BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEPHEN ARTHUR LOWERY,

Claimant,

v.

GALEN KUYKENDALL LOGGING,

Employer,

and

STATE INSURANCE FUND,

Surety,
Defendants.

IC 2019-022568

ORDER ON DEFENDANTS' MOTION FOR RECONSIDERATION

FILED
APR 07 2023
INDUSTRIAL COMMISSION

On February 2, 2023, the Commission entered its Findings of Fact, Conclusions of Law, and Order in the matter above referenced. On February 21, 2023, Defendants filed their timely motion for reconsideration pursuant to Idaho Code § 72-718. Claimant's response, titled as "Claimants Motion Against Defendants [sic]", was mailed to the Commission on March 30, 2023 and filed with the Commission on April 4, 2023. Claimant's filing is untimely and is not considered. The Commission has reviewed the Defendants' motion and supporting memorandum and issues this order on the motion for reconsideration.

DISCUSSION

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "[i]t is axiomatic that a [party] 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 reconsideration. *Davidson v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196 (1986). The Commission may reverse its decision upon a motion for reconsideration, or rehear 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.

"Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Curtis v. M.H. King Co.*, 142 Idaho 383, 385, 128 P.3d 920, 922 (2005) (citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003)). The burden on a workers' compensation claimant is to establish by the weight of the evidence that his injury was the result of a compensable accident or occupational disease to "a reasonable degree of medical probability." Furthermore, "a worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery." *Evans v. O'Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

In its February 2, 2023, decision, the Commission concluded that Claimant suffers from an occupational disease involving the L3-L4 level of his lumbar spine that manifested on or about

June 19, 2019, for which he is entitled to the medical and the time loss benefits enumerated in the decision. In their motion and supporting brief, Defendants have articulated a number of objections to the Commission's decision which warrant further discussion.

Turning first to Defendant's assertion that the Commission has *sua sponte* raised and discussed issues that were neither raised nor argued by the parties, the Commission notes that among the issues noticed for hearing are the following: "1. On what date did the accident occur or the occupational disease become manifest; ... 3. Whether Claimant suffers from a compensable occupational disease." Decision and Order pp. 1-2. These stated issues necessarily implicate a variety of sub-issues relating to the elements of a compensable occupational disease, including, inter alia, whether Claimant's condition is of a type contemplated for inclusion as an occupational disease under Idaho Code § 72-438, whether the disease was incurred in Claimant's employment, whether the hazards to which Claimant was exposed are characteristic of and peculiar to his employment, whether he was disabled as a result of the disease, whether the disease or claim is barred by the rule of *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994), which employer should be held liable for Claimant's disease in a multiple employer scenario, etc. Discussion of these and other matters is made necessary in order to ascertain whether the claimed occupational disease is in fact compensable, the issue raised by the parties in the notice of hearing. As Defendants have noted, the Referee assigned to this case concluded that Claimant has not proven the elements of an occupational disease. The Commission declined to adopt the Referee's proposed decision because he gave limited treatment to an issue that warrants more. *See* proposed decision at ¶ 63. This is not a case like *Deon v. H&J, Inc.*, 157 Idaho 665, 339 P.3d 550 (2014) in which the Court stated that it "takes a dim view of fact-finding tribunals raising defenses or theories *sua sponte*. Theories and defenses should be determined by the parties, not the tribunal."

Id. at 671, 556 (italics in original). Here, the Commission's decision treats matters necessary to decide whether Claimant has suffered a compensable occupational disease.

As noted by the Commission in its original decision, it is conceded that Claimant argues that his L3-L4 lesion[1] is a "new injury", one that is to be distinguished from his prior L5-S1 injury:

> [BY CLAIMANT] We were trying to figure out – we didn't know it was a new injury. I'm still thinking, oh, it is my old injury. All the pain is in my hips and in my low back.
>
> ...
>
> And if you read this Omak [sic] report, it will tell you and explain that this old surgery has nothing to do – my old surgeries and stuff has nothing to do with this new incident.
>
> ...
>
> Q. [BY MS. VELTMAN] So when did you come to the conclusion that something was different, that it was a new type of problem?
>
> A. That was like June – that was actually June – that was June 30th – or July 30th. Excuse me. I think – let me see here. I went and seen [sic] Larson. I may need a surgery. So it was actually June 19th, 2019, is when I actually found out that I had a new injury, and it was not my old injury.

