

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATO PENDIC,

Claimant,

v.

INDEPENDENT FOOD CORPORATION,

Employer,

and

LIBERTY NORTHWEST
INSURANCE CORPORATION,

Surety,
Defendants.

IC 2010-003026

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed September 27, 2013

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Boise on February 4, 2013. Claimant was present and represented by Daniel J. Luker. Defendants were represented by Kent W. Day. The parties presented oral and documentary evidence. Post-hearing depositions were taken, and briefs were later submitted. The matter came under advisement on June 14, 2013. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

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

1. Whether and to what extent Claimant is entitled to additional medical benefits, specifically lumbar fusion surgery as requested by Dr. Verska;
2. Whether Claimant's current need for surgery is related to the injury of January 21, 2010; and

3. Whether and to what extent Claimant is entitled to temporary disability benefits for surgical recovery.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

There is no dispute that Claimant suffered a compensable accident and injury. After coming to America in 1998, Claimant began working for Employer in 2003. By 2010, Claimant worked putting boxes of wieners on pallets. The job involved much twisting at the waist. On January 21, 2010, near the end of a shift, Claimant felt sudden low back pain. He sought medical attention and ultimately had back surgery. Defendants paid time loss and medical bills through this surgery.

Claimant contends the surgery helped, but did not correct the condition. He still has right leg radiculopathy. Claimant's preexisting degenerative disc disease was aggravated, exacerbated and accelerated by the injury. Joseph Verska, M.D., has recommended a lumbar fusion. Claimant's need for a fusion is causally related to the injury because the original, indisputably compensable surgery was incomplete. Moreover, the compensable injury caused his preexisting condition to be permanently aggravated, exacerbated and accelerated.

Defendants contend that the surgery performed by Michael Hajjar, M.D., was sufficient. Claimant recovered from that surgery and reached medical stability. Later arising complaints are due to the preexisting degenerative disc condition. There exists an insufficient clinical basis upon which to perform a fusion. Even if a fusion surgery were deemed to be reasonable and necessary, it results solely from Claimant's previously symptomatic degenerative disc condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant and his companion and co-worker Sherry Baker;
2. Claimant's Exhibits 1 through 9 admitted at the hearing;

3. Defendants' Exhibits A through Q admitted at the hearing; and
4. The post-hearing deposition testimony of surgeons Michael Hajjar, M.D., and Joseph Verska, M.D.

All pending objections are overruled.

FINDINGS OF FACT
Introduction and Accident

1. Claimant is a native of Bosnia. He came to America with his family in 1998 to avoid the war in Bosnia.

2. Claimant worked as a mine engineer, supervising as many as 50 people, in Bosnia. He received a college education there.

3. Because of a language barrier and the U.S. accreditation system, Claimant has not worked in his profession here. He first worked in the United States as a cemetery worker. He began working for Employer in 2003 as a sanitation worker. He worked various jobs for Employer into 2010.

4. On January 21, 2010, Claimant was packaging and labelling boxes of wieners which he then put on a pallet. Each box weighed 24 pounds. Each pallet held 50 boxes. The processing line called for another pallet every 35 minutes.

5. Claimant suffered an accident and injury to his low back when he felt sudden, intense pain in his low back and right leg. He described the leg pain as feeling like a "shock."

6. Claimant had experienced intermittent low back pain—muscle pain—before. It had never been bothersome enough to seek medical attention. He had never experienced right leg pain before the date of the accident.

7. After a painful and sleepless night, Claimant asked his companion to drive him to work. Claimant usually drove himself, but felt unable because of pain.

8. Arriving at work, Claimant reported the accident. Despite attempting to assure

his supervisor that he could work, Claimant was sent to the office to report it. Employer sent Claimant to Brian Johns, M.D.

2010 Medical Care

9. A February 10 CT scan showed degenerative disc disease from L2 through S1 with bulges, osteophytes, and narrowing of the central canal at various levels. The scan was unable to show whether nerve root involvement was a factor. L5-S1 showed “significant disc space narrowing.”

10. A March 15 X-ray of Claimant’s pelvis showed osteoarthritic changes in the SI joints and hips, worse on the right.

11. An April 1 MRI showed a disc bulge impinging on the L5 and S1 nerve roots on the right. It also showed generalized degenerative disc disease throughout the lumbar spine, although except for L5-S1 this was considered to be insignificant.

12. On April 12 and May 3, David Jensen, D.O., performed steroid injections.

13. In April and May, Dr. Jensen limited Claimant’s activity to no lifting over 15 and 10 pounds respectively. He included motion and position restrictions as well.

