BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK N. ANDERSON, Claimant, v. MARCUS & MARCUS, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-035174** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** filed June 10, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Boise on November 23, 2009. The Referee submitted his recommendation, the Commissioners, having reviewed the same, have prepared modified findings and conclusions. Claimant appeared *pro se* at the hearing, and Bradley J. Stoddard of Coeur d'Alene represented Employer and the State Insurance Fund. The parties presented oral and documentary evidence. Claimant and Defendants then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on February 17, 2010.

ISSUES

By agreement of the parties, the issues to be decided are:

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

2. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate;

3. Whether Claimant is entitled to past and future medical care;

4. Whether Claimant is entitled to temporary total disability benefits;

5. Whether Claimant is entitled to benefits for permanent partial impairment; and

6. Whether Claimant is entitled to benefits for disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant contends that he strained himself while pulling drill steel at work on August 4, 2007, resulting in a right groin area injury. He further contends that he is entitled to workers' compensation benefits through the first part of January 2008.

Defendants contend Claimant is not entitled to any additional benefits in relation to the alleged industrial injury. They argue that Employer paid all of Claimant's related medical bills incurred prior to the hearing, and that no features of any compensable injury persisted after August 10, 2007.

DEFENDANTS' OBJECTION

At the hearing, Defendants objected to Claimant's proffered testimony of Judy O'Hara because Claimant failed to disclose Ms. O'Hara as a witness in response to Defendants' Interrogatory No. 4, which states:

> *Please state the name, address and telephone number of each and every person you intend to call or may call, if any, as a witness at the hearing of this action, or via post-hearing deposition, and outline the subject matter on which each is expected to testify and a summary of the testimony which you expect to adduce through said witness.*

Exh. G, p. 10.

Claimant did not argue against Defendants' objection. The Referee took the objection under advisement and allowed Ms. O'Hara to testify.

Interrogatory No. 4 was served on Claimant via U.S. Mail, as part of Employer/Surety's Interrogatories and Requests for Production of Documents, on October 15, 2009. Exh. G, p. 12. By the time of the hearing, on November 23, 2009, Defendants had not received a response to their discovery request.

After a careful review of the record, the Commission finds that Claimant did not timely respond to Interrogatory No. 4. Even so, the Commission declines to sanction Claimant. The Idaho Supreme Court has held that *pro se* Claimants should not be held to the standard of an attorney in workers' compensation proceedings. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990). The Commission recognizes that, under certain circumstances where a party has failed to identify its hearing witnesses, it is sometimes appropriate to exclude the testimony of those witnesses from the record or impose other penalties. However, when it comes to a *pro se* claimant, who does not know the rules, sanctions are inappropriate where, as here, the movant has not previously filed a motion to compel or attempted to confer with the claimant concerning his delinquency. Therefore, Ms. O'Hara's testimony is admitted into evidence.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. The testimony of Judy O'Hara taken at the hearing;
3. Claimant's Exhibit 1 admitted at the hearing; and
4. Defendants' Exhibits A-I admitted at the hearing.

FINDINGS OF FACT

1. Claimant was 51 years of age and resided in Boise at the time of the hearing. At the time of the alleged industrial accident, he was working for Employer as a driller.

2. On August 4, 2007, Claimant presented to the emergency room at Ferry County Public Hospital in Republic, Washington. He complained of right abdominal pain that had persisted since he was injured at work on July 25, 2007. Claimant described the onset of his pain as a "sudden tearing in his right abdomen" while he was lifting some heavy drill pipe at work. Exh. E, p. 3. The Initial Nurse's Assessment indicated "possible hernia - pain rt testicle x 2 wks." Exh. E, p. 1.

3. Jim Corbett, a physician's assistant, examined Claimant, diagnosed on palpation a "likely indirect" right inguinal hernia and arranged for a follow-up examination with a surgeon. *Id.* Mr. Corbett placed Claimant on light duty until his next appointment.

4. On August 10, 2007, Claimant followed up with Mehrdad Farahmand, M.D., a surgeon. Claimant reported that his right inguinal pain started while he was doing some heavy lifting at work on July 25, 2007. He also reported that he was feeling better. Dr. Farahmand found no evidence of hernia on exam and recommended conservative treatment with anti-inflammatory medication. He did not place any limitations on Claimant, stating, "I do not see any problems with him returning to work unless the pain worsens and if that is the case then he should plan for a light duty type of work." Exh. F, p. 2.

5. Claimants' pain did not thereafter increase, and he notified Employer that he was ready and able to return to work sometime in mid-November 2007. Claimant did not seek medical care for his inguinal pain condition after August 10, 2007.

DISCUSSION AND FURTHER FINDINGS

6. The provisions of the 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). However, the Commission is not required to construe facts 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).

Causation.

7. A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). 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). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

8. Claimant argued in his brief that he was injured at work on August 4, 2007. This is at odds with 1) the medical records of Mr. Corbett and Dr. Farahmand, 2) the injury report bearing Claimant's signature, 3) Claimant's April 29, 2009 letter to Surety, and 4) Claimant's Complaint, all of which indicate the injury occurred on July 25, 2007.