Tr. 23:18-20; 27:16-19; 29:19 - 30:2.

Defendants assert that while Claimant did argue that he suffers from a "new injury" at L3-L4, he denied the occurrence of a specific accident, yet failed to expressly allege that his condition was an occupational disease. However, whether Claimant suffers from a compensable

[1] Defendants argue that the Commission's use of the term "lesion" to identify Claimant's L3-L4 condition reveals that the Commission has arrived at its own medical assessment of the etiology and nature of Claimant's L3-L4 condition, since nowhere in the record does any medical expert refer to Claimant's L3-L4 damage as a "lesion". *See* Defendants' Brief in Support of Motion for Reconsideration p. 11. "Lesion" is defined as follows: "an abnormal change in structure of an organ or part due to injury or disease." *Merriam-Webster.com Dictionary*, Merriam Webster, https://www.merriam-webster.com/dictionary/lesion Definition 2 (accessed April 4, 2023). It is in this sense that the Commission used the term. It is merely shorthand for the fact that the medical evidence supports a conclusion that Claimant has a physical abnormality at this level.

occupational disease is a noticed issue, one that was deemed important enough to warrant treatment by Defendants in their briefing.

Workers' Compensation is remedial legislation. The Act must be construed to enact the legislative intent to afford sure and certain relief to injured workers. *Page v. McCain Foods*, 141 Idaho 342, 109 P.3d 1084 (2005). The primary purpose of proceedings before the Commission is the attainment of justice in a particular case. Proceedings should be summary, simple and in accordance with the rules of equity. Idaho Code § 72-708. This direction is particularly relevant to pro se proceedings:

> The policies of simplicity and equity are underscored by the pro se nature of the Industrial Commission proceedings, such as this was. From the time of its creation, the Industrial Commission and its proceedings have contemplated pro se claimants. The original notion was that the Industrial Commission would be like most any other Commission. It would lend a ready ear and a helping hand to a citizen with a grievance; the overriding purpose being to do justice in the given situation. This potential for limited assistance to claimants is sensible because pro se claimants cannot be expected to have the legal expertise or wherewithal possessed by attorneys, many of whom specialize in workers' compensation cases either on behalf of the claimants or on behalf of sureties.

Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990).

However, this guidance does not supersede the requirement that it is Claimant who bears the burden of proving the elements of his case. He must establish causation by adducing medical proof that supports the claim to a reasonable degree of medical probability. *Hagler*, *supra*. Here, if the evidence supports a finding that Claimant suffers from a compensable occupational disease, he should be compensated for it. Our analysis of the opinions of Drs. Popovics and Bauer is directed to responding to that question.

Defendants assert that the Commission has selected bits and pieces of the conflicting medical opinions of Drs. Bauer and Popovics to synthesize its own hybrid opinion supporting the

compensability of the claim. In so doing, Defendants assert that the Commission has failed to abide by the direction of *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013).

The Commission hears many contested cases and is exposed to a great deal of information relating to various medical issues, especially orthopedic matters, owing to the frequency of those types of injuries in the population of injured workers. However, *Mazzone* makes it clear that the Commission may not rely on its specialized knowledge as a substitute for evidence. Therefore, the Commission may not rely on what it independently knows, or thinks it knows, about a medical topic to make a determination on whether to accept or reject the opinion of a medical expert. The Commission may, however, utilize its expertise in drawing inferences from the facts or record to resolve conflicts in the evidence.

Issues central to the compensability of the occupational disease claim include whether the Claimant's L3-L4 lesion is causally related to the hazard of his employment, and if so, whether it meets the other elements of a compensable occupational disease. Here, Dr. Popovics and Dr. Bauer rendered conflicting opinions on the cause of Claimant's L3-L4 lesion. The Commission adopted the opinion of Dr. Popovics that Claimant's L3-L4 lesion is causally related to the demands of his employment. As set forth in the original decision, Dr. Popovics' opinion is well explained in his records and testimony. That the demands of Claimant's customary profession are the cause of his low back difficulties also finds support in the records of treaters/evaluators associated with Claimant's Alaska workers' compensation claims. Finally, Dr. Larson was also prepared to acknowledge the possibility that Claimant's past low back injuries were related to the type of work he did. It is the same type of work that Dr. Popovics thought responsible for Claimant's current difficulties.