14. Claimant attended physical therapy, but was dissatisfied with the result.

15. On June 23, Dr. Hajjar signed his IME report. On examination, Claimant showed a limp and diminished right leg strength. After also reviewing records including diagnostic imaging, Dr. Hajjar opined Claimant suffered a work related L5-S1 disc protrusion which required a microdiskectomy. He opined that, given Claimant’s degenerative disc disease at L5-S1, additional surgery—including a fusion—would not likely be related to the work injury. Two days later, Dr. Hajjar wrote to Surety to offer a price break on the IME if Claimant were to become a patient of Dr. Hajjar’s.

16. On July 10, Dr. Hajjar performed a right L5-S1 microdiskectomy. The operative

report describes how the S1 nerve root was decompressed. It further states, “Complete decompression of the S1 nerve root, the L5 nerve root and the spinal canal was achieved and confirmed.”

17. On July 21, Dr. Hajjar reported that Claimant reported he was “doing well and his leg pain is essentially gone, but he does still have some soreness in his back.”

18. On August 5, ICRD consultant Greg Taylor began providing services to Claimant. ICRD closed its file in December after Claimant returned to work with Employer. Upon closure, ICRD noted Claimant, though working, was not yet medically stable.

19. On August 9, Dr. Hajjar reported that Claimant reported some right foot pain which was “not radicular in an anatomical distribution.”

20. On September 1, Dr. Hajjar reported that Claimant reported right leg pain in the inner thigh, but not any L5 radicular pain. Claimant also reported some pain at his right SI joint.

21. A September 27 X-ray confirmed the lumbar degenerative disease.

22. A September 30 MRI showed mild facet arthrosis at L3-4 and L4-5, no problems at L1-2 or L2-3, and postoperative changes and significant scarring and degenerative changes—but no recurrent disc herniation—at L5-S1.

23. On October 27, Claimant reported left gluteal pain, but no right radicular pain. Dr. Hajjar opined Claimant was at MMI and rated his permanent impairment at 6%. Degenerative and spondylotic changes at L5-S1 were not included in this rating as Dr. Hajjar opined them unrelated to the work injury. He released Claimant to full work without restriction.

2011 Medical Care

24. On February 16, Dr. Hajjar wrote that Claimant was at MMI as of December 8, 2010. His permanent restrictions included no lifting over 20 pounds together with motion and position restrictions.

25. On May 13, Dr. Verska examined Claimant. He noted Claimant walked with an antalgic gait, had a positive result with Patrick's and Fabere's tests on the right, showed SI joint tenderness, but was otherwise normal. He diagnosed sacroiliitis, postlaminectomy syndrome and disk degeneration. He suggested a right SI joint injection because Claimant described pain over the SI joint, not in the midline of his back. He restricted Claimant from all work.

26. The injection relieved pain for less than a day. Dr. Verska ordered an MRI and proposed a fusion at L5-S1.

27. On May 17, a bone scan showed mildly increased activity at L5-S1 "secondary to degenerative disk disease." Radiologist Joshua Hall, M.D. also noted, "Findings are likely degenerative," with reference to focal activity at T9 and T10 as well.

28. A May 24 MRI showed the post-surgical changes, "minimal" disc bulges at L2-3, L3-4, and a "very mild disc bulge" at L4-5, together with scar tissue, a "very mild" disc bulge, and very mild bilateral foraminal narrowing at L5-S1.

29. On May 26, Dr. Verska reviewed the MRI with Claimant. Dr. Verska opined the need for a fusion was related to the work injury.

30. On July 7, Dr. Verska opined Claimant was not at MMI and was unable to work. He again opined that the fusion was related to the work injury.

31. On July 29, Dr. Verska opined that Claimant had two problems in his back, SI joint inflammation and discogenic pain with right leg radiculopathy.

32. On August 4, after another SI joint injection, Dr. Verska recorded: "Today, I talked to Mato about his anxiety, his fears, and his worries and that he does not need a lumbar fusion." Dr. Verska released Claimant to return to full-time work without restrictions.

33. On August 10, after a review of Dr. Verska's reports, Dr. Hajjar maintained his

opinion that Claimant's need for ongoing treatment was related to the preexisting condition and not to the work injury.

34. On August 30, Dr. Hajjar opined the Claimant was not a good candidate for fusion surgery.

35. On September 16, Dr. Verska reviewed X-rays he interpreted as showing a collapsed disk space at L5-S1. He returned to his opinion that a fusion was necessary.

