BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSE GALLEGOS, Claimant, v. LUIS M. BETTENCOURT, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2008-020633** **ORDER DENYING RECONSIDERATION** filed February 4, 2010

On December 7, 2009, Claimant filed a motion for reconsideration of the Commission's Order dated November 17, 2009. Defendants timely filed a response to Claimant's motion on December 16, 2009. On December 24, 2009, Claimant submitted a reply brief in support of its motion for reconsideration.

Claimant requests that the Commission reconsider issues of causation and Claimant's entitlement to benefits connected with his industrial accident. Claimant argues that the record does not support the following Commission findings: (1) Claimant's need for lumbar surgery is not causally related to the industrial accident of June 19, 2008; (2) Claimant is entitled to medical care for his lumbar spine from June 19, 2008 through July 31, 2008, but not thereafter; and, (3) Claimant is entitled to temporary disability benefits from June 19, 2008 through July 31, 2008. Claimant argues that the Commission should find that Claimant's need for lumbar surgery

is causally related to the industrial accident of June 19, 2008; Claimant is entitled to medical care for his lumbar spine from June 19, 2008 to the present; and Claimant is entitled to TTD benefits from June 27, 2008, until he has surgery and is thereafter determined to be medically stable.

Claimant questions the Commission's finding that Claimant suffered a strain/sprain which only temporarily aggravated Claimant's pre-existing lumbar condition. Claimant questions the credibility of the expert opinion from Dr. Verst, and argues that the Commission should have adopted Dr. Verska's testimony.

In response, Defendants contend that the decision is supported by substantial and competent evidence, and that the Referee's Findings of Facts thoroughly detail and explain the decision. Defendants argue that Claimant has failed to present new reasons, factually or legally, to support his motion.

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. In any such event, 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." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005). 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)).

Claimant challenges the Referee's adoption of Dr. Verst's biomechanical explanation over Dr. Verska's temporal relationship explanation. The Referee was not persuaded by Dr. Verska's testimony that the requested spinal surgery was causally related to the act of picking up a towel at work. On this issue, the parties adduced competing medical opinions. Claimant presented the testimony of Dr. Verska who opined that the temporal relationship between Claimant's picking up of the towel and the onset of symptoms supports the conclusion that Claimant's need for surgery was caused by this injury at work. Defendants put forth the testimony of Dr. Verst, who also treated Claimant on several occasions. The Referee was persuaded by Dr. Verst's testimony on the need for surgery, and there is sufficient evidence to support that conclusion.

Claimant argues that the Commission should reconsider the decision based on Dr. Verst's inconsistencies in rendering his opinion. The Referee noted that both parties sought clarification of Dr. Verst's causation opinion. Under questioning by Claimant's counsel, Dr. Verst expressed an opinion that was seemingly inconsistent with his other statements. At hearing, Dr. Verst promptly explained his seemingly inconsistent opinions.

> Q. Doctor, Scott Harmon again. I'm having some difficulty piecing together what I've just heard. I had understood in your December 18th, 2008, or late December 2008 response to Lynn Green that your assessment was that, on a more probable than not basis, the procedure was not the result of picking up a towel.

> Then I think I just heard you testify to Claimant's counsel that the surgery was causally related to picking up a towel. Which is your opinion?
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> A. Sorry to make that gray, in terms of understanding the causation. My point with response to the letter of December 18th was that Mr. Gallegos had severe spinal stenosis, severe disk degeneration, severe loss of disk height, there was bulging centrally of the canal, there was no evidence of acute injury.
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> He was bending down, picking up a towel. It could have been a sneeze, it could have been tying his gym shoe that sudden can [sic] cause leg pain. The onset occurred while he was at work. Do I feel like the underlying pathology was the result of picking up a towel? The answer is absolutely not. There is not evidence on that MRI scan of an acute event. It just happened while he was at work with picking up a towel. You can't tell me that by picking up a towel, that weighs less than a pound, can cause a central disk herniation, severe stenosis and can activate a charged nerve root. It just so happened to occur while at work. I don't feel picking up a towel led to the need for spinal surgery.
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> Dr. Verst Depo. pp. 12-16.

It is not uncommon for a witness or expert to misspeak under the artful questioning of a skilled advocate. Inconsistencies in testimony may affect the credibility of an expert, but witnesses and experts are not expected to be infallible in order to present credible testimony before the Commission. Viewed as a whole, it is clear from Dr. Verst's testimony that he did not think Claimant's act of picking up the towel necessitated the need for spinal surgery. Dr. Verst saw Claimant multiple times and acted as his treating physician. In contrast, Dr. Verska performed a one-time evaluation of the Claimant. In his report, he concluded that Claimant's mechanism of injury was the *repetitive* lifting, twisting and bending to pick up towels. *Emphasis added*. However, Claimant testified at hearing that the accident involved picking up a single towel, not repetitive activities. On these new facts Dr. Verska testified that Claimant's injuries were probably related to a specific incident, even though he had previously opined that Claimant's injuries were more probably than not related to repetitive trauma. Ultimately, the

Referee rejected Dr. Verska's shifting opinion in favor of Dr. Verst's biomechanical explanation on the matter of the cause for Claimant's requested spinal surgery.