It is only Dr. Bauer who has proposed that Claimant's low back problems are altogether unrelated to the work he has performed over the past forty years. Per Dr. Bauer, Claimant's lumbar spine degeneration is referable to age and genetics, without contribution from his employment.

The Commission concluded that Dr. Bauer's opinion on causation is an outlier opinion contrary to the other evidence of record that has been adduced on the question of whether or not Claimant's customary profession is implicated in causing or contributing to his low back problems.

As pointed out in the original decision, Dr. Popovics related Claimant's L3-L4 lesion to the demands of Claimant's current work, but he may also have acknowledged that Claimant's previous L5-S1 fusion contributes to Claimant's current condition:

> Q. [BY MS. VELTMAN] And it appears that the final chart note that I have at least in evidence is from November of 2019, and under long-term goals you indicated: Our long-term goal is to decrease Stephen's pain symptoms significantly enough that he may not need spinal surgery?
>
> A. [BY DR. POPOVICS] Correct.
>
> Q. However, he has been under care on and off for several years, and his condition keeps getting worse due to his three past spinal fusions and continued deterioration of his spine.
>
> A. Okay. Is that a quote? Are you quoting that or reading that?
>
> Q. I am.
>
> A. Then I would say that it's accurate if I said it, if I wrote it. Can I say a little aside on that one, however?
>
> Q. Yes.
>
> A. Okay. In that respect there being continued deterioration, the only mechanism at the time that I could see for continued deterioration is his job, and we had that discussion with him and his wife upon initial entry in the office years before.

Tr. 17:21 - 18:18.

Between June 20, 2019 and November 19, 2019, inclusive, Dr. Popovics treated Claimant on eight occasions. The chart notes for each of those visits contain the following identical entry:

> Our long-term goal is to decrease Steven's[2] [sic] pain symptoms significantly enough that he may not need spinal surgery, however, he has been under care on and off for several years and his condition keeps getting worse due to his three past spinal fusions and continued deterioration of his spine.

E.g., DE 5 pp. 1202. As with other of Dr. Popovics' chart notes, it is unclear how the entry above quoted came to be included in each of the eight chart notes. Other than the fact that the language appears verbatim in eight separate chart notes, there is nothing about the language that makes it intrinsically incompatible with the chart note for a particular visit. However, the eight treatment notes referenced above also contain the following identical patient medical history update:

> Accidents History: Other (please inform doctor) (9/04/16 – Steven's wife called on a Sunday stating that Steven was in excruciating upper left back pain that has been causing migraine level headaches. He has pain referring to the left triceps area. She stated that they were considering going to the ER, but would rather see a chiropractor for the injury. He stated that he cannot recall a mechanism of injury.), Other (please inform doctor) (2/23/17 – Stephen stated that his pain today is mainly sore in the center of the lower back. About a week ago, Steve felt like a rib was popped out on the left side. Neck pain and stiffness. His central lower back pain was rated at a 7/10 present 100% of the time and made worse with sitting. His left side neck and upper back pain rated at a 3/10 and a 2/10 and described as burning. The pain stated to be present 100% of the time and made worse with turning his head side to side. There was no reporting mechanism of his injuries.

E.g., DE 5 p. 1222. Unlike the previously quoted excerpt, the above excerpt is obviously not part of a chronology of treatment history taken between June 20, 2019 and November 19, 2019. Obviously, this is simply a single entry that has been repeated in subsequent notes, and it seems likely that the same is true for the entry referring to the contribution of the L5-S1 fusion. In other words, we see no reason to believe that reiteration in this case equates to added significance.

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[2] Claimant's first name is alternatively spelled "Stephen", "Steven", and "Steve" throughout Dr. Popovics' chart notes.

Even so, at first blush, Dr. Popovics' chart note still seems to admit the possibility that Claimant's L3-L4 condition is, in some respect, a natural and probable consequence of the previous fusion at L5-S1. This is important because, if true, Claimant's L3-L4 lesion is simply a part of his L5-S1 claims. However, careful review of Dr. Popovics' comments reveals only an assertion that Claimant's "condition" worsened due to the prior L5-S1 fusion and his on-going degeneration, not that the L5-S1 fusion is responsible for causing or contributing to Claimant's L3-L4 lesion. In the final analysis it is difficult to understand exactly what Dr. Popovics intended by his comment; neither his chart note nor his testimony are particularly helpful in explaining whether he believes that Claimant's L3-L4 lesion is, in some respect, causally related to Claimant's prior L5-S1 fusion.