2012 Medical Care

36. On May 22, Dr. Hajjar reexamined Claimant, whom he had not seen since February 2011. Dr. Hajjar opined, "His pain is not clearly discogenic in nature at all and it is more muscular and paraspinal in nature." He maintained his opinion that surgical fusion was unlikely to help Claimant. Dr. Hajjar did suggest a nerve conduction study to attempt to clarify whether Claimant's symptoms are neurogenic. After reviewing a new MRI, Dr. Hajjar found that it supported his opinions.

37. On June 6, Dr. Hajjar restricted Claimant to no lifting over 25 pounds with position and motion restrictions.

38. On June 13, Dr. Hajjar reversed his opinion and stated Claimant was "clearly" a candidate for fusion surgery, but maintained his opinion that it was not related to the work injury.

39. On July 5, Dr. Verska imposed work restrictions of light duty, shifts of four to six hours, and no lifting over 20 pounds. This was in response to an examination which showed "exquisite tenderness of the L5-S1 motion segment" and pain with movement and activity.

40. A July 11 MRI was consistent with the May 24, 2011 MRI, except that it showed a small fracture at L2 with "severe" edema, "moderate" edema at the left upper SI joint, "minimal" L5-S1 degenerative retrolisthesis, and the L3-4 disc bulge had been upgraded from "minimal" to "very mild." Radiologist Gary Howell, M.D., characterized the L5-S1 disc

degeneration as “severe.”

41. On August 16, Dr. Verska released Claimant to full work. No lifting restrictions were indicated.

42. Dr. Hajjar evaluated the 2011 and 2012 MRIs and opined them consistent with the imaging taken at the time of the accident. He opined that the degenerative changes were symptomatic before the accident and were not related to the work related injury. He opined that Claimant’s symptoms in 2012 related only to the preexisting degenerative condition and not to the accident and injury.

DISCUSSION AND FURTHER FINDINGS

43. The provisions of the Idaho Workers’ Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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

44. In order to obtain workers’ compensation benefits, a claimant’s disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967). The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection

between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.* An employee may be compensated for the aggravation or acceleration of a preexisting condition, but only if the aggravation results from an industrial accident as defined by Idaho Code § 72-102(18)(b).

45. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

46. To understand whether the subject accident is responsible for Claimant's ongoing complaints and potential need for further treatment, it is necessary to further examine the opinions of Drs. Hajjar and Verska, the only two physicians involved in Claimant's treatment/evaluation who have addressed at any significant length the threshold question of causation.

47. Although Drs. Hajjar and Verska disagree about the nature and cause of Claimant's current condition, they are in essential agreement on a number of other matters tangential, but important, to the resolution of the central causation question. Both Drs. Hajjar and Verska agree that Claimant suffered injury to his L5-S1 disc as the consequence of the subject accident. Both agree that Claimant required the decompressive surgery performed by Dr. Hajjar, and that the need for such surgery was related to the subject accident. Both physicians agree that in addition to the accident-caused L5-S1 disc herniation, Claimant suffers from longstanding multi-level degenerative disc disease which predated the subject accident. Both Drs. Hajjar and Verska agree that from the various MRI reports they have reviewed in

connection with this case, it is difficult, if not impossible, to determine whether, or to what extent, Claimant's degenerative disc disease has progressed since the time of the first study. Both Drs. Hajjar and Verska are in agreement that if Claimant's underlying degenerative disc disease has progressed since the date of the subject accident, it is possible that such progression is simply part of the natural course of the disease process and unrelated to the subject accident. Beyond these points, however, Drs. Hajjar and Verska are in significant disagreement concerning the cause of Claimant's condition, and his need for further treatment.

48. Dr. Hajjar believes that the surgery he performed was successful in decompressing Claimant's L5 and S1 nerve roots. In support of this assertion he points to the various post-surgery MRI studies that fail to show any residual compromise of the L5 or S1 nerve roots. Further, Dr. Hajjar has testified that during the period that he followed Claimant post-surgery, he never noted symptoms or findings on exam consistent with ongoing radiculopathy.

49. Dr. Verska, on the other hand, believes that the surgery performed by Dr. Hajjar incompletely decompressed the Claimant's L5 nerve root. Dr. Verska has noted that the various post-surgery MRI studies demonstrate no scarring at L5, suggesting that the surgery performed by Dr. Hajjar did not decompress that nerve root. (However, it must be noted that Dr. Verska has also conceded that the same post-surgery MRI studies do not reveal any extant compression of the L5 nerve root, notwithstanding the lack of scar tissue.) Dr. Verska also followed Claimant over the course of several months following the 2010 microdiscectomy. Interestingly, he noted that Claimant had symptoms and clinical findings on exam consistent with lumbar radiculopathy, supporting his belief that Claimant continued to suffer from an L5 nerve root compression. Dr. Verska's observations in this regard find additional support in the post-surgery records of Drs.

