

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL E. DAVIS,

Claimant,

v.

U.S. SILVER-IDAHO, INC.,

Employer

and

STATE INSURANCE FUND,

Surety,
Defendants.

IC 2008-031273

**ORDER GRANTING
RECONSIDERATION**

Filed July 3, 2013

On January 7, 2013, Claimant filed a Motion for Reconsideration regarding the Industrial Commission's decision filed December 20, 2012, in the above referenced case. On January 16, 2013, Defendants filed a Defendants' Response to Claimant's Motion for Reconsideration.

In the underlying case Claimant contended that he permanently aggravated his admitted pre-existing lumbar degenerative disk disease (DDD) when he attempted to stand from a kneeling position while repairing track in Employer's silver mine. Defendants argued that Claimant's current complaints are nothing more than the natural progression of his underlying DDD; therefore, he is not entitled to benefits.

Claimant was working as a supervisor for Employer on September 4, 2008, when Claimant was dispatched to repair an area where a rail car had de-railed.¹ Claimant was on his hands and knees driving spikes, and he was unable to rise normally because his back locked up.

¹ The Commission's decision contains a typographical error on page 3, paragraph 2. The undisputed date of the industrial accident is September 4, 2008, not September 24.

The Commission accepted Claimant's testimony that he experienced a significant worsening of his pain following the accident and that Claimant had proven an aggravation of his condition, but not a permanent aggravation. The Commission then concluded that although Claimant suffered an accident, he failed to prove the occurrence of a compensable injury, as the term is used in Idaho Code §72-102(18).

In his motion for reconsideration, Claimant argues that the Commission's finding that there is no medical testimony to establish an injury has occurred is inconsistent with its observation that Dr. McDonald persuasively testified that Claimant had suffered a temporary injury, at least, as a consequence of the accident. Claimant contends that since the Commission found that he did suffer an injury, he is entitled to medical care and temporary disability benefits until the report from Dr. McDonald, detailing his new examination of Claimant, is received.

Defendants contend that the Commission's decision correctly relied on the MRIs showing no acute injury, as supported by Dr. Friedman's report and Dr. McDonald's findings that Claimant's pain was temporary and instead constituted the natural worsening of his condition.

Under Idaho Code § 72-718, a decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision . . . and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion."

ORDER GRANTING RECONSIDERATION - 2

On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See, Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

Claimant contends that he is not required to prove a permanent aggravation of a pre-existing condition in order to receive benefits. Claimant is correct. Claimant does not need to prove his injury was permanent in nature; temporary injuries are also compensable.

An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by accident which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). The medical opinions provide a large portion of what the Commission reviews in determining whether a qualifying injury occurred. Some of the facts from the December 20, 2012 order are discussed below with additional analysis.

Three doctors opined regarding Claimant's back condition: Drs. McNulty, Friedman, and

ORDER GRANTING RECONSIDERATION - 3

McDonald. The Commission assigns the least weight to the opinion of Dr. McNulty, who provided very little elaboration supporting his conclusion that the subject accident did cause injury to Claimant's lumbar spine, while acknowledging that an opinion on this important question deserves consideration of a complete medical record.

Dr. Friedman reviewed the complete record and found that it supported his conclusion that Claimant's facet arthropathy is a condition which progresses over time. Though it can be accelerated by direct trauma to the facet joints, Dr. Friedman did not identify any such trauma in this case. However, Dr. Friedman did not reconcile this opinion with what the Commission found to be the facts of this case; Claimant experienced a dramatic worsening of his symptoms immediately following the subject accident. Dr. Friedman did not explain how this sudden change can be squared with his belief that Claimant's condition worsened gradually over time. For these reasons, we find Dr. Friedman's opinion to be less persuasive.

Dr. McDonald believed that Claimant suffered an injury to his low back as a consequence of the described accident. Though he initially described that injury as "temporary," his deposition testimony makes it clear that all he knows is that Claimant suffered an injury and that he has no knowledge of whether it is temporary or permanent. Dr. McDonald also testified that his review of the 2002 and 2008 MRI studies does not demonstrate any interval change in Claimant's low back pathology, but we discuss the problematic MRI studies further below.

Claimant underwent MRI evaluation of his low back in 2002, 2005, and 2008. Each study was read by a radiologist whose findings are memorialized in the three reports that have been admitted into evidence. The physicians who have offered opinions in this case have only had access to the MRI reports; none of the treating/evaluating physicians have had the opportunity to review and compare the actual films from the 2002, 2005, and 2008 studies. It is

interesting, and frustrating, that each physician who compared the three reports at issue extracted something slightly different from this exercise. Dr. McDonald was unable to identify an interval change. Dr. Friedman, though apparently able to discern a gradual worsening of Claimant's low back condition over the span of time covered by the MRI studies, saw nothing on those reports that spoke to an acute change consistent with a specific mishap/event. Had the actual films been available for review, different conclusions might have emerged. However, from the objective medical evidence at hand, all we are able to conclude is that there may or may not be an interval worsening of Claimant's condition between 2002 and 2008.