However, Dr. Bauer has addressed the question of whether or not the Claimant's prior fusion at L5-S1 is implicated in the cause of his current difficulties at L3-L4. Dr. Bauer considered whether Claimant suffers from adjacent segment disease, i.e., by fusing Claimant's spine at L5-S1, greater stress is placed on levels above the fusion, and in this manner it can be shown that the Claimant's L3-L4 lesion is a natural and probable consequence of the prior fusion at L5-S1. Dr. Bauer persuasively explained why this theory of causation is inapplicable to the facts before the Commission. Claimant retains an undamaged motion segment at L4-L5, the level immediately adjacent to the L5-S1 fusion. The retention of the L4-L5 motion segment makes it unlikely that the L5-S1 fusion has any impact on the L3-L4 motion segment.

Dr. Bauer's opinion is well explained, and we see nothing in Dr. Popovics' treatment notes that necessarily contradicts Dr. Bauer's conclusion in this regard.

This complex case arises from a rather straightforward assertion; Claimant suffers from a work caused L3-L4 lesion that was first diagnosed in June of 2019. The claim is pursued both as

an accident/injury and as an occupational disease. No accident has been identified, so Claimant is left to pursue his claim, if at all, as an occupational disease. Defendants contend that Claimant has suffered from and known about work-caused low back degeneration for many years. Therefore, Claimant's degenerative back disease was manifest years before he commenced his employment with Employer in 2010 and is barred by the rule of *Nelson, supra*, as limited by *Sundquist v. Precision Steel and Gypsum*, 141 Idaho 450, 111 P.3d 135 (2005). Because his date of manifestation predated his employment by Employer, it is shown that Claimant has a pre-existing occupational disease that was, at most, aggravated by the demands of his employment, and is therefore barred by the rule of *Nelson*.

The simplest answer to this defense is that while Claimant knew about the work-related nature of his prior problem at L5-S1, and knew that his back pain was getting worse over time, he did not know that his current symptoms are related to a lesion at L3-L4 until being so advised by Dr. Larson on or about June 19, 2019. Claimant's L3-L4 lesion represents a distinct occupational disease that did not become manifest until June 19, 2019. Therefore, per *Sundquist,* Claimant's Claim is not barred by *Nelson,* because he did not have an earlier manifestation of his L3-L4 disease that would have implicated the rule of that case.

Moreover, we find no basis to conclude that the L3-L4 lesion is a part of Claimant's prior L5-S1 claims. It might be argued that Claimant's L5-S1 fusion caused further stresses at the L3-L4 level, causing it to fail. However, other than Dr. Popovics equivocal statement, there is no evidence supporting this assertion. Because we find Dr. Bauer persuasive on this point, we conclude there is no nexus between the earlier L5-S1 lesion and the L3-L4 lesion. In other words, the evidence we find persuasive establishes that the L3-L4 lesion would have developed regardless of the L5-S1 fusion. The L3-L4 lesion is not a natural and probable consequence of the previously

treated problem at L5-S1 and constitutes a separately compensable occupational disease. In reaching these conclusions we have considered the testimony and records of both Dr. Popovics and Dr. Bauer.

It is true that the Commission has rejected some of Dr. Bauer's opinions, while finding other of his views persuasive. However, we see nothing in *Mazzone* which requires that if we reject one of the several opinions a medical expert might hold, we must reject that expert's other opinions as well, even though they be persuasive. Nothing in *Mazzone* requires that in evaluating the competing opinions of two experts, the Commission must wholly reject one while wholly accepting the other. Indeed, to place such a constraint on the factual deliberations of the Commission would impede the Commission's obligation to fully and fairly consider the medical opinions that come before it.

Defendants also assert that there was no evidence on the question of whether or not the risks to which Claimant was exposed in his occupation were characteristic of and peculiar to his employment. Whether or not a risk of injury is characteristic of and peculiar to an injured worker's employment is a factual determination to be made by the Commission.

In support of his occupational disease claim, Claimant must show, not only that his condition is causally related to the demands of his employment, but also that the hazards to which he was exposed are characteristic of and peculiar to his employment. Idaho Code § 72-102(21)(a). The phrase "characteristic of and peculiar to" has been construed as follows:

> ...the phrase "peculiar to the occupation," is not here intended to be used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations.

