

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT M. BERMEA,)
)
 Claimant,)
)
 v.)
)
 BIG DOG INSULATION,)
)
 Employer,)
)
 and)
)
 TRAVELERS PROPERTY CASUALTY)
 COMPANY OF AMERICA,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2010-020494

ORDER

FILED 10/07/2011

Pursuant to Idaho Code § 72-717, Referee submitted the record in the above-entitled matter, together with her recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove that Defendants are liable for any of his medical costs related to his right ankle dislocation treated on and after July 11, 2010.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 7th day of October, 2011.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ROBERT BERMEA
1905 W BANNOCK
BOISE ID 83705

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

srn

/s/

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**FINDINGS OF FACTS,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED 10/07/2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise, Idaho on June 10, 2011. Claimant, Robert Bermea, was present and represented himself. Defendant Employer, Big Dog Insulation, and Defendant Surety, Travelers Property Casualty Company of America, were represented by W. Scott Wigle. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Briefs were later submitted, and the matter came under advisement on August 10, 2011.

ISSUES

The issues to be decided by the Commission as a result of the hearing are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment; and, if so
2. Whether Claimant's condition is due in whole or in part to a subsequent injury or condition; and
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits;
 - c. Permanent partial impairment; and
 - d. Disability in excess of impairment.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered an industrial accident resulting in an injury to his right ankle, on June 18, 2010, after he fell from a ladder at the back of a work truck. It is also undisputed that Claimant's supervisor drove him home that day and offered Claimant medical treatment, which Claimant declined.

Claimant contends that the industrial injury did not resolve on its own, but ultimately required surgical repair, on July 11, 2011. He relies upon the testimony of himself, his girlfriend, her son, and her sister to establish that the industrial accident is the only event that could have caused Claimant's right ankle injury because Claimant was unable to leave the sofa between the date of his injury and the date on which he finally obtained medical treatment. Claimant seeks reimbursement for his medical care, as well as benefits for temporary total disability, permanent partial impairment and permanent partial disability.

Defendants counter that Claimant's reports as to what caused his need for surgery are not credible and, thus, he has failed to adduce sufficient evidence to prove Defendants are liable for

any of his benefits. They emphasize that when Claimant finally sought medical care, more than three weeks after he fell at work, he consistently reported to his physicians that he had injured his ankle while drunk and chasing rabbits in the park. Further, it was only after a representative from Ada County Indigent Services (ACIS) began assisting him with his medical bills, several weeks after his surgery, that Claimant filed a workers' compensation claim. Defendants rely upon the internal inconsistencies within Claimant's own statements about the onset of his symptoms to support their case-in-chief. In the event Claimant does prove his right ankle surgery was related to his industrial accident, Defendants concede that he is entitled to TTDs from June 18, 2010 until either December 16, 2010 or March 24, 2011; however, they maintain that Claimant is not entitled to any PPI or PPD benefits, even under this scenario.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition testimony of Robert Bermea taken on May 5, 2011;
2. Claimant's Exhibits 1-6 and Defendants' Exhibits 1-9, admitted at the hearing;
and
3. The testimony of Claimant, Verda Chavez, Kenneth Gough and Susan Smith taken at the hearing.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

OBJECTIONS

All pending objections are overruled.

FINDINGS OF FACT

BACKGROUND AND DELAY IN SEEKING MEDICAL TREATMENT

1. Claimant was 47 years of age on the date of the hearing and residing in Boise. He presented as someone with an upbeat, somewhat eccentric personality. He was clearly inexperienced with the details of navigating through a courtroom setting, but he nevertheless elicited relevant responses from his witnesses and provided material testimony on his own behalf.

2. On June 18, 2010, Claimant fell off a ladder at the back of a work truck, injuring his right ankle. He immediately reported the injury to his supervisor, who took a written statement from Claimant. Claimant declined medical treatment, and his supervisor drove him home. Claimant never returned to work for Employer.

