BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM POWELL, Claimant, v. NORTHWEST CASCADE, INC., Employer, and EMPLOYERS INSURANCE CO. OF WAUSAU, Surety, Defendants.	**IC 2007-001470** **ORDER DENYING RECONSIDERATION** Filed July 3, 2014

On April 14, 2014, Claimant filed a motion for reconsideration of the Commission's April 7, 2014 Order finding Claimant was stable from his December 28, 2006 industrial accident on February 6, 2013, and that Claimant has not proven his entitlement for additional medical benefits. Claimant argues that he has disability related to his industrial accident. Claimant contends that his Social Security disability determination is instructive on the issue, and asks the Commission to find his disability directly related to the industrial accident.

On April 24, 2014, Defendants filed a response to Claimant's motion for reconsideration and a cross-motion for reconsideration of the Commission's Order. Defendants argue that Claimant's assertions regarding disability were not noticed in the January 18, 2013 hearing, and are not appropriately considered on reconsideration. Defendants' cross-motion for reconsideration concerns the Commission's medical stability conclusions. Defendants argue that Claimant was medically stable by March 2, 2007, or earlier on February 8, 2007. Defendants contend that the Commission erred in applying the doctrine of the "law of the case" to this

matter. Moreover, the Idaho Supreme Court has recently held in *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2014), the following: (1) collateral estoppel does not apply where the litigation, albeit including several different hearings, is nevertheless all part of the same case; and (2) a previous decision of the Commission is not a final order, but rather an interlocutory order that was subject to modification, until such time as a final, appealable order was entered.

In addition, Defendants argue that remedial measures do not apply in the workers' compensation setting under *Urrutia v. Blaine County*, 134 Idaho 353, 2 P.3d 738 (2000). The law of the case was never intended to be a form of estoppel in administrative proceedings involving multiple fact-finding hearings, and the Commission has erred in applying this legal doctrine to overcome the non-contradicted medical opinions that Claimant was medically stable back in 2007. Assuming that the law of the case is a discretionary Commission power, its application in this case—arriving at a date of medical stability some six years later than Claimant actually reached medical stability—creates a manifest injustice.

On May 1, 2014, Claimant filed a response to Defendants' motion for reconsideration and a reply to his April 14th filing. Claimant states that he did not intend to request reconsideration of the Commission's April 7, 2014 Decision, but wishes to move to the other remaining issues in the case, specifically disability. However, Claimant disputes Defendants' claim that their expert medical opinions on medical stability were non-contradicted because Claimant's treating physicians thought further medical treatment was required.

Per Claimant's May 1, 2014 filing, his request for reconsideration is considered withdrawn. Claimant must file a request for hearing with the Commission if he wishes to pursue

additional issues, including disability in excess of impairment. The Commission will now address Defendants' motion for reconsideration.

A decision of the Commission, in the absence of fraud, is final and conclusive as to all matters adjudicated, provided that within 20 days from the date of filing the decision, any party may move for reconsideration. See Idaho Code § 72-718. A motion for reconsideration must present the Commission with new reasons factually and legally to support reconsideration, rather than rehashing evidence previously presented. See *Curtis v. N.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission will not reweigh evidence and arguments simply because the case was not resolved in the moving party's favor. On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions set forth in the Decision. However, the Commission is not compelled to make findings of fact under a reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

Hearing on this matter was bifurcated at the request of Defendants. At the time of the June 22, 2012 hearing the Commission considered the following threshold issues:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether Claimant is medically stable, and if so, the date thereof; and

3. Whether and to what extent Claimant is entitled to medical care.

All other issues were reserved for future hearing. In its January 18, 2013 decision, the Commission determined that Claimant had met his burden of proving that he suffered low back and groin injuries as a result of the subject accident. The Commission further found that Claimant was entitled to medical care for his injuries, although the Commission was unable to determine the extent to which Claimant was entitled to additional treatment due to its inability to