9. In addition, Claimant's testimony at trial contradicts the documentary evidence, particularly where temporal issues are concerned. For example, Claimant testified that he was

taken to the hospital the morning after he was injured. However, Mr. Corbett's August 4, 2007 Emergency Room Report states:

> *The patient states that two weeks ago he was working for M and M, Inc., a core drilling company working for Kinross. He states that on July 25, 2007 he was lifting some heavy drill pipe when he felt a sudden tearing in his right abdomen and he has been experiencing pain since that time. He states that the pain can come on with lifting and at times at rest.*

Likewise, Dr. Farahmand's August 10, 2007 Consultation Report states:

> *The patient reports he noticed some right inguinal pain on 7-25-07. This occurred when he was doing some heavy lifting at work and picking up some pipes.*

10. In spite of Claimant's testimony and briefing to the contrary, the remainder of the evidence in the record indicates he obtained treatment, on August 4, 2007 and August 10, 2007, for right inguinal pain arising from heavy lifting at work on July 25, 2007. The extent to which Claimant's testimony fails to square with the documentary evidence raises credibility concerns. However, the fact that Claimant does not recall dates as recorded in his medical records is not unusual and is not sufficient to discredit his testimony on other matters.

11. Further, Mr. Corbett's responses on the industrial injury report indicate that the condition for which Claimant sought treatment on August 4, 2007 was "probably (50% or more)" caused by the accident at work. Exh. E, p. 5. The Commission finds that Claimant's right inguinal pain condition was caused by an industrial injury on July 25, 2007.

Medical care.

12. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to

make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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, 890 P.2d 732 (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).

13. In *Sprague*, the following factors were found to be relevant to the determination of whether the particular care at issue in that case was reasonable: 1) the claimant benefitted from gradual improvement from the treatment rendered, 2) the treatment was required by a claimant's treating physician, and 3) the treatment was within the physician's standard of practice and the charges were fair and reasonable.

14. Defendants argue that Claimant is not entitled to additional benefits for medical expenses because Employer paid all of Claimant's pre-hearing medical expenses and, further, because Claimant has not established that he suffered any compensable injury that persisted after August 10, 2007.

15. It is undisputed that Dr. Farahmand's August 10, 2007 Consultation Report states that he released Claimant without restrictions, suggesting that light-duty work may be appropriate *if* Claimant's pain increased in the future. It is also undisputed that Claimant wrote in his April 29, 2009 letter to Surety, "No, I never stated my pain worsened," that Employer paid all of Claimant's prehearing medical expenses, and that Claimant never sought medical care for his right inguinal pain condition after August 10, 2007. Exh. 1, p. 3. In light of these facts, the Commission is unconvinced by Claimant's testimony that Dr. Farahmand diagnosed any lasting condition or required him to be on bed rest.

16. The Commission finds Defendants liable for Claimant's medical expenses associated with his right inguinal pain condition. However, Claimant has failed to establish that any additional medical expenses were due at the time of the hearing.

Temporary total disability ("TTD").

17. Idaho Code § 72-408 and § 409 provide time loss benefits to an injured worker who is temporarily totally disabled. In support of his TTD claim, Claimant testified that he was required to be "on bed rest" following both his August 4, 2007 examination by Mr. Corbett and his August 10, 2007 examination by Dr. Farahmand. Claimant further testified that, at some later point, he was able to do light-duty work; however, he did not return to work because Employer had none available for him.

18. Claimant's testimony is inconsistent with the medical records, which indicate he was released, first for light-duty work on August 4, and then without restrictions on August 10.

19. The Commission finds the medical records more credible than Claimant's testimony because they were prepared contemporaneously by an uninterested party. The medical records do not support Claimant's testimony at hearing that he was required to be "on bed rest" after his industrial accident. Instead, the medical records show that Claimant was in a period of recovery from August 4-10, 2007, and capable of performing light-duty work. Under *Maleug v. Pierson Enterprises*, 111 Idaho 789 (1986), once a claimant establishes by medical evidence that he is within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work

release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which Claimant has reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

20. As stated above, the medical evidence establishes that Claimant was within a period of recovery from his industrial accident from August 4-10, 2007. Employer therefore has the burden of showing that suitable light-duty work was offered to Claimant during his period of recovery, or that suitable light-duty work is otherwise available in Claimant's labor market. Employer has not met its burden of proof in this regard. Claimant's exaggerations at hearing about his capability to perform work do not establish that Claimant refused or declined an offer of suitable light-duty work, when none was offered. Had Employer made a reasonable offer of suitable, light-duty work to Claimant, and Claimant refused or declined without substantiation of his medical condition, then Claimant would not have been eligible for TTD benefits. The waiting period from Idaho Code § 72-402 applies, and Claimant is entitled to TTD benefits only for August 10, 2007.

Permanent partial impairment/disability in excess of impairment.

21. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When

determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

22. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

23. In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

24. The Commission finds insufficient evidence in the record to establish that Claimant suffered any permanent partial impairment. As a result, Claimant has failed to establish any right to benefits for permanent partial impairment or disability in excess of impairment.

CONCLUSIONS OF LAW

1. Claimant has proven that his 2007 right inguinal pain was due to the industrial accident.

2. Claimant has proven his entitlement to medical benefits for his right inguinal pain condition; however, no medical benefits were due at the time of hearing.

3. Claimant has proven his entitlement to temporary total disability benefits for

April 10, 2007.

4. Claimant has failed to prove his entitlement to benefits for permanent partial impairment.

5. Claimant has failed to prove his entitlement to benefits for disability in excess of impairment.

ORDER

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

1. Claimant has proven that his 2007 right inguinal pain was due to the industrial accident.

2. Claimant has proven his entitlement to medical benefits for his right inguinal pain condition; however, no medical benefits were due at the time of hearing.

3. Claimant has proven his entitlement to temporary total disability benefits for August 10, 2007.

4. Claimant has failed to prove his entitlement to benefits for permanent partial impairment.

5. Claimant has failed to prove his entitlement to benefits for disability in excess of impairment.

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

DATED this __10th___ day of June, 2010.

INDUSTRIAL COMMISSION

__/s/_____
R. D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___10th___ day of ___June_____, 2010, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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