3. Claimant provided detailed testimony at the hearing about his industrial accident and injury and his subsequent three weeks, which he maintains he spent on the couch:

And so it was – the ladder was leaning against that end corner and as I got on it to go get John Paul, it slid off the back – the rail. That’s what it is. It’s a little metal plate back there and – and I could feel the ladder entangling into my foot. As I was going down I was already bracing for a – for a crouch and the ladder somehow just took the rest of my foot out. It got tangled up in there and, then, I was pounding the ground, because I could feel the pain and about a minute or two after that John Paul came out, because I can understand that, there was no more insulation, and he came out and he saw me down there and I told him, hey, you know, this is – the ladder just slid off the back of the truck and I sat on the back of the truck – well, we called the boss and I sat on the back of the truck waiting for the boss to arrive and at that point the boss – I think about 5:00’ish the boss shows up in another coworker’s truck and transports me over to my girlfriend’s house and we took a statement there. We took a statement on that right there and he had to leave, because – he said he had to find somebody to help John Paul finish that job, which I can understand. But that’s where I stayed, right there on the couch, for three weeks, approximately, and, then, I finally came to my senses.

Tr., pp. 17-18. Claimant testified that he waited more than three weeks to obtain medical treatment, even though many people told him he should not wait. Then, he finally decided to see a doctor because he was tired of the nagging:

Q (Referee) ...Did you at anytime seek medical care?

A After three weeks.

Q Okay. Then what did you do?

A Went to the hospital.

Q Which hospital?

A St. Luke's.

Q And why did you go after three weeks?

A Common sense finally sank in and I got enough yelling from my girlfriend and her sister and everybody else that kept seeing me. You know, ["]you need to go to the hospital. Are you still hurt? How did it happen?["] I just was getting annoyed and I knew that eventually I couldn't be like that forever.

Tr., p. 18.

4. Kenneth Gough is the son of Claimant's girlfriend of 15 years, Verda Chavez. He also lived at Ms. Chavez's house at the time of Claimant's industrial injury. During this time, Mr. Gough only worked off and on as a day laborer. He observed Claimant's return to Ms. Chavez's house following his industrial accident. Mr. Gough first testified that Claimant's supervisor and coworker "carried" him up to the back, and that someone said Claimant had hurt his ankle stepping off a curb. *See*, Tr., p. 63-64. On cross-examination, however, Mr. Gough testified that Claimant did not need to be carried into the house. He also testified that Claimant's right ankle was "cocked" and swollen:

Q (Mr. Wigle): ...Who carried him into the house?

A I don't think anyone carried him. He was pretty much standing under his own power on his foot. I mean we made sure to be right there so he wouldn't fall or nothing.

Q Did you see his foot that day?

A Oh, yes.

Q What did it look like?

A I forget which one it is now. I think it was his right. It was just - - just cocked, you know, like - - further than I can almost [sic] and it was swollen and it didn't look good.

Q Did he have his shoe off? Did you see it with his shoe off?

A I believe at that point, yeah, he did have his shoe off.

Tr., p. 64.

5. Thereafter, according to Mr. Gough, Claimant self-treated at Ms. Chavez's house for two or three weeks because he did not think his ankle was broken:

Q (Mr. Bermea): Okay. From that point - - that point on where was I at?

A The house.

Q Doing - -

A Nothing. Sitting there.

Q Okay. How long did that last?

A Oh, I don't think you went to the doctor for two or three weeks.

Q Okay. Did I - - did I - - did I go anywhere? Did I go - -

A No. You sat at the house and iced it and kept it bandaged and - -

Q Okay.

A Because you didn't think it was broke [sic] at the time.

Tr., p. 63.

6. Mr. Gough told Claimant he should have his ankle examined. However, according to Mr. Gough, Claimant's stubbornness prevented him from seeking medical care in a timely fashion.

7. When Claimant finally obtained medical attention, Mr. Gough visited him at the hospital. However, he was never present during any conversations with any of Claimant's physicians.