ascertain whether Claimant was at a point of medical stability. In so ruling, the Commission found Claimant's testimony persuasive that although he had suffered from low-back injuries in the past, the subject accident produced new symptomatology which made it impossible for him to perform his time-of-injury job. Claimant had ongoing treatment recommendations contemporaneous with his evaluation by Dr. Greendyke on March 2, 2007. Dr. Greendyke noted Claimant's history of persistent lumbar back pain since the subject accident. Dr. Greendyke opined that Claimant suffered an exacerbation of a pre-existing mechanical back problem as a result of the accident. Paradoxically, he stated that Claimant's condition is one that "should have healed as much as it is going to heal" within 6-8 weeks after the injury. He declined to award Claimant an impairment rating, although he did impose rather significant permanent limitations/restrictions. On the evidence before it the Commission could not concur with Dr. Greendyke's conclusion that Claimant was medically stable and ratable as of the March 2, 2007 exam. Dr. Greendyke's opinion in this regard is clearly premised on his belief that Claimant's complaints "should have" resolved within 6-8 weeks following the subject accident. However, the Commission found that Dr. Greendyke's expectation in this regard was not borne out by the facts of record. As of the date of Dr. Greendyke's exam Claimant was still suffering from significant unresolved low-back pain from the subject accident, and there were medical recommendations, contemporaneous with Dr. Greendyke's exam, for further treatment of Claimant's back.

Although Claimant testified that as of the June 22, 2012 date of hearing his complaints continued unabated, the Commission declined to speculate on the Claimant's need for additional medical care, if any, and whether or not he was at a point of medical stability as of the date of hearing. For these reasons, the Commission ordered the Defendants to provide additional

evaluation/care as specified in the January 18, 2013 order. The most the Commission could say is that as of March 2, 2007, the date of the last medical record in evidence, Claimant was not at a point of medical stability.

Following the Commission's January 18, 2013 hearing, Claimant underwent two additional medical exams, the first performed by Jeffrey Larson, M.D., on or about February 6, 2013, and the second performed by J. Craig Stevens, M.D., on or about April 3, 2013. Dr. Larson ordered a current MRI, which was unremarkable. He noted Claimant's complaints of persistent low-back pain since the subject accident. He examined Claimant and concluded that Claimant's complaints were somewhat exaggerated, and that there were no objective findings on exam or testing suggesting an anatomical basis for Claimant's complaints. Dr. Larson concluded that Claimant suffers from chronic low-back pain, which was temporarily aggravated by the subject accident. He evidently concluded that this temporary exacerbation resolved by March 2, 2007, since he concurred with Dr. Greendyke's assessment that Claimant was at a point of maximum medical improvement as of that date. He felt that Claimant was without permanent physical impairment, and that his condition did not warrant the imposition of any permanent limitations/restrictions.

When seen by Dr. Stevens on April 3, 2013, Claimant again described persistent complaints since the subject accident. Dr. Stevens proposed that Claimant suffered a lumbar sprain/strain as a result of the subject accident, but like Dr. Greendyke, explained that Claimant's lumbar sprain/strain should have resolved within six weeks following the date of injury. Dr. Stevens did not believe that Claimant suffered any permanent injury to his lumbar spine as a result of the accident. He felt that Claimant had returned to pre-injury status, presumably, within six weeks following the date of injury. He found no basis upon which to award an impairment

rating, and he felt that Claimant had reached a point of maximum medical improvement no later than six weeks following the subject accident, i.e. by February 7, 2007.

The opinions generated by Drs. Greendyke, Larson, and Stevens are very similar. All three physicians believe that Claimant suffered a simple lumbar sprain/strain as a result of the subject accident. All believe that this condition is ordinarily self-limiting, and should have resolved within 6-8 weeks following the subject accident. However, we did not adopt this opinion when it was expressed by Dr. Greendyke, primarily because the other physicians with whom Claimant was treating as of March 2, 2007 seemed to feel that Claimant was not at a point of medical stability and required further medical care. We also deemed it significant that Claimant, himself, did not endorse a resolution of his complaints, or a return to baseline as of March 2, 2007. Indeed, Claimant has consistently testified that he continues to experience unrelenting pain/discomfort since the subject accident. Nothing in his testimony supports the proposition that his complaints have, in any wise, returned to baseline. Since we rejected Dr. Greendyke's conclusion concerning the resolution of Claimant's complaints, it might reasonably be asked whether we should give any greater weight to the similar opinions endorsed by Drs. Larson and Stevens. Both of these physicians have opined that Claimant suffered a lumbar sprain/strain which should have been self-limiting, and from which he should have long since recovered.