Claimant argues that the adoption of Dr. Verst's biomechanical explanation is a departure from the Commission practice of accepting a common sense temporal approach, and is inconsistent with the holding in LaValley v. Personnel Plus, Inc., a case decided by the same Referee. 2009 IIC 0308. Claimant represents that the LaValley v. Personnel Plus, Inc., case stands for the proposition that the "temporal cause and effect relationship have primarily heretofore been the basis for a claimant's burden of proof on causation." Claimant's Reconsideration Brief, p. 5. While Claimant is correct that an accident must precede an injury before a causal relationship can be established, it does not follow that the establishment of such a temporal relationship, standing alone, is sufficient to prove medical causation on a more probable than not basis. Nothing in LaValley stands for the proposition that Claimant can meet his burden of proof by the simple expedient of showing that his injury was first noted following an accident. Although cause must precede effect, more is required of Claimant to prove his case, and this, Dr. Verska's testimony failed to do.

The Commission is not persuaded that the Referee's adoption of Dr. Verst's biomechanical explanation in this case will force all claimants to develop and pay for biomechanical expert opinions to safeguard their entitlement to a positive outcome. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732, 736 (1995). Each case is decided on its own particular facts, and the Referee's finding in this case does not mean that biomechanical expert testimony is always inherently more persuasive than a temporal explanation.

Claimant takes issue with the conclusion that although the incident caused some temporary pain, it is not causally related to Claimant's need for lumbar surgery. Dr. Verst acknowledged that Claimant felt pain while he was picking up the towel. Dr. Verst declined to find that "a single event of picking up a towel caused this internal disruption of disk, joint nerve root to become severely painful to the point of requiring surgery. . . ." Dr. Verska testified that the onset of pain after Claimant picked up the towel is significant because it indicated that something went wrong and caused the back pain. Dr. Verska depo, pp. 12-13. The parties did not dispute that Claimant felt pain after picking up the towel. Instead, the parties focused their arguments on whether the extent of medical care, specifically the lumbar surgery, was causally related to the towel incident. It can be tempting for parties to take an all-or-nothing approach when it comes to entitlement to medical care. The difficulty in this case is that as the medical record developed serious issues surrounding causation arose, and it was necessary to consider expert medical testimony to determine those issues. Dr. Verst concluded that the towel incident did not cause Claimant's long-standing neurogenic pain. Dr. Verst was aware that Claimant continued to express pain complaints after July 31, 2008, but declined to correlate those pain complaints to the accident. The Referee found Dr. Verst's testimony more persuasive on the matter of causation. The parties do not question that a lumbar surgery may be an appropriate remedy to resolve Claimant's pain complaints, but Claimant has not persuasively shown that Defendants should be financially responsible for the surgery.

Claimant argues that the Referee's finding regarding a sprain/strain injury is not supported by the record. As the decision now stands, the Referee's adoption of Dr. Verst's opinion does not preclude a finding that some medical care was causally related to the accident. Rather, Dr. Verst's salient conclusion is that the condition leading Claimant to require surgical

treatment is not causally related to the described accident. The parties submitted joint exhibits, including records from the Jerome Family Clinic. On July 1, 2008, Claimant visited the Jerome Family Clinic and was diagnosed with lumbar strain/sprain that was improving. Joint Exh. D, p. 23. Claimant continued to receive treatment from the Jerome Family Clinic until July 17, 2008. By July 31, 2008, Dr. Verst's treatment plan was based on diagnoses of degenerative disc disease, spinal stenosis and a central disc bulge that Dr. Verst opined was not caused by the towel lifting incident. Rather than finding that Claimant was not entitled to any medical care, the Referee concluded that Claimant was entitled to some medical care.

Claimant also argues that his entitlement to TTD benefits should not end as of July 31, 2008. Claimant avers that the continuance of Claimant's pain complaints beyond July 31, 2008 means Claimant's pain complaints were not temporary in nature and were unresolved. Claimant contends that he was still in a period of recovery and entitled to TTDs because his symptomology never changed. The Commission is sympathetic to Claimant's predicament. However, the legal standard for the "period of recovery" is not whether Claimant still experienced similar symptoms, absent a finding that the symptoms were causally related to the subject accident.

Here, Claimant references documents and arguments already presented, examined, and considered in the initial action. Claimant is understandably disappointed that the Commission did not find Dr. Verka's opinion as persuasive as Dr. Verst's opinions in the matter. The record supports the Commission's decision. As such, there is no justification to warrant a reconsideration of the order. The record reflects an exhaustive review of all the medical evidence and testimony by the Referee who clearly articulated her findings. The Referee's determinations are fully supported by the record.

Based upon the foregoing reasons, Claimant's Motion for Reconsideration should be, and is hereby, **DENIED**.

IT IS SO ORDERED.

DATED this _4th___ day of February, 2010.

INDUSTRIAL COMMISSION

__Participated but did not sign_____
R.D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this _4th___ day of _February_____2010, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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cs-m/cjh ___/s/_____