8. Ms. Chavez also testified that Claimant spent all of his time on the couch, the bed or the bathtub following his industrial accident. From the date of his accident until he sought medical care, Ms. Chavez testified, Claimant "...[j]ust laid on the couch and on the bed, wrapped up [his] foot, [and] laid in the bathtub to try to take a bath...". Tr., p. 50. She further testified

that she helped care for Claimant and that she could see that he was in pain. Ms. Chavez described Claimant's injury on his arrival from work on June 18:

The foot was totally swollen. Bent. So, the foot was - - it was bent - - the bottom of the foot was up like up here. You could see the bottom of the foot up here on your - - on your leg, instead of down on the ground where it should have been. It was all swollen. It had three bumps where I guess the top of your foot has bones, three bumps almost ready to break through and they did eventually break through. It was just swollen and ugly. All kinds of colors. It was very serious.

Tr., p. 54. She confirmed her testimony on cross-examination:

A...like I said, it was twisted clear up to - - the bottom of his foot was up against the leg.

Q (Mr. Wigle) You're pointing to the side of your leg above your ankle.

A Yes. Yes. That foot - - the bottom of the foot was above the ankle.

Q Okay.

A Twisted that much.

Q And the bones, if not poking out, close to being - -

A Close to poking out and eventually did.

Tr., p. 55. Although she testified that Claimant's injury was serious, Ms. Chavez did not call 911, Claimant's boss or anyone else to obtain medical assistance before July 11 because she did not want to make Claimant, who kept saying it was just a sprain, mad. Ms. Chavez explained that she repeatedly urged Claimant to seek medical attention, but he would not go.

9. Like Mr. Gough, Ms. Chavez attributed Claimant's refusal to seek medical attention for so long to his stubborn personality and crazy behavior. *See*, Tr., pp. 51, 52. She surmised that she and he were both in shock the whole time between June 18 and July 11, when he finally obtained treatment.

10. Susan Smith, Ms. Chavez's sister, also testified about Claimant's mental and physical states shortly following his industrial accident. She said it was obvious that Claimant

needed medical care, and illustrated Claimant's obstinacy in refusing treatment, in part, by impersonating his responses:

Q (Mr. Bermea): What would you say my mental capacity was at the moment?

A You really want me to say that?

...

A You're angry. You're angry and you're mean and you're ignorant and - - well, you asked. You know, like - - like you know everything. You don't want to listen to anybody.

Q And that showed the very moment that you saw my injury for the first time?

A Yes. [“]No, I'm okay. I'm okay. I'm okay.[”] It's obvious you're not okay, Robert.

Q After that you would - - how long would you say that you saw me laid up?

A Well, until the day you went to the hospital finally. I believe I probably saw you every day from the - - not the first day you hurt your foot, but the day after that I was - - I was at my sister's house every day. I help her quite a bit. And so I saw you every day and every day I said you need to go to the hospital.

Tr., p. 69.

11. Ms. Smith lives near Veterans Memorial Park in Boise. From her house, it is two blocks to the river and a bridge leading to the park. During the summer of his industrial accident, Claimant sometimes stayed with Ms. Smith and did work around her house. He would also walk her dog at the park and by the river. Ms. Smith did not know exactly when Claimant was at her house that summer, but she explained that he was free to stay there whenever he wanted to, and often did during that period.

12. Like Mr. Gough, Ms. Smith never had any conversations with any of Claimant's physicians.

MEDICAL TREATMENT

13. On July 11, 2010, more than three weeks following his industrial right ankle injury, Claimant sought medical treatment at the emergency department at St. Luke's Regional Medical Center. Ms. Chavez accompanied him.

14. Claimant was initially evaluated by Steven N. Wyman, M.D. Dr. Wyman's chart note indicates Claimant told him he hurt his ankle while chasing rabbits: "Chief complaint/quote: "I fell chasing rabbits" a week and a half ago. reports [sic] only able to walk to the bathroom." DX 3, p. 1.

15. Similarly, Claimant advised a subsequent treating physician at St. Luke's that he had injured his ankle about two weeks previously while he was drunk and chasing rabbits near Veterans Memorial Parkway. Michael J. Curtin, M.D. recorded Claimant's statements in his chart note:

The patient reports that two weeks ago he was intoxicated, ambulating somewhere near Veterans Parkway, when he injured his right lower extremity. He did note deformity and pain. He has had difficulty with ambulation since. Given persistent deformity and ongoing pain his significant other convinced him to come to the ER. He presented for evaluation and Dr. Steve Wyman performed that evaluation prior to phoning me.

