BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DALLAS L. CLARK, Claimant, v. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2009-011431** **ORDER DENYING RECONSIDERATION AND REHEARING** **Filed August 28, 2012**

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's March 13, 2012 decision in the above-captioned case. Claimant argues that the decision is not based on substantial and competent evidence, because the Referee overlooked or misinterpreted key evidence, improperly excluded other evidence, and made "obvious and clear" factual errors. Claimant requests reconsideration or rehearing of the case so that additional witnesses may testify. Defendants object to the motion, arguing that the decision is supported by substantial and competent evidence and that Claimant's motion is merely asking the Commission to reweigh and reinterpret evidence already considered.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must "present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128

P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party's favor.

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

DISCUSSION

I.

Factual and Procedural History

In the decision, the Commission held that Claimant failed to prove the occurrence of an industrial accident. Our review of the record on reconsideration confirms that the substantial and competent evidence supports this conclusion.

Claimant, a waitress, testified at hearing that she suffered a herniated disc on November 24, 2008 as she attempted to lift a heavy silverware tray onto a high shelf. Claimant's hearing testimony was contradicted by earlier accounts of how her back pain began. She first sought treatment for back and leg pain from a chiropractor on December 11, 2008. She told the chiropractor that she had been suffering pain for about three weeks. Chiropractic care failed to alleviate Claimant's symptoms, and on December 16, 2008, she presented to Community Care, an urgent care and injury center in Idaho Falls. Claimant was diagnosed with sciatica. She was prescribed medication, but her pain continued, and on December 19, she returned to Community Care, which referred her to the emergency room at Eastern Idaho Regional Medical Center. Claimant's chief complaint at the emergency room was back pain, with an onset of "several days ago." D.E. D, p. 10. Claimant informed emergency room personnel that she had suffered from "similar symptoms previously," though it is unclear from the medical records when these prior

symptoms occurred. *Id*. Claimant was diagnosed with lumbar strain and treated with medication. There is no mention, in the records, that her pain began after a workplace accident.

On December 29, 2008, Claimant began to treat with Dr. Gary Walker, a specialist in physical medicine and rehabilitation. Dr. Walker's records from Claimant's initial visit state that Claimant's history of back and leg pain

> dates back to *early* November. [Claimant] did not recall any particular injury but noted the onset of left lower extremity pain associated with work. It became sharper over time and has continued to worsen.

D.E. E, p. 19 (emphasis added). Based on the nature of Claimant's symptoms, Dr. Walker suspected a "radicular process, most likely related to underlying disc herniation given her age." *Id*. at 20. Dr. Walker prescribed medication and ordered an MRI, noting that, based on the findings, an epidural steroid injection or surgical consultation might be appropriate.

On December 30, 2008, Claimant underwent an MRI, which revealed a large left paracentral disc extrusion at L5-S1 impacting the S1 nerve root. Dr. Walker discussed Claimant's options with her, and she indicated that she would prefer to avoid surgery if possible. Claimant received a series of epidural steroid injections, and Dr. Walker prescribed physical therapy. Claimant chose not to attend physical therapy, because the injections succeeded in significantly reducing her pain.

However, in early March, Claimant's pain began to increase again, and she returned to Dr. Walker. She told him that her preference was still to avoid surgery. Claimant received another injection on March 12, and Dr. Walker again recommended that Claimant participate in physical therapy. Claimant presented to Stephanie Liddle, physical therapist, on March 19, 2009. Ms. Liddle noted that Claimant

> has had a four-month history of pain into her left leg. She states the pain came on suddenly, but she is unaware of any specific injury to cause her pain. She denies any background or previous history of low back pain and contributes [*sic*] this episode to being a

> server/bartender for many, many years catching up to her and her not taking care of her body….She states she works graveyard at Shari's and is on her feet for 10 hours at a time. She sleeps when she gets home following her shift and does not do any type of maintenance or exercise for fear she may increase her pain.

D.E. G, p. 41. Claimant participated in a few sessions of physical therapy, but returned to Dr. Walker on April 7, 2009 because her pain would not resolve. Dr. Walker recommended surgical consultation, and Claimant informed Dr. Walker that she was "leaving town for a week but [would] check her insurance plan to see who is a participant." D.E. E, p. 24. There is no indication in the medical records that Claimant, at this time, had made a workers' compensation claim with Employer, or intended to have her potential surgery covered by workers' compensation.