The Commission is aware that the MRI is not a perfect diagnostic tool; both false positive and false negative results are obtained from time to time. Therefore, it is always important to correlate such studies with clinical findings on exam, and the patient's history. Here we have accepted, as true, Claimant's testimony that he experienced a sudden and significant worsening of his pain following the subject accident. Under facts similar to those at bar, the Commission has, in the past, found that a compensable injury has occurred, even in light of pre- and post-injury radiology studies which show no interval change in an injured worker's condition. In such cases, we have been persuaded by medical testimony tending to establish that an injury has occurred, notwithstanding negative radiology studies.

In this case, we have found that the most persuasive medical testimony, that of Dr. McDonald, fails to establish that the subject accident caused a permanent aggravation of Claimant's preexisting condition. Claimant's arguments on reconsideration leave us unpersuaded to revise that finding. However, implicit in our original finding is that Claimant did suffer an injury of some type as a consequence of the accident. We are simply unable to conclude, on the basis of the evidence before us, whether that injury is temporary or permanent

in nature. Even so, and as Claimant has correctly observed, our finding that Claimant suffered a compensable injury (quite apart from whether it is temporary or permanent) creates in Claimant the potential right to workers' compensation benefits, at least until further medical evidence is adduced which sheds light on the question of whether Claimant's accident produced aggravation is temporary or permanent in nature.

Based on the foregoing, Claimant's Motion for Reconsideration is GRANTED, and the remaining issues are discussed below.

Medical Care

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 bears the burden of proving that medical expenses and treatment were incurred as a result of an industrial injury and 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). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho forest Industries, Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

ORDER GRANTING RECONSIDERATION - 6

No physician involved in this matter has argued, medically, against Dr. McDonald's recommendation of at least two epidural steroid injections in conjunction with physical therapy. Based on the revised finding that Claimant suffered, at the very least, a temporary aggravation of a preexisting condition, the Commission finds that such recommendation is reasonable and necessary for both diagnostic and therapeutic purposes. Further, depending on what the medical evaluation reveals on the question of whether Claimant's work related aggravation is temporary or permanent in nature, Claimant may be entitled to additional medical care.

TTD Benefits

Idaho Code §72-408 provides from income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in a period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work and that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery or that (2) there is employment available in the general labor market which claimant has a

reasonable opportunity of securing and which employment is consistent with the terms of a light duty work release. *Malueg, Id.*

Claimant contends that he is entitled to TTD benefits from September 25, 2008, the date he was placed on administrative leave, until he is released to return to work by a physician (less three days that he was employed as a consultant in Montana). Defendants contend that Claimant is entitled to no TTD benefits because he did not suffer a compensable accident.

One of the issues noticed for hearing was whether Claimant is entitled to TTD benefits, and if so, the extent of his entitlement. We have found that Claimant suffered an aggravation of his preexisting low back condition as a result of the accident. Claimant has adduced evidence sufficient to establish that he entered a period of recovery following the accident. Defendants then had the burden of coming forward with evidence challenging Claimant's entitlement to TTD benefits. However, the evidence at hearing leaves us unable to conclude whether or when Claimant reached a point of medical stability following the accident. Similarly, there is no evidence that would allow us to conclude that Defendants have met their burden of satisfying any of the criteria discussed in *Malueg, supra*, that would curtail their TTD exposure.

The Commission finds that Claimant has proven he is entitled to appropriate time loss benefits from September 25, 2008 (the day after Dr. Haller imposed work restrictions as well as the date Claimant was placed on administrative leave, less three days) through the date of hearing and until he is declared at MMI or until Defendants satisfy any of the criteria identified in *Malueg* that authorize curtailing TTD benefits.

ORDER

1. Claimant's Motion for Reconsideration is granted.
2. Claimant suffered an accident causing an injury to his low back.

ORDER GRANTING RECONSIDERATION - 8

3. Claimant is entitled to the medical treatment recommended by Dr. McDonald consisting of a trial of epidural steroid injections and physical therapy, and to such further medical treatment as may be required for the treatment of Claimant's work related injury.
4. Claimant is entitled to time loss benefits at the appropriate rate from September 25, 2008 (less three days) through the date of hearing and until he is declared at MMI or until Defendants satisfy any of the criteria identified in *Malueg* that authorize curtailing TTD benefits.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

IT IS SO ORDERED.

DATED this 3rd day of July, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

/s/ _____
R.D. Maynard, Commissioner

Participated but did not sign.

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

ORDER GRANTING RECONSIDERATION - 9

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2013, a true and correct copy of the foregoing **ORDER GRANTING RECONSIDERATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE, ID 83816-1312

ALAN K HULL
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/s/ _____