The patient is adamant that he was not injured otherwise in the fall. He has been unable to work during the past two weeks, not surprisingly. Though he was intoxicated at the time he vehemently denies history of alcohol abuse at present. He is well aware of the implications of alcohol withdrawal and is adamant that he is not a risk for alcohol withdrawal at this time. He also denies IV and drug abuse.

DX 4, p. 1.

16. Claimant was diagnosed with a right talar dislocation and taken to surgery, where an open reduction with pinning of the talonavicular joint was performed. Jason F. Robison,

M.D., Claimant's surgeon, indicated in his operative report that he also believed Claimant had injured himself while drunk and chasing rabbits.

17. Claimant is an occasional drinker. However, medical tests conducted on July 11, 2010 detected no intoxicating substances in Claimant's system.

18. All three physicians whose treatment is represented by chart notes in the record reported Claimant had an open lesion on his right ankle. Dr. Wyman described it as a soft tissue infection, Dr. Curtin as a skin ulceration, and Dr. Robison as a full thickness skin loss.

19. Following surgery, Claimant underwent a course of physical therapy. By the time of hearing, his symptoms had largely resolved.

20. Dr. Robison's December 16, 2010 chart note is the only medical evidence in the record that addresses Claimant's claim that his injury is work-related. Dr. Robison wrote:

He has recently been denied a workers' compensation claim on this. He brought in some paperwork today to try and clarify the mechanism for me. While he initially stated he had twisted his foot while chasing rabbits while intoxicated, he says, at this point, that this is actually related to a work injury with documentation stemming back from 06/18/2010. Apparently, at that point, he misstepped coming off of a ladder. They documented a claim but no x-rays were taken. He said he had deformity and an inability to weight bear from that point forward until he presented to the emergency department. This note just addends what he claims to be his mechanism of injury.

DX 5, p. 8. Dr. Robison offered no medical causation opinion.

FIRST REPORT OF INJURY

21. There is some question as to when and with whom the notion of filing a workers' compensation claim originated. Claimant's testimony was not clear on this point, but he confirmed that he was aware workers' compensation benefits would pay expenses related to workplace injuries before he obtained treatment for his right ankle.

22. A copy of Claimant's First Report of Injury (FROI) in evidence bears date stamps from both ACIS (September 15, 2010) and the Commission (September 16, 2010). DX 2, p. 1. There is also a fax strip identifying ACIS as the sender dated September 16, 2010. *Id.* Claimant met with a representative from ACIS following his surgery about his medical bills. He acknowledged that he still owes ACIS for these bills, but denied that he felt pressured to file a workers' compensation claim by anyone at ACIS.

23. Defendants suggest that ACIS faxed its copy to the Commission, and this is how Claimant's FROI came into the Commission's possession. They believe that such evidence tends to establish that Claimant only filed his claim to comply with some kind of request from ACIS. Claimant testified, however, that he procured and returned the FROI through direct correspondence with the Commission. There is inadequate evidence in the record from which to determine Claimant did not file a copy of the FROI directly with the Commission. However, the record does establish that ACIS had a copy of the FROI before the Commission did and that, more likely than not, Claimant provided it.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Idaho Worker's 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). Facts, however, need not be construed 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

The Idaho Worker's Compensation law defines accident to mean "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." An injury is "construed to include only an injury caused by an accident, which results in violence to the physical structure of the body." See I.C. § 72 – 102(18); *Perez v. J.R. Simplot Company*, 120 Idaho 435, 816 P.2d 992 (1991); *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995).

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).

The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006).

24. Here, there is no question that Claimant suffered an industrial injury to his right ankle on June 18, 2010. There is also no dispute that Claimant required medical treatment, including surgery, for a dislocated right ankle on July 11, 2010, nor that he told medical care providers on that day that he injured his ankle while drunk and chasing rabbits in the park, but later recanted this explanation. Therefore, the primary issue in this case is whether Claimant can carry his burden of proving that the medical treatment he received on and after July 11, 2010 is related to his fall from the back of the work truck, as opposed to some subsequent event.