On April 22, 2009, Claimant consulted with Dr. Stephen Marano, neurosurgeon, and James Cook, physician's assistant. Mr. Cook noted that Claimant

> began having some left sided low back and left hip pain at work in *early* November. She cannot associate any injuries or trauma to the onset of her pain. She said that it just kind of started out of the blue. She thought it was maybe due to standing funny.

D.E. I, p. 53 (emphasis added). After discussing her diagnosis and prospects with Dr. Marano and Mr. Cook, Claimant agreed to proceed with surgery.

On April 24, 2009, a First Report of Injury or Illness was completed on Claimant's behalf by Zach Dummermuth, general manager for Employer. This document was signed by Claimant. The report states that on November 24, 2008, Claimant experienced an ache in her low back while she was "standing" and "making salad." In describing the specific sequence of events in how the injury occurred, the report states, "standing there and back began hurting." The report cites December 15, 2008 as the date that Employer was notified of the accident.

The First Report was received by Surety on April 28, 2009. Surety's claims investigator, Bradley Armstrong, conducted an interview with Claimant on May 6, 2009. Mr. Armstrong

asked Claimant to describe what happened on November 24, 2008:

> Bradley Armstrong: Now I have a date of injury of 11/24/2008. Was there a specific accident that happened that day or were you just kind of, was that when you started to feel the pain in your back?
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> Claimant: Um, I was at work and my manager Michelle Miller [*sic*, Morgan]…and I were standing there [by] the salad bar [and] I noticed a pain and so I thought that it was because I was standing on it wrong, put all my weight on it wrong and so we were kind of joking around about my weight. […] Then later on that evening … I was bringing silverware out from the kitchen and I went to put it up in the water station number two and [when] I went to put that up there it just like a sharp pain in the same area and I drop…dropped and so I just laid it there set it down on the counter where I was [and] just set my tables.

D.E. P, p. 207. Claimant did not mention any witnesses besides Michelle Morgan.

On May 19, 2009, Mr. Armstrong, after completing his investigation, sent Claimant a letter informing her that her claim was being denied because "there was no accident associated with" the claim. D.E. B, p. 5. Despite the denial, Claimant proceeded with surgery, a disc excision, root decompressive foraminotomy and annular repair at L5-S1 performed by Dr. Marano. Claimant has since suffered complications from surgery and a recurrent disc herniation at L5-S1.

On November 23, 2009, Claimant filed a workers' compensation complaint with the Commission. By the time of her deposition on April 13, 2011, her account of the accident had changed substantially. Asked by defense counsel how exactly the accident occurred, Claimant testified:

> I had been doing the salad bar reach-ins, which is down underneath our cabinets. And there was a pain, but I didn't think it was more than a pain of just bending and stretching.
>
> And then later on that night, probably around 1:30, 2:00 in the morning — it was when I was working graveyard — I was carrying a tray of silverware — a full tray of silverware out to put it into the water station.
>
> And as I was coming out of the water station to lift it above to where the shelf is, which is above the water spout — so it was

> just about a little higher than my shoulders — I just felt a sharp pain. And I dropped the tray, and I fell.
>
> And Aaron, he came out. The cook came out — running out and helped me up. And he was like, "What's going on?" And I told him that something happened. "Something is wrong with my back." And he told me — he helped me up to the booth and told me just to sit still for a little bit and that he was going to try to call Michelle. And then he picked up the silverware for me off the floor and told me just to stay there.

Claimant's Deposition, pp. 35-36. Though Claimant had mentioned Michelle Morgan as a witness to Surety's investigator, she had not mentioned Aaron Swenson, the cook.

Defense counsel then asked Claimant to clarify what she meant by "doing the salad bar reach-ins." Claimant testified that the reach-ins were refrigerators below the salad bar where salad makings are stored. Claimant stated that she was cleaning out the salad bar trays, putting the salad makings in clean dishes, and replenishing the salad bar. Claimant testified that this required significant bending, reaching, lifting, and twisting. Defense counsel then asked Claimant to describe the silverware incident in more detail:

> Q. Now, you said that you dropped the tray and you fell; is that correct?
>
> A. Yes. Well, actually, when I went to put it up there, it felt like somebody had taken, like, an ice pick and hurt my back. And so when I went to put it up there and it felt, like, the stabbing, the silverware tray fell. And, of course, then the weight of it — it fell, like, towards me. So I tried to, like, stop that from falling, and then I fell. And then I was trying to, like, stop that from coming, but it was *coming down on me*.