Bowman v. Twin Falls Const. Co., Inc., 99 Idaho 312, 323, 581 P.2d 770, 781 (1978).

Mulder v. Liberty Northwest Ins. Co., 135 Idaho 52, 14 P.3d 372 (2000) involved a claim of a loss prevention consultant whose job required him to drive his personal vehicle from Boise to visit clients in the Idaho Falls, Pocatello, and Blackfoot regions on a regular basis. During these trips he was required to use pen and paper to take handwritten notes to memorialize his client meetings. Finally, while at his Boise office, claimant's work included use of a computer keyboard. The claimant developed carpal tunnel syndrome which he related to the aforementioned demands of his work. Liberty defended the matter arguing, inter alia, that the claimant had put on insufficient proof that the risks of developing carpal tunnel syndrome to which he was exposed could be distinguished from the risk of developing the disease in the general run of occupations. The Commission found that the claimant's employment exposed him to long periods of repetitive upper extremity motions, including writing, keyboarding and gripping a steering wheel and that these risks were not characteristic of all occupations. In upholding the Commission, the Court took notice of the fact that while a significant fraction of occupations might require of an employee that he drive, write and use a computer keyboard, an equally great number do not.

Here, the Commission has found that the hazards to which Claimant was exposed in his customary profession did cause his L3-L4 lesion. We are further persuaded that the risk to which Claimant was exposed is characteristic of and peculiar to his occupation. More so than in *Mulder*, it is clear to us that the risks to which Claimant was exposed are not encountered in the general run of occupations. In the general run of occupations workers are not subjected to the repetitive jarring, shaking and bumping that is described by Claimant. Having reviewed Claimant's testimony, and the approximate four minutes of video depicting his work activity, we are satisfied that his job subjected him to a risk of injury which can be distinguished from the risks inherent in the general run of occupations. *See* Tr. 32-34; CE 4.

As a final matter, the Commission found that Claimant's disease first manifested on or about June 19, 2019, the date on which he recalls being advised by Dr. Larson that his complaints emanate from the L3-L4 level. The Commission also found that Claimant's employment came to an end on May 25, 2019. Defendants assert as fact that immediately after May 25, 2019, i.e., on May 26, 2019, Claimant commenced his employment with Evergreen Timber (hereinafter "Evergreen") and was so employed on June 19, 2019. *See* Defendants' Brief in Support of Motion for Reconsideration pp. 2-4. At Evergreen, Claimant pursued his customary work operating a shovel loader. Therefore, as of his June 19, 2019, date of manifestation, Claimant was employed by Evergreen, in whose employ he was last injuriously exposed to the hazards of his disease. If Defendants are correct in these assertions, per *Sundquist*, *supra*, Defendants cannot be held responsible for Claimant's occupational disease since the disease did not manifest until after Claimant had left that employment.

Defendants assert that there is an internal inconsistency in the Commission's findings. On the one hand, the Commission found that on the date his disease first manifested (June 19, 2019) Claimant had last been injuriously exposed to the hazards of his disease while in the employ of Employer. On the other hand, the Commission also made the following finding at paragraph 11 of the decision:

> Claimant commenced his employment with Employer sometime in 2010. His employment with Employer came to an end on May 25, 2019. *See* Tr. 32. He quit because Employer failed to follow through with a promise to replace the machine that was "beating up" Claimant's back. Tr. 32-34. Since then, and through the date of hearing, Claimant has been employed by Evergreen Timber in Alaska. Tr. 34-36.

Decision and Order ¶11 p. 5.

The argument is that if, as the Commission appears to have found, Claimant began his employment with Evergreen on May 26, 2019, and worked there through March 22, 2022 (the date

of hearing), it was error for the Commission to find that as of his June 19, 2019, date of manifestation Claimant had last been exposed to the hazards of his disease while employed by Employer.

The Commission agrees that there is the potential for conflict in these findings. Saying that "since" May 25, 2019, Claimant has been employed by Evergreen admits the interpretation that Claimant's employment by Evergreen started immediately after he left Employer as opposed to sometime thereafter.