WITNESS CREDIBILITY

25. Given the conflicting evidence in the record, the credibility of each witness must be assessed.

26. **Ms. Chavez.** Ms. Chavez testified that Claimant could not have left her couch because his right ankle and foot were in such bad condition after his June 18 accident. She testified that the bottom of his right foot was above his right ankle, touching his leg. Further, he had bones that looked obviously broken poking out against the skin of his right foot which eventually broke through.

27. Ms. Chavez was with Claimant while he told at least one physician on July 11 that he injured himself at the park; however, the evidence establishes that she did not correct Claimant or otherwise notify any medical care provider that Claimant's report was inaccurate, other than to shake her head, until sometime after Claimant's surgery. At first, she testified that she told Claimant's physician on July 11 that Claimant had injured his ankle at work. On cross-examination, however, she admitted she did not discuss this matter with Claimant's physician until after Claimant was discharged, at the physician's office. Ms. Chavez's failure to speak up, immediately, tends to indicate she did not dispute Claimant's rabbit-chasing scenario at the time

he related it to his physician. Further, Ms. Chavez's claims that she said anything at all to any of Claimant's physicians about a workplace injury are unsupported by any other evidence in the record.

28. In addition, Ms. Chavez's description of Claimant's condition following his industrial accident on June 18, particularly compared with Mr. Gough's description, appears greatly exaggerated. If the bottom of Claimant's foot were indeed above his ankle and touching his leg, as Ms. Chavez described, it is unbelievable that Claimant would deny medical attention or be able to walk into the house without being carried, as Mr. Gough testified. In addition, Mr. Gough did not identify bruising, while Ms. Chavez described multi-colored bruising.

29. Further, the dramatic tone of Ms. Chavez's testimony was that of an advocate. This is understandable, given her relationship with Claimant. However, Ms. Chavez's tone, exaggeration and inconsistencies left the Referee dubious as to the relative truth of any of her statements on any material point. As a result, no weight is allocated to her testimony.

30. **Mr. Gough.** Mr. Gough thought Claimant had injured his ankle stepping off of a curb, when this is clearly not the case. He also testified, inconsistently, that Claimant was carried into the house following his industrial accident and, later, that he did not need assistance but just spotters in case he started to fall. He consistently testified that Claimant "sat" on the couch the whole time from June 18-July 11, in slight contrast with the other witnesses, who all described him as "laying" on the couch. Like the other witnesses, Mr. Gough testified that he thought Claimant needed medical treatment:

Q (Mr. Wigle): Did you talk to him about going to the doctor?

A Yes. Yes, I did.

Q Tell me about that.

A Well, as soon as I saw it I said you need to go to the hospital to get it looked at, you know, but he says that, you know, it's not broke, it's - -

it's sprained, you know, and you can't make someone go to the hospital,
so - -

Tr., p. 65. Mr. Gough described Claimant's ankle as swollen and malpositioned ("cocked"). *Id.*, p. 64. He also testified that Claimant did not go anywhere until he went to the doctor.

31. Mr. Gough's testimony is credible. Although he is inaccurate about some facts, he did not appear to be intentionally exaggerating the facts as he knew them. The injury Mr. Gough described is different, however, than the injury with which Claimant presented to the emergency room, which included a full-thickness open lesion. There is no medical evidence in the record to explain how the injury Mr. Gough described on the day of Claimant's industrial accident morphed into the injury with which Claimant presented to the emergency room. Further, there were times following the industrial accident when Mr. Gough did not witness Claimant's activities, when he could have reinjured his ankle. Mr. Gough's testimony fails to rebut Claimant's statements to his medical care providers about the onset of his right ankle injury.

32. **Ms. Smith.** Ms. Smith's testimony is also credible. She did not shy away from questions, the answers to which established Claimant's opportunity and past experience with accessing the park near her home. In addition, she was persuasive in expressing her unfiltered frustration with Claimant for failing to see a physician immediately following his industrial accident. However, like Mr. Gough, Ms. Smith was not with Claimant all of the time, even though she visited every day. Ms. Smith's testimony also fails to rebut Claimant's statements to his medical care providers about the onset of his right ankle injury.