Claimant's Deposition, pp. 43-44 (emphasis added). Claimant went on to testify that, following her accident, she had two hours left in her shift. According to Claimant, Mr. Swenson served tables for her. She did not work for the rest of her shift, other than putting orders into the computer. This contradicts her statement to Surety that, following the silverware accident, Claimant set tables.

Claimant gave yet another discrepant account of the accident at hearing before the Referee. Asked by her attorney to describe what happened, Claimant testified:

> I was cleaning the reach-ins, which are the refrigerators underneath the salad bar….As I was standing up, I felt — I felt a dull pain into my back as I straightened up.
>
> I went along with my duties through the night. And it was approximately — I want to say it was closer to 2:00 or 3:00 in the morning rather than 1:00 or 2:00. And I was carrying out a full silverware — tub full of silverware from the dish area, which is in the kitchen.
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> And as I was coming into Water Station 1 or Station 2, I went to put the tub of silverware up on the ledge where the silverware goes. And as I was lifting the tub up, I felt a sharp pain in the lower part of my back that went down my leg. And it caused me to drop the silverware, and it actually landed onto the water station itself. And then the weight of it had dropped it to the floor.
>
> And I caught myself as I was, like, going forward. I used the ledge of the water station to hold myself, but I was still — I was almost to the bottom of it, to the end of the floor.

Tr. 48-49. Claimant testified that Mr. Swenson helped her to a booth, cleaned up the silverware, and served customers while she rested. Claimant said that she put orders in the computer and handled money at the register for the remainder of her shift.

Aaron Swenson also testified at hearing. He stated that he did not see the accident, but heard a loud crash and discovered Claimant on the floor. He said that he helped Claimant "get her stuff picked up" and then helped her "get to a seat." Tr. 24. He further testified that Claimant told him that she had "slipped." Tr. 26. Mr. Swenson testified specifically that Claimant had dropped a "dish bucket" that was full of "dishes" — i.e., "plates, silverware, and stuff." Tr. 24, 26. Mr. Swenson could not remember whether he tried to call someone after the accident, and he could not remember when, approximately, the accident occurred. He testified that, due to Claimant's injury, he had to drive her home that night.

After considering the testimonial and documentary evidence in the record, as well as the briefs of the parties, the Referee issued her findings of fact, conclusions of law, and recommendation, which were approved, confirmed, and adopted by order of the Commission on

March 13, 2012. Claimant disputes the accuracy of several findings of fact and now moves for reconsideration or rehearing.

II.

A.

Reconsideration

Claimant contends that the Referee erred in finding 1) that Claimant herself "completed" the First Report of Injury or Illness; 2) that Surety did not accept Claimant's claim and pay some related expenses; 3) that Employer was not aware of Claimant's accident and injury until late April 2009; and 4) that Claimant's accident was not recorded in Employer's log book. Additionally, Claimant argues that the Referee's findings, as a whole, are not supported by substantial and competent evidence, because while Claimant's various accounts of the accident might have changed "a little over the years," the inconsistencies are minor and should not overshadow the fact that Claimant's accounts of the accident are substantially similar. Claimant's Request for Reconsideration/Rehearing, p. 12 [*hereinafter* Claimant's Request]. Finally, Claimant objects to the Referee's finding that Claimant and Mr. Swenson are not credible witnesses, arguing that it was error for the Referee to accept "hearsay" evidence, in the form of medical records and the First Report, over Claimant's credible, first-person statements and testimony about what happened. These arguments are addressed below.[1]

First, Claimant is correct that there are some errors in the findings of fact. Claimant did not complete or write the First Report herself, as stated in Finding of Fact No. 4; she signed the First Report, but Mr. Dummermuth prepared it for her. *See Clark v. Shari's Management Corp.*, 2012 IIC 0023.1, 0023.3 (March 13, 2012); D.E. A, p. 2. Also, it does appear that Surety, through mistake or otherwise, did pay some medical expenses associated with Claimant's claim,

[1] Claimant also argues that the medical opinions support a conclusion that Claimant's injury is consistent with the described accident; however, since we conclude that Claimant has failed to prove an accident, we do not need to address the issue of medical causation.

contrary to the conclusions in Finding of Fact No. 5. *See Clark*, 2012 IIC at 0023.3; C.E. 18, pp. 2-3.[2] Defendants argue that these are harmless errors, in that they do not form the basis of the Commission's decision against Claimant. We agree. We found against Claimant because she failed to prove that an industrial accident occurred. This conclusion does not change because someone other than Claimant completed the First Report.