However, we must also be mindful that Claimant bears the burden of proving that he continues to suffer from the effects of the subject accident. Although Claimant's testimony is to this effect, in order to meet his burden of proof, he must adduce medical evidence of some type supporting the proposition that there is a causal relationship between his current complaints and the subject accident. *See Politte v. Department of Transportation*, 126 Idaho 270, 882 P.2d 437

(1994); *Fowble v. Snowline Express, Inc.*, 146 Idaho 70, 190 P.3d 889 (2008). Claimant's burden is met when he submits proof of causation to a reasonable degree of medical probability, with medical probability being defined as having more evidence for than against. *See Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). Here, the medical record fails to establish that Claimant's ongoing complaints are causally related to the subject accident. The great weight of the medical evidence, now consisting of three Idaho Code § 72-433 exams producing almost identical opinions, establishes that Claimant is medically stable from the effects of the subject accident. We no longer find the recommendations of Claimant's treating physicians, recommendations that were made in 2007, to be persuasive in light of the additional opinions authored by Drs. Larson and Stevens.

However, as explained in the April 7, 2014 decision, the Commission is not free to assign a March 2, 2007 date of medical stability. In its January 18, 2013 decision, the Commission specifically found that Claimant was not at a point of medical stability as of March 2, 2007. Although Defendants urge us to side with Drs. Larson and Stevens and find that Claimant was medically stable as of March 2, 2007, we believe that the provisions of Idaho Code § 72-718 foreclose this possibility.

Idaho Code § 72-718 adopts a version of the doctrine of *res judicata*, peculiar to the Idaho Workers' Compensation system. That section provides:

> **Finality of commission's decision.** – A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-734, Idaho Code.

Therefore, a decision of the Industrial Commission is *res judicata* only as to matters actually adjudicated. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). In its January 18, 2013 decision, the Commission specifically found that Claimant was not at a point of medical stability as of March 2, 2007. There is no allegation that the decision was fraudulently obtained. Neither party filed a motion for reconsideration of that decision. The decision, therefore, became final and conclusive as to all matters adjudicated by the Commission in that case twenty days after the date of the decision. Per Idaho Code § 72-718, neither the parties, nor the Commission, may disturb such a decision, lest the plain meaning of "final and conclusive" be ignored.

We are, of course, mindful of the Supreme Court's treatment of the issue of collateral estoppel in *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2014). That case, too, involved a bifurcated hearing. In the first hearing, the Commission made a determination on Claimant's entitlement to the payment of certain medical expenses. In a subsequent hearing on remaining issues, the Commission determined that the doctrine of collateral estoppel barred Claimant's attempt to revisit the issue of his entitlement to the medical benefits at issue. The Supreme Court reversed, ruling that the doctrine of collateral estoppel precludes re-litigation of the same issue in a separate cause of action. Since the bifurcated hearings in *Vawter* involved multiple hearings, but only one cause of action, the Court ruled that the doctrine of collateral estoppel did not apply. Further, the Court stated:

> The Commission's 2010 order awarding medical benefits was not a final order, but rather, an interlocutory order that was subject to modification until such time as a final, appealable order was entered.

In discussing the doctrine of collateral estoppel and the finality of Industrial Commission decisions, the Court neither discussed nor cited the provisions of Idaho Code § 72-718. It is

impossible to square the Court's holding quoted above with the plain language of Idaho Code § 72-718, a statute whose meaning has been recognized by the Court in numerous past decisions. In *Woodvine v. Triangle Dairy, Inc.*, *supra*, claimant suffered a work-related low-back injury in 1974. In 1977, claimant was given a 10% PPI rating by his treating physician. The workers' compensation surety prepared a compensation agreement as authorized by Idaho Code § 72-711, memorializing the payment of the 10% PPI rating. The agreement was approved by the Industrial Commission. In 1978, claimant's treating physician increased his impairment rating to 15%. Another compensation agreement was executed and approved by the Industrial Commission to memorialize the payment of this rating. Finally, in 1979, claimant's treating physician increased his impairment rating to 20%. This additional impairment was paid pursuant to a compensation agreement executed by the parties and approved by the Commission in 1980. Claimant later retained counsel and filed a complaint with the Industrial Commission seeking additional disability benefits. The Commission ruled that the complaint was timely filed but that claimant was not entitled to additional disability benefits since the third compensation agreement was final and conclusive as to claimant's entitlement to impairment and disability. On appeal, the Court recognized that under Idaho Code § 72-718, the third compensation agreement was final and conclusive as to all matters adjudicated therein. However, in reviewing the third compensation agreement, the Court was unable to ascertain whether that agreement was intended to foreclose claimant's right to disability over and above his 20% PPI rating. The case was remanded to the Industrial Commission with instructions to make a determination on this critical point. The opinion clearly anticipates that if the compensation agreement was not intended by the parties to settle the claim for disability, then Idaho Code § 72-718 did not foreclose claimant's claim for additional benefits since the compensation agreement was only final and