33. **Claimant.** For Claimant to prevail, the evidence must establish a reasonable explanation for why he consistently reported to his medical care providers that he was drunk and chasing rabbits if his injury was really due to a workplace accident. Given that Claimant was

generally aware that workers' compensation insurance would cover medical bills from a workplace accident, it is particularly puzzling that he would inaccurately report that his symptom onset was related, instead, to a drunken folly. This foundational issue is intertwined with questions regarding Claimant's credibility, so they are addressed together, below.

34. Claimant offered two explanations for why he said, inaccurately, that he was chasing rabbits. First, that he was crazy from lying on the couch and second, that he was just being hard-headed:

Q (Mr. Wigle): Why would you tell them that if it wasn't true?

A After three weeks of being on that couch I had no idea where my head was at at the time. It was - - I was so - - it was like a blistering - - how can I say it? It was just - - I wasn't thinking straight. I was going mad. I was going crazy.

...

Q Okay. Well, you knew what worker's comp is generally, didn't you?

A Generally. Yes, sir. Yes.

Q Yeah. That if you hurt yourself on the job that [sic- it's] a way to get the medical bills paid - - even some money for the time you're off work?

A Yes.

Q Okay. What were you thinking?

A I was being hard headed [sic]. I was being very - -

Q I understand that, but I still don't get why it would be rabbits at the park.

A I don't know. I don't know. I don't know how my people would even explain that. They got other ways and phrases to describe what I was doing and thinking.

Tr., pp. 28-29, 30.

35. Similarly, Ms. Chavez, Mr. Gough and Ms. Smith each blamed Claimant's stubborn streak. Ms. Smith tried to explain her perspective on Claimant's inconsistent statements:

Q (Mr. Wigle): I'm trying to understand this. Is Robert, in your experience, a truthful person?

A Oh, yeah. He's one of the most honest people I know. I mean I would - - I'd trust him with grandkids.

Q Okay.

A And I don't trust hardly anybody with my grandkids.

Q So, tell me some - - tell me why it makes sense that he would go to the hospital and say I was drunk chasing rabbits at the park.

A Well, I can't ever say that would make sense. It don't make sense to me. Maybe he was in pain and hallucinating. I don't know. He's just - - I don't know how to explain. That's just how Robert is. A little bull head, a little stubborn, and my term was ignorant. You know, that - -

Q I got you.

A - - nothing to do with intelligence.

Q I understand.

A Attitude. Angry. I think he's real agree [sic] at life. Maybe that makes you shut things away from you. You know, don't let anybody close. Be a little ignorant. I don't know how else to say anything else.

Tr., pp. 75-76.

36. The Referee understands how Claimant's stubborn (hard-headed) disposition could account for why he refused immediate medical care. He did not believe his ankle was broken and thought it would get better with rest and other self care, so he obstinately refused the advice of others. However, the Referee fails to see how stubbornness could possibly explain why Claimant would fabricate a story about chasing rabbits in the park, drunk, if he actually thought his injury occurred at work. Further, there is no medical or psychological evidence suggesting that Claimant was intoxicated or otherwise impaired at the time he made the statements in question. His explanations on these grounds are unconvincing.

37. Claimant had nothing to gain by telling his medical care providers, inaccurately, that he had injured his ankle in a non-work-related event. To the contrary, he had a financial incentive to report that the injury was, indeed, related to his workplace accident. So, why report the rabbit-chase and later recant? Defendants posit that Claimant was telling the truth about an ill-fated rabbit hunt, but was later prompted to claim workers' compensation benefits by a representative from ACIS. They argue that the evidence in the record shows that it was only

after ACIS involvement that Claimant sought to ascribe all of his right ankle symptoms to his industrial accident.