Claimant argues that some of the information contained within the First Report is inaccurate — specifically, the description of Claimant's accident — and that this inaccurate information led the Referee to her conclusion that Claimant was not credible. However, as made clear in the decision, the medical records and Claimant's own contradictory statements were primarily responsible for leading the Referee to conclude that Claimant was not credible:

> 17. **Claimant's statements**. Claimant's description of how she first came to require medical treatment for her low back pain is recorded in her early medical records, above, as well as in her later statements made to Surety on May 21, 2009,[3] during her deposition on April 13, 2011, and during her hearing testimony on June 1, 2011.
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> 18. Claimant's later statements are inconsistent with those recorded in her early medical records with respect to the details surrounding onset of her symptoms. Her later statements are also inconsistent *with each other* on key points, including the onset of her pain and the circumstances under which she says her supervisor told her to go to the doctor.
>
> a. Onset of Pain.
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> i. *According to her statement to Surety*, Claimant's earliest recollection is that her low back pain began around the beginning of her shift on November 24, 2008, when she was talking with Michelle Morgan, her supervisor.

[2] This does not mean, as Claimant apparently believes, that Surety "accepted" the claim. Nothing in the workers' compensation law would support the conclusion that once a surety pays benefits, it automatically accepts liability for a claim. Indeed, the policy of the law — to provide sure and certain relief to injured workers — encourages permitting sureties to make preliminary payments of benefits while investigating a claim. In this way, an injured worker in financial duress would not have to wait for approval or denial of his or her claim before seeking medical care. *See* Idaho Code § 72-201 (describing the purpose of the workers' compensation law).

[3] May 21, 2009 is actually the date on which the statement was transcribed; Claimant gave the statement to Surety on May 6, 2009.

> Claimant thought she was just standing wrong, and she joked with Michelle that her weight might have something to do with it. Later, Claimant felt a sharp pain in the same area in her low back when she was lifting a heavy silverware tray up to a head-height shelf. Due to the pain, she set the tray down and did not try to lift it, full, again. Claimant set her tables, then placed the empty tray on the shelf.
>
> …[A]nd when I went to put that up there it just like a sharp pain in the same area and I drop…dropped and so I just laid it there [*sic*] set it down on the counter where I was (*several words unintelligible*) and, um, just set my tables, from there I didn't try to put the container up there I set all my tables from there and then went to the tray that was just about empty I just set it up on the top….

DE P, p. 207-208.

ii. <u>*According to her deposition testimony*</u>, however, Claimant's low back pain began when she was cleaning the salad bar reach-ins. Then, when only Claimant and Aaron Swenson, a cook, were working, Claimant felt a pain like an ice pick being shoved into her low back while lifting a heavy silverware tray up to a head-height shelf. The pain caused Claimant to lose her balance and the weight of the tray caused her to fall to the ground, spilling the silverware. Upon hearing the loud clatter, Aaron came out of the kitchen, helped Claimant to a booth and picked up the silverware. He also tried to call a manager. Claimant remained on shift, but due to the pain, she rested. Until the end of her shift, Claimant only punched orders into the computer, while Aaron served her food for her.

iii. <u>*According to Claimant's hearing testimony*</u>, her back pain started <u>when she stood up</u> while cleaning the salad bar reach-ins. Later, when only Claimant and Aaron were working, Claimant felt a sharp pain in her low back <u>that went down her leg</u> while lifting a heavy silverware tray up to a head-height shelf. The rest of her hearing testimony is materially consistent with her deposition testimony.

b. Why Claimant Sought Medical Treatment.

i. *According to her statement to Surety*, at some unspecified later shift, Claimant was reaching for the scheduling book, but could not bend over to grab it, so Michelle told her to go to the doctor.

ii. *According to her deposition testimony*, Claimant went in the next day and spoke to Michelle, who told her to take the night off. When Claimant did not feel better the next day, Michelle told her to go to Community Care. Claimant "showed them her prescription" and obtained treatment, then took the next two days off. Tr., p. 47.

iii. *According to her hearing testimony*, Claimant worked "at least the next five days" because she had no other income. Tr., p. 54. She guessed that she probably went seven or eight days before she determined that the constant pain was not improving and decided to go to the chiropractor. He taped her ankles, but did not want to touch her spine because he did not think he could improve the pain she described. Claimant worked for a couple of days with taped ankles. The taping took some pressure off Claimant's back, but she was still in pain. At this point, Claimant called in sick and told Michelle that she had gone to the chiropractor and was not improving. Michelle told her to go to the doctor, so Claimant went to Community Care the next day.