conclusive as to matters actually adjudicated. The *Vawter* Court would simply have treated the third compensation agreement as an interlocutory order that could have been revisited by the Commission at any time. And yet, the *Vawter* Court did not overrule *Woodvine*, *supra*, or any of the other cases construing Idaho Code § 72-718.

The Commission's January 18, 2013 Order issued following hearing on the noticed issues is, per Idaho Code § 72-718, final and conclusive as to all matters adjudicated at the time of that hearing. The statute does not recognize any mechanism by which the Industrial Commission may treat that decision as "interlocutory" or "subject to modification", except where a timely motion for change of condition is made under Idaho Code § 72-719, an avenue unavailable to Claimant under these facts. To do otherwise would be to completely re-draw the landscape of practice before the Industrial Commission. We are disinclined to accept that *Vawter* should be read as might be suggested by the Court's language quoted above, where the controlling statute, Idaho Code § 72-718, was not discussed, and where the Court did not expressly overrule any of the several cases which affirm the plain reading of the statute.

Per Idaho Code § 72-718, and the Commission's January 18, 2013 decision, Claimant was not medically stable as of March 2, 2007, and we cannot issue a decision following the second hearing which is inconsistent with the January 18, 2013 Order. Instead, we must identify a date of medical stability that falls subsequent to March 2, 2007. The problem, of course, is that the two opinions on which we rely to determine medical stability do not identify a date of medical stability subsequent to March 2, 2007. With no further medical guidance as to when Claimant became medically stable, the Commission chose the date of the medical exams to identify the date of medical stability. Drs. Larson and Stevens both examined Claimant in early 2013, and both determined that he was medically stable. Therefore, at the very least it could be

said that Claimant's date of medical stability is no later than the dates of the 2013 exams. The question is whether the reports of Drs. Larson and Stevens are sufficient to identify a date of medical stability falling between March 2, 2007 and the 2013 exams. After careful review of the reports of Drs. Larson and Stevens, we are unable to conclude that they support the identification of a date of medical stability closer to 2007 than 2013. We rejected Dr. Greendyke's 2007 opinion on medical stability because we accepted Claimant's testimony that his low back complaints had not resolved, and because his treating physicians were recommending more treatment, even as Dr. Greendyke was pronouncing Claimant stable. As developed above, Drs. Larson and Stevens saw Claimant on only one occasion in 2013. Both physicians relied on past medical records to identify the nature of the original injury and the date by which they thought Claimant should have healed. Consideration of the same information, in conjunction with Claimant's testimony, led us to conclude that Claimant was not medically stable as of March 2, 2007, and that whether he became medically stable at some point thereafter must await further evaluation. To adopt the conclusions of Drs. Larson and Stevens concerning the date of medical stability would require us to reject the evidence we found persuasive at the time of the January 18, 2013 decision. This we decline to do. Although Drs. Stevens and Larson have convinced us that Claimant is now medically stable, we are not persuaded that they are possessed of some special insight that allows them to retroactively identify a date of stability predating the dates of their respective exams. Therefore, Defendants' request for reconsideration is DENIED.

ORDER DENYING RECONSIDERATION

1. Defendants' request for reconsideration is **DENIED**. The Commission declines to revise its previous decision that Claimant reached medical stability on February 6, 2013.

2. Claimant has not proven his entitlement to additional medical benefits.

3. All other issues are reserved.

DATED this __3rd_ day of ___July_____, 2014.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
R.D. Maynard, Commissioner

Participated but did not sign

_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _3rd_ day of __July_____, 2014, 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/_____