38. Claimant denied that anyone from ACIS encouraged him to file a claim; however, he was unable to provide a reasonable explanation for why he would give the rabbit-chase report if it were inaccurate, or for why he waited for nearly three months following his industrial accident to file a workers' compensation claim. Further, date stamps and a fax strip on copies of Claimant's FROI show that Claimant provided it to ACIS before it was received at the Commission, possibly because ACIS forwarded it on. (*See*, DX 2, p. 1). The evidence tends to show that ACIS played some role in this claim. This does not establish ill intentions on Claimant's part, but it does indicate that his testimony on this point is incomplete or inaccurate.

39. In addition, the evidence in the record does not rule out the possibility that Claimant was chasing rabbits in Veterans Memorial Park when he said he was. The park is just blocks away from Ms. Smith's house, and he had been there before. Moreover, the lay eyewitness evidence of Claimant's industrial ankle injury is inadequate to establish that he was physically unable to engage in the activities he reported to his physicians on July 11. Mr. Gough's testimony is more credible than Ms. Chavez's testimony, so his recollection that Claimant was able to stand on his foot, which was swollen and malpositioned, is more persuasive than Ms. Chavez's recollection illustrating a much more serious injury.

40. Claimant's own testimony as to his condition following his June 18 initial injury fails to establish any material facts in this regard because it is internally inconsistent. For example, Claimant testified at his deposition that he had previously sprained his ankle, so he knew that his June 18 injury felt different than a sprain, making the point that he knew at the outset that it was a very serious injury. However, all of the witness testimony, including

Claimant's at the hearing, establishes that Claimant did not want medical attention following his industrial injury because he thought his ankle was just sprained and would heal on its own. The latter version is consistent with the decision he and his coworker made, following the accident, to wait two hours for Claimant's supervisor rather than to seek medical care immediately. Because the latter version is supported by other credible evidence in the record, it is more persuasive.

41. Because Claimant is unable to reasonably reconcile his inconsistent material statements, the Referee finds Claimant's testimony as to the condition of his right ankle following his industrial accident on June 18, 2010 is not credible. Likewise, his testimony as to the onset of his symptoms requiring medical treatment on July 11, 2010 is internally inconsistent and also lacks credibility. Claimant's testimony on both of these points is allocated no weight in these proceedings.

42. The Referee further finds that, on June 18, 2010, Claimant refused medical treatment because he believed his ankle was just sprained. He had a swollen right ankle with pain and his foot appeared to Mr. Gough to be malpositioned. There is no medical evidence to indicate whether or not this condition could progress to the condition with which Claimant presented at the hospital three weeks later, which featured a full-thickness open lesion, among other injuries, or whether Claimant could have been running around during the ensuing three weeks. As such, the medical evidence is inadequate to prove that the industrial injury, and not some subsequent event, prompted Claimant's need for medical treatment on July 11, 2010.

43. The record establishes that Claimant suffered a workplace accident on June 18, 2010 and was entitled to reasonable medical care and treatment related to that event. However, Claimant declined medical treatment offered by his supervisor on that day. Thereafter, he either spent three weeks immobilized while his industrial right ankle injury degenerated or, at some

point, he became intoxicated and ran around in the park, again injuring his right ankle. Claimant's causation case relies entirely upon his witness testimony. As determined, above, the testimony of Claimant and Ms. Chavez is not credible and is, thus, inadequate to establish that Claimant's condition for which he obtained treatment on July 11, 2010 was related to his workplace injury. Likewise, the testimony of Ms. Smith and Mr. Gough is inadequate to establish that the industrial injury, and not some subsequent event, prompted Claimant's need for medical treatment on July 11, 2010.

44. As a result, Claimant has failed to prove by a preponderance of evidence that the industrial accident caused or contributed to the medical condition for which he obtained treatment, starting in July 2010. Claimant appeared sincere at the hearing, and he is a charming fellow. However, none of the evidence in the record provides a cogent explanation for why he would report to multiple physicians that he injured his right ankle chasing rabbits in the park while intoxicated unless that was the truth as he knew it.

45. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that Defendants are liable for any of his medical costs related to his right ankle dislocation treated on and after July 11, 2010.

2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 29th day of September, 2011.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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/s/