Clark, 2012 IIC at 0023.6-0023.7 (emphasis in original). Though the Referee also mentioned the First Report in some of her findings, her apparent belief that Claimant completed the First Report did not, by itself, lead the Referee to conclude that Claimant lacked credibility.

Claimant tries to gloss over her inconsistencies by asserting, first, that her accounts of the accident are substantially similar, differing only in the minor details, and second, that the medical records are "hearsay" and any statements contained within them are not as credible as Claimant's own testimony. In support of her first argument, Claimant cites to *Stevens-McAtee v.*

Potlatch, 145 Idaho 325, 179 P.3d 288 (2008) and discusses that case at length. In *McAtee*, the Idaho Supreme Court reversed a decision by the Commission, holding that the Commission erred in finding that the claimant's testimony about his accident was not credible. The claimant's earlier statements about his accident had been vague; he said that his "injury arose from the jostling and vibrations of his forklift." *McAtee*, 179 P.3d at 294. Later, at hearing, he specified that his back began hurting when he hit a drain ditch. *Id*. at 292. The Commission found that the claimant's testimony was not credible because it improved and enhanced his prior accounts by the addition of the drain ditch detail. *Id*. However, the Court found that this detail was consistent with the claimant's earlier accounts of his accident; i.e., the claimant's hearing testimony was *more detailed* than his earlier accounts, but was not *inconsistent*.

Here, Claimant argues that her testimony, as in *McAtee*, was simply more detailed than her earlier statements, but as noted by the Referee, Claimant's later accounts *contradict* her earlier accounts. In the early days of her back pain, she failed to mention a workplace accident to her medical providers. More than simply not mentioning it, Claimant stated that her pain began "out of the blue." She thought it was maybe due to "standing funny." According to Stephanie Liddle, the physical therapist, Claimant attributed the pain to her many years as a waitress and bartender catching up to her and to not taking care of her body.

Claimant characterizes the medical records as "hearsay," implying they are not credible, or at least, not as credible as Claimant's first-person statements about the matter. Claimant argues that she "made three statements that were not hearsay addressing the accident: to the Surety on May 6, 2009; in her deposition of April 13, 2011; and her hearing testimony." Claimant's Request, p. 12. Hearsay is defined as a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). We note that "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

source thereof" are a hearsay exception pursuant to I.R.E. 803(4). Likewise, records of a regularly conducted activity (such as medical examinations) constitute a hearsay exception under I.R.E. 803(6). We further note that the Commission, as an administrative agency, is not bound by the same formal rules of evidence and procedure that bind trial courts; "strict adherence to the rules of evidence is not required in Industrial Commission proceedings, and admission of evidence in such proceedings is more relaxed." *Stolle v. Bennett*, 144 Idaho 44, 50, 156 P.3d 545, 551 (2007) (*citing Hagler v. Micron Technology*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990)). The Commission "should have the discretionary power to consider any type of reliable evidence having probative value, even though that evidence may not be admissible in a court of law." *Id*. (*citing Hite v. Kulhenak Building Contractor*, 96 Idaho 70, 72, 524 P.2d 531, 533 (1974)). This point was acknowledged by Claimant's counsel at hearing, when Defendants objected to two of Claimant's exhibits:

> Mr. Curtis: [I]t's an administrative proceeding; therefore, you know, the technical rules of evidence don't apply, and the [Commission] can give the weight that they choose to give them.

Tr. 9, ll. 17-21. Finally, we note that the Commission's own rules specifically allow for the admission of medical reports at hearing, and the "fact that such [a report] constitutes hearsay shall not be grounds for its exclusion from evidence." J.R.P. 10(G). However, here, it is irrelevant whether or not the medical records are hearsay, because *Claimant did not object to their admission*, and the records, as such, are evidence before the Commission. *See* Tr. 13, ll. 9-25.

