartzman Depo., pp. ll. 14/6-15/21 (emphasis supplied). Therefore, it is argued that while Dr. Schwartzman staked out a position for himself that there was absolutely no evidence of inflammation in the area of Claimant's right scapula, this insistence is denigrated by his acknowledgement of Dr. Lynch's operative findings, findings which included evidence of inflamed bursal sacs.

However, review of Dr. Lynch's April 11, 2017 operative report altogether fails to reflect that he made any finding about an inflamed bursa, or any other type of inflammation. See Defendants' Exhibit 8 at 132-133. Why Dr. Schwartzman referred to the bursal tissue under the scapula as "inflamed fluid sacs" is unknown; this observation is not supported by the operative report, and it was to that document that Dr. Schwartzman was referring when the responding to counsel's questions.

We conclude that there is no inconsistency in Dr. Schwartzman's testimony when it comes to his opinion on whether or not Claimant suffered inflammation of some type in her scapular structures. The operative report actually makes us more skeptical of Dr. Lynch's

observation concerning a "subtle hyperintensity" in the area, supposedly suggesting inflammation. Had such inflammation had been present, one would expect Dr. Lynch to reference it in his operative report.

Further, even if it be assumed that inflammation of Claimant's scapula or associated structures has been demonstrated, this actually does little to advance Claimant's theory of causation. Dr. Schwartzman proposed a number of mechanisms by which a snapping scapula could be caused. First, muscular atrophy underneath the scapula might allow the shoulder blade to ride directly over the rib cage, causing the snapping as it moves forward. Second, snapping scapula syndrome might be caused by a tumor interposed between the rib cage and the shoulder blade. Another cause might be inflammation of the bursa underlying the scapula. Another cause might be rib fractures resulting in bony prominences which, in turn, lead to snapping scapula syndrome. Finally, and perhaps most commonly, snapping scapula syndrome is due to anatomic variance in the shape of the rib cage. See Schwartzman Depo., p. ll. 9/14-11. Neither tumors, nor rib fractures, nor muscle atrophy appeared to be implicated in this case. However, to the suggestion that inflammation of soft tissues or other soft tissue injury might explain Claimant's snapping scapula syndrome, Dr. Schwartzman was emphatic in his testimony that only repetitive forceful, high velocity overhead activities, such as those performed swimmers, pitchers, tennis players, or throwing athletes might be implicated in this cause of snapping scapula syndrome. Schwartzman Depo., pp. ll. 10/25-12/8. Dr. Schwartzman rejected the suggestion that the Claimant's discrete accident could be responsible for causing a soft tissue injury or inflammation sufficient to lead to snapping scapula syndrome. He further rejected the suggestion that Claimant's job responsibilities, generally, are of the type sufficient to cause snapping scapula syndrome. Schwartzman Depo., pp. ll. 36/9-39/6. Therefore, even if the November 2016 MRI

and the April 11, 2017 surgical report were conceded to show some evidence of inflammation, this would do little to explain a causal relationship between the subject accidents and those hypothesized findings. As noted in the original decision, we attach little weight to Dr. Bates' November 20, 2017 report in which he vaguely proposed that as a result of the subject accidents Claimant suffered injury to her right shoulder, resulting in some myofascial soft tissue components, which in turn progressed to snapping scapula syndrome. Dr. Bates might have elaborated on the causal chain he proposes, but he was not deposed, leaving the Commission unable to assign any significant weight to his explanation.

In summary, we are not persuaded by Claimant's arguments on reconsideration that Dr. Schwartzman's ultimate opinions are significantly undermined by other elements of his testimony.

Finally, Claimant argues that Dr. Schwartsman was not a credible witness, and the Referee's observation of Dr. Schwartsman's combative and evasive behavior in a footnote made it reversible error to rely on his opinions as probative. Claimant also cites many previous case examples where the Commission has not relied on Dr. Schwartsman's testimony. Defendants argue that the unfortunate footnote reflects that Dr. Schwartsman reacted indignantly to some rather aggressive questioning, but does not mean that the substance of his medical opinions must be disregarded.

The footnote at the center of this dispute is as follows:

> Dr. Schwartsman appeared to have lost his composure at the outset of cross examination when asked about his income derived from IMEs. He became indignant that anyone would even implicitly question his objectivity, in spite of his six-figure annual income augmentation from doing such examinations. Any "IME" physician who does not think his or her credibility will be called into question, at least implicitly, at some point in their career is either supremely naïve, or incredibly arrogant. Dr. Schwartsman's consistently combative manner

> during cross examination and reluctance to answer numerous questions straightforwardly negatively impacted his objectivity and lacked professionalism.

The Referee was completely transparent with his assessment that Dr. Schwartsman lost his cool under questioning, and that he appeared combative and unprofessional. The Commission has never required witnesses and experts to be infallible in order to be believed, and the Commission strives to discern between genuine medical opinions and opinions manufactured solely for litigated purposes—a difficult task in an adversarial forum. Losing one's temper during deposition is unfortunate and unprofessional; however, it is not the equivalent of deceit or subterfuge. The Referee did not state that Dr. Schwartsman was scheming to deceive, such that his testimony should be discarded. The Referee's straight-forward style and careful treatment of his credibility shows he was not improperly reliant on this testimony. Further, Dr. Schwartsman's opinions in other cases have no bearing on resolving this matter.

Is Claimant entitled to rehearing under Idaho Code § 72-718?

The Commission has considerable leeway to grant Claimant a re-hearing of the case under Idaho Code § 72-718. Here, Claimant wishes to both discredit Dr. Schwartsman and then use his testimony to justify a rehearing by investigating a new avenue of causation. Notwithstanding her criticism of Dr. Schwartsman, Claimant believes his testimony justifies a rehearing to search for credible medical evidence supporting an occupational disease theory of causation, i.e., whether the Claimant's snapping scapula syndrome was caused, or aggravated, or both, by the repetitious above-shoulder lifting required in her work. Claimant contends that Defendants failed to disclose the scope of Dr. Schwartsman's testimony. On rehearing, Claimant intends to depose Dr. Lynch for clarification.

Claimant did not bring her claim under a theory of occupational disease; she brought her claim under an accident-injury theory. Notwithstanding the Commission's leeway, granting a

rehearing of Claimant's accident/injury claim would not allow Claimant to introduce a new claim under the theory of occupational disease claim. A rehearing is not synonymous with granting a hearing on a new and separate claim. If Claimant wishes to pursue her claim under an occupational disease theory, she must file a new Complaint to pursue this matter.[2]

Claimant also seeks rehearing for the opportunity to obtain additional testimony from Dr. Lynch. While it is possible that Dr. Lynch might offer an opinion supporting Claimant's case, he also might not support her case. The Commission will not reopen a hearing on such speculation. Claimant has not explained why she did not timely adduce at hearing additional testimony favorable to her case. The Commission is not inclined to revisit previously considered evidence or argument or invite the parties the opportunity to offer additional evidence which could have been timely adduced at hearing.

Based on the foregoing, Claimant's request for reconsideration and rehearing is DENIED.

DATED this ___30th____ day of __November__, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

[2] On September 4, 2018, Claimant filed a new Complaint alleging an occupational disease. Defendants filed their answer on October 22, 2018.

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___30th___ day of November, 2018, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

JOHN F. GREENFIELD
PO BOX 854
BOISE, ID 83701

W. SCOTT WIGLE
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_____/s/_____