Claimant testified as follows concerning the end date of his employment by Employer, and the starting date of his employment by Evergreen:

> Q. [BY MS. VELTMAN] When is the last time that you worked for anybody?
>
> A. [BY CLAIMANT] A couple days ago.
>
> Q. Okay. For whom are you currently working?
>
> A. Evergreen Timber.
>
> Q. Okay. How long have you worked for them?
>
> A. Two years steady, and then I think it was maybe a year or two, maybe prior to that, for just a couple months in the wintertime.
>
> Q. When is the last time you worked for Galen Kuykendall?
>
> A. That was in May. Must be around May 25, 2019. I'd have to look at my W-2s, but I think that was it.
>
> ...
>
> Q. Who did you work for after May 2019?
>
> A. Evergreen Timber.
>
> Q. All right. Where is Evergreen Timber located?
>
> A. Alaska.

Q. What do you do for Evergreen Timber?

A. I log.

Q. Can you be more specific?

A. I shovel log. I do the same thing I have done for 40 years.

Q. Do you continue to go back and forth between Idaho and Alaska to work for them?

A. Nope.

Q. Do you work for the company in Idaho currently?

A. No.

Q. All right. When – I got the impression you worked for Evergreen Timber just a couple of days ago?

A. Yes.

Q. All right. Where was that?

A. Alaska. …

Tr. 31:21-32:8; 34:22-35:17.

Even from this it seems clear that after May 25, 2019, Claimant did not immediately start work for Evergreen. Per his testimony, he started working steadily for Evergreen approximately March 22, 2020, which would be shortly after he was released to return to work by Dr. Larson on February 25, 2020.

More important to this question is Claimant's recorded statement, taken by Surety on September 3, 2019, and admitted as Defendant's Exhibit 10. That statement clearly reflects that as of September 3, 2019, Claimant was still employed by Employer. DE 10 pp. 1328-1330; 1335.

The evidence of record discussed above, including a recorded statement given closer in time to the events in question, seems to support a conclusion that Claimant was employed by

Employer through September 3, 2019, and perhaps later. It also seems to suggest that Claimant did not start with Evergreen until mid to late March of 2020. However, this evidence conflicts with Claimant's testimony that he quit his job with Employer on May 25, 2019.

Claimant did not become entitled to medical benefits for his occupational disease until his disease first manifested on June 19, 2019. His entitlement to income benefits did not arise until disablement, no later than his date of surgery, but perhaps sooner. Who Claimant was working for during these time frames is important to the Commission's decision. We believe that the interests of justice are best served by reopening the hearing of this matter to elicit additional testimony on this question.

Per Idaho Code § 72-714(3), the Commission "shall make such inquiries and investigations as may be deemed necessary." The Court has interpreted this language as permitting the Commission to demand additional evidence if it finds that satisfactory evidence on the question of material fact is lacking. *Green v. Green*, 160 Idaho 275, 371 P.3d 329 (2016); *Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005). In view of the authority granted by Idaho Code § 72-714 to conduct additional hearings in the interest of justice, we retain jurisdiction in this matter in order that the parties may adduce additional evidence on the date his employment with Employer came to an end, and the beginning and ending date of any subsequent employment he held through March 22, 2022.

In accordance with the foregoing, we continue to adhere to our previous decision that Claimant's L3-L4 lesion represents an occupational disease causally related to the demands of his employment, but unconnected to his prior lumbar spine surgery at L5-S1. We do not accept that Claimant's L3-L4 lesion is a natural and probable consequence of having been previously fused at L5-S1. While Claimant may have had symptoms related to the L3-L4 lesion for a period of years

prior to June 19, 2019, it was on that date that his disease became manifest. The Commission is persuaded by the causation opinion rendered by Dr. Popovics, and further concludes that Dr. Bauer has cogently explained why Claimant's L5-S1 injury is not implicated in the cause of his L3-L4 lesion. Claimant has satisfied his burden of establishing that the hazards to which he was exposed are characteristic of and peculiar to his employment. Whether Employer can be held liable for the payment of medical and indemnity benefits depends on identifying the employer in whose employ Claimant was last injuriously exposed to the hazards of his disease as of the date of first manifestation and disablement. The Parties may stipulate to Claimant's employment history, or the Commission will hold another hearing to adduce evidence on this issue.

DATED this 7th day of April, 2023.

INDUSTRIAL COMMISSION

__Participated but did not sign__________
Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2023, a true and correct copy of the foregoing **ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION** was served by regular United States Mail and Electronic Mail upon each of the following:

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