Once hearsay evidence is in the record, the Commission may rely on it, provided that it is substantial and competent. *Fisher v. Bunker Hill*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). *See also Colpaert v. Larson's*, 115 Idaho 825, 828, 771 P.2d 46, 49 (1989) (Commission properly relied on hearsay evidence in reaching conclusions). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Stolle*,

144 Idaho at 48, 156 P.3d at 549 (*citing Neihart v. Universal Joint Auto Parts*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005)). As Claimant's counsel stated above, it is for the Commission, as the finder of fact, to determine whether evidence should be given any weight. In other words, "credibility of evidence is a matter within the province of the Commission." *McAtee*, 179 P.3d at 292 (*citing Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999)).

There are three reasons why we find the information in the medical records more credible than Claimant's later statements and testimony. First, the medical records from December 2008 to April 2009 are more contemporaneous to the onset of Claimant's back pain than statements and testimony delivered after April 2009. Second, statements made during litigation, or even during the course of making a workers' compensation claim, are inherently self-serving; this does not make them *per se* untrue, but it does make them more suspect than statements made for the sole purpose of receiving appropriate medical care. Indeed, the Idaho Rules of Evidence recognize that statements made for purposes of medical care have a "circumstantial [guarantee] of trustworthiness"; that is why they are an exception to the rule that hearsay is inadmissible. *See* I.R.E. 803(24) (providing that statements not covered by any express hearsay exceptions but having "equivalent circumstantial guarantees of trustworthiness" are admissible). Third, Claimant's later accounts of her accident, both in her statement to Surety and in her testimony, are so contradictory as to be unreliable. Claimant's descriptions of the accident are not just progressively more detailed, as in *McAtee* above; Claimant's descriptions actively conflict with each other. In her interview with Surety, she stated that 1) she first felt a twinge of back pain while she was *standing by the salad bar* with Michelle, her supervisor, and that in response to the pain, she joked about her weight; and 2) she later felt a sharp pain while lifting the silverware tray, so she set down the tray, set her tables, and then lifted the almost-empty tray onto the shelf.

Later, at deposition, Claimant testified that 1) she first felt pain while she was *bending* to clean the salad bar reach-ins, and 2) that she later felt pain while lifting the silverware tray. Only

this time, instead of putting down the tray and setting tables, Claimant fell and the *tray came down on top of her*. Aaron Swenson heard the noise and came rushing out to help Claimant. He picked up the silverware and helped Claimant to a booth, where she sat for the rest of her shift, punching orders into the computer.

Finally, at hearing, Claimant testified that 1) she first felt pain after *standing up* while cleaning the salad bar reach-ins, and 2) she later felt a sharp pain while lifting the silverware tray, which caused her to drop it. The tray landed on the water station, but its momentum carried it to the floor, and though Claimant herself was falling, she was able to catch herself on the water station's ledge.

We understand that memory is an imperfect device, and that the details of an accident resulting in an injury can be forgotten or misremembered as time passes. We understand, too, that even credible witnesses have a desire to present themselves in the best possible light, and may subconsciously massage certain details without a malicious intent to deceive. Thus, when determining whether a witness is credible, we do not look for perfect consistency. Rather, we look for substantial consistency supported by the other evidence in the record.

Here, Claimant's accounts are not substantially consistent. Either she fell, or she did not fall; either she fell to the floor, or she was able to catch herself; either she dropped the tray, or she set it down; either she set tables after the accident, or she rested in a booth for the remainder of her shift; either the silverware tray actually "came down on" Claimant, or it fell without impacting her — these are not minor details, easily misremembered; these are material facts about how the accident occurred. A heavy silverware tray "coming down on" a fallen person could easily cause injury, perhaps even serious injury, depending on how heavy it was and what part of the body was impacted, and it defies belief that if this actually happened, Claimant would have neglected to mention it to Surety.

We, like the Referee, find it suspicious that Claimant's description of a lifting accident, by the time of her deposition,

> grew to include an elaborate recitation of how she dropped the silverware tray as she fell to the ground, creating a clamor that brought Aaron from the kitchen. She had not previously divulged this dramatic fact, not to her many treating medical providers, and not in response to direct questioning by Defendants about how she incurred her back pain. Instead, she told Surety in May 2009 that she set the tray down.

Clark, 2012 IIC at 0023.12. This is not merely providing more detail as contemplated by the holding in *McAtee*. This is a direct contradiction, and it calls into question the veracity of Claimant's testimony as a whole.