Jensen and Johns, both of whom noted signs and symptoms consistent with lumbar radiculopathy.

50. Dr. Hajjar testified that Claimant's L5-S1 disc herniation and related nerve root compression was completely addressed by the May 2010 surgery. He consistently expressed his view that Claimant's ongoing complaints of mechanical low back pain can only be related to Claimant's underlying, and non-work related, degenerative disc disease. He did not believe that this underlying disease was in any wise aggravated or accelerated by the right sided disc herniation at L5-S1. Therefore, per Dr. Hajjar, Claimant's current condition and need for medical treatment is all together related to the underlying disease process.

51. For his part, Dr. Verska believes that Claimant's underlying degenerative disc disease was aggravated/accelerated by the subject accident and that the surgery performed by Dr. Hajjar further weakened the disc and surrounding structures. Dr. Verska is also of the view that Claimant's acknowledged right sided disc herniation and related nerve root compression was never properly addressed by Dr. Hajjar's surgery. His findings on exam of Claimant support this conclusion, as do the records of Drs. Jensen and Johns. Also, Claimant's own testimony tends to establish that he suffered from radicular complaints following the surgery.

52. On balance, we find Dr. Verska's opinion to be better supported by the evidence. Dr. Verska adequately explained why the post-surgery MRI studies might be false negatives for L5 nerve root compression. These studies are taken with the patient in a supine position, and may not demonstrate nerve root compression that occurs with a severely collapsed disc when the claimant is in a standing position. He persuasively described how Claimant's current symptoms could either be the result of accident produced acceleration of Claimant's underlying degenerative disc disease or because the L5 nerve root was not adequately decompressed at the

time of the first surgery. Dr. Verska's observations concerning Claimant's post-surgery radicular complaints are well supported by Claimant's testimony, and the contemporaneous records of other physicians. For these reasons we conclude that Claimant's ongoing low back and lower extremity complaints continue to be causally related to the subject accident. We recognize, of course, that Claimant has a significant underlying condition which predated the subject accident. However, we believe the evidence and medical opinion establishes that the condition was, and continues to be, aggravated by the effects of the subject accident.

Medical Care

53. Having found that Claimant's current condition is causally related to the subject accident, we must next determine whether he is entitled to the treatment proposed by Dr. Verska. To treat the Claimant's ongoing L5 nerve root compression Dr. Verska proposes further decompressive surgery. Because this will be destabilizing, Dr. Verska has testified that an L5-S1 fusion will be necessary. Dr. Hajjar, at least at the time of his deposition, was reluctant to support such a procedure for Claimant, noting that fusion procedures are notoriously ineffective in relieving mechanical low back pain. However, as noted above, the more persuasive evidence in this case establishes that Claimant does not suffer from mechanical low back pain alone. The medical and other evidence establishes that Claimant suffers from lower extremity radiculopathy, a condition that is more amenable to treatment by lumbar fusion. Even Dr. Hajjar acknowledged that the procedure recommended by Dr. Verska would be a good choice for someone suffering from lumbar radiculopathy.

54. Based on the foregoing, we conclude that Claimant is entitled to the decompressive and L5-S1 fusion surgery proposed by Dr. Verska.

Time Loss Benefits

55. The narrow issued posed by the parties in regard to time loss benefits is whether Claimant is entitled to time loss benefits during his period of recovery following the surgery we have authorized. Clearly, he is. See I.C. § 72-408; *Maleug v. Pearson Enterprises*, 111 Idaho 789, 727 P.2d 1217(1986). We do not have before us, and therefore do not address, the question of whether Claimant is entitled to TTD benefits from the date those benefits were curtailed to the date of the surgery recommended by Dr. Verska, whenever that may occur. Nor do we have the ability, at this juncture, to ascertain when Claimant’s entitlement to time loss benefits might be curtailed following the proposed surgery, since we have no way to ascertain when Claimant might reach a point of medical stability or satisfy other of the *Maleug* criteria that might warrant curtailment of time loss benefits.

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CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commission hereby ORDERS the following:

1. Claimant’s condition as of the date of hearing was causally related to the industrial injury;
2. Claimant is entitled to reasonable medical care for this condition under I.C. § 72-432, including the decompressive and L5-S1 fusion surgery proposed by Dr. Verska;
3. Claimant is entitled to time loss benefits from the date of the proposed surgery until such time as he shall reach a point of medical stability or such other time when it is appropriate to curtail time loss benefits under *Maleug*, supra; and

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

DATED this 27th day of September, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2013, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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