The substantial evidence in the record does not support a conclusion that Claimant's accident occurred as described at deposition or hearing. It does not support a conclusion that Claimant's accident occurred as described in her initial interview with Surety. In fact, the substantial evidence in the record does not support a conclusion that Claimant's accident occurred at all. She did not mention any such accident to her medical providers from December 2008 to April 2009. It is true, as Claimant points out, that she "associated" her pain with work — but only in the general sense of her years of work "catching up to her," not in the specific sense of suffering a workplace accident. Claimant pleads that she has "less than an 8th grade education," that her understanding of words such as "injury" and "trauma" are different than a lawyer or doctor's understanding, and that it is therefore unremarkable that the medical records state that Claimant reported no injuries or trauma associated with the onset of her pain. Claimant's Request, p. 14. This argument might be more compelling if the records did not also contain the statement that Claimant's pain began "out of the blue." One does not need to be a lawyer, a doctor, or a highly educated person to be able to explain that her back began hurting when she lifted a heavy tray at work. Claimant was certainly able to say those words in her interview with Surety's investigator, as well as at deposition and hearing. The Commission does

not expect Claimant to use "magic words," nor does the Commission expect Claimant to have a doctor or lawyer's understanding of the significance of the words "injury" or "trauma," but the Commission does expect patients to give a reasonably accurate history of the onset of their symptoms to their medical providers.

Claimant argues that the medical records contain, not her own statements, but rather the statements of the medical providers, and that they therefore should not be held against her. However, the medical records summarize what Claimant told the providers when she sought care, and Claimant has given us no reason to believe that these summaries are inaccurate, misleading, or false. It is clear from the records that Claimant did discuss her work with some of her medical providers, and those providers duly mentioned Claimant's work in their records. Presumably, if Claimant had mentioned a specific work accident that resulted in pain, that accident would have been mentioned in the records as well. Yet no such accident is described.

Related to the findings on Claimant's credibility, Claimant takes considerable issue with the Referee's implication that Claimant "did not report to Employer that she thought her low back pain was due to a workplace accident until after April 30, 2009." *Clark*, 2012 IIC at 0023.9. Claimant argues at length that Employer was aware that Claimant had an accident and/or injury by December 15, 2008. Whether this is true or not, it is immaterial. Timely notice of an accident/injury is not at issue in this case, and the mere fact that Claimant *told* people that she suffered an accident/injury does not mean that the accident and injury actually happened. Defendants, if found liable, would not be liable because Claimant *told* them she suffered an industrial accident; they would be liable because Claimant *proved* she suffered an industrial accident. Here, Claimant has failed to prove that she did.

Claimant argues that the testimony of Aaron Swenson establishes the occurrence of the accident. We disagree. It is undisputed that Mr. Swenson did not see the alleged accident, and his testimony about the immediate aftermath conflicts with Claimant's. Mr. Swenson testified that

Claimant dropped a "dish bucket" full of "dishes." Tr. 26. He could not remember how, exactly, she said she hurt herself, but thought she said that she had "slipped or tripped." *Id.* Though Claimant testified that Mr. Swenson tried to call Michelle, their supervisor, Mr. Swenson could not remember trying to call Michelle. Tr. 27. He did testify, consistent with Claimant, that he helped her to a booth and had to perform her work for her, because she was too hurt to do it herself. Tr. 28. Yet despite finding Claimant on the floor, struggling to get up; despite having to do her work for her, because she was too injured to do it herself, and despite having to drive Claimant home, Mr. Swenson — and Claimant herself — apparently did not believe that Claimant should seek medical evaluation at the emergency room. In fact, the record indicates that Claimant did not seek medical treatment for her pain — which was supposedly excruciating enough for her to equate it to being stabbed with an ice pick — until December 11, seventeen days after the alleged accident. When Claimant did ultimately consult with medical personnel, she reported "moderate" pain, and she was inconsistent about when it began. D.E. D, p. 10. To her chiropractor, she said it began three weeks before; to the emergency room staff, she said it began several days before; to other providers, she said it began in early November. Again, no mention was made in the contemporaneous medical records of the pain beginning after a lifting incident at work.

Nor was mention of a workplace accident involving Claimant made in Employer's log book. As the Referee stated, this fact, standing alone, would not defeat Claimant's claim, but it cannot be said to support it, either.

In effect, the substantial and competent evidence in the record does not support a finding that Claimant suffered an industrial accident. Claimant's statement to Surety and her later testimony are not substantial and competent, as they are too contradictory to be reasonably relied upon. Having reviewed the entire record on reconsideration, we conclude that, while there are

some slight factual errors in the Referee's findings, her holding that Claimant failed to prove that a compensable accident occurred is supported by the record.

B.

Rehearing

In the alternative to reconsideration, Claimant requests that the case be reheard so that additional witnesses may testify. Under Idaho Code § 72-718, the Commission may grant requests for rehearing, but is not obligated to do so. *Curtis*, 142 Idaho at 388, 128 P.3d at 926. The Commission has discretion whether or not to grant such requests. *Id*.

Claimant contends, first, that the Referee improperly excluded some evidence that should have been considered; second, that material witnesses were not available to testify at the original hearing, but are available now; and third, that the Commission has recently allowed the record to be re-opened in some cases, at the defendants' request, and that Claimant should be "afforded" the "same consideration" given to the defendants in those cases. Claimant's Request, p. 16. We find each of these arguments unpersuasive for the reasons stated below.

At hearing, Defendants objected to the admission of two of Claimant's exhibits into evidence. These exhibits were affidavits by individuals who did not testify at hearing, and Defendants had no opportunity to cross-examine them. The Referee sustained the objection, finding that the exhibits were more prejudicial than probative, and that the evidence was not "sufficiently reliable to assist the Referee in resolving the issues in dispute." *Clark*, 2012 IIC at 0023.3.

Claimant argues that the Referee erred in excluding the exhibits. Claimant contends that the applicable standard for admitting affidavits is the one set forth in I.R.C.P. 56(e). This rule concerns affidavits offered in opposition to motions for summary judgment. Claimant avers that "an administrative proceeding is even less formal than that in a summary judgment motion" before a court, and therefore Commission procedure should be even more lenient than this rule.

However, we do not find this rule instructive on the issue before us. The purpose of affidavits in a motion for summary judgment is to demonstrate that there are facts in dispute; the affidavits are not offered as evidence to *prove* the facts. Here, Claimant is attempting to prove facts through the admission of these affidavits. As such, the affidavits are hearsay: out-of-hearing statements offered to prove the truth of the matter asserted.

As discussed above, the Commission is not bound by the same evidentiary rules that bind trial courts. Thus, the standard for admission of hearsay evidence before the Commission is whether the evidence appears to be "reliable" and whether it has "probative value." *Stolle*, 144 Idaho at 50, 156 P.3d at 551 (*citing Hite*, 96 Idaho at 72, 524 P.2d at 533).

Here, the Referee found that Claimant's proffered exhibits were more prejudicial than probative, and were not sufficiently reliable. We agree. Defendants had no opportunity to challenge the averments of these witnesses under cross-examination, and affidavits made to support a certain party in litigation do not come with the same circumstantial guarantee of trustworthiness as Claimant's medical records. Therefore, the exhibits were properly excluded.

Claimant also pleads the unavailability of certain witnesses at hearing and asks that the case be reheard so that these witnesses may testify. Claimant makes an offer of proof that these witnesses would testify to the fact that Employer was aware of Claimant's accident and injury "long before" April 2009. Claimant's Request, p. 7. As this is not a notice case, it is irrelevant when Employer became aware that Claimant was alleging an accident and injury. This case was decided on the basis that Claimant failed to prove she suffered an industrial accident. It is undisputed that no one saw Claimant's alleged accident; as such, none of the proposed witnesses would cure the principal defect in Claimant's case.

Finally, Claimant argues that the Commission has re-opened cases or continued hearings in the past, and that she deserves the "same consideration"; however, neither example cited by Claimant is similar to her situation. In one case, the record was re-opened after the matter had

been heard and briefed so that additional evidence could be admitted and considered. However, this happened before, not after, the decision was issued. In the second case, a hearing was continued so that a doctor could perform additional tests. Again, this happened before, not after, the decision was issued.

The procedure to object to a decision after it has been issued is to file a motion for reconsideration or rehearing, as Claimant has done here. She has had the opportunity to be heard, but our review of the record confirms that the decision was correct. Claimant failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment, because Claimant failed to prove that an industrial accident occurred. Accordingly, Claimant's motion for reconsideration or rehearing is DENIED.

IT IS SO ORDERED.

DATED this _28th_____ day of August, 2012.

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 _28th___ day of August, 2012, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION AND REHEARING** was served by regular United States mail upon each of the following:

PAUL T CURTIS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

ROGER BROWN
PO BOX 6358
BOISE ID 83707-6358

eb _/s/_____