BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHRISTOPHER MIKLOS, Claimant, v. L&W SUPPLY CORPORATION, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Surety, Defendants.	**IC 2019-033631** **ORDER DENYING MOTION FOR RECONSIDERATION** FILED MAY 08 2024 INDUSTRIAL COMMISSION

Order denying motion for reconsideration from the Decision and Order of the Commission filed on March 4, 2024.

Claimant, Christopher Miklos, requests that the Idaho Industrial Commission ("Commission") reconsider its March 4, 2024 Order. That order held that Claimant failed to prove by a preponderance of the evidence that his 2019 industrial accident caused the medical condition for which benefits were sought – specifically a second right ankle tendon injury diagnosed in 2022 – and Claimant was not entitled to additional medical care. Claimant also requests that the Commission reconsider an interlocutory decision of the referee which purportedly denied Claimant's request for a hearing to determine whether surety was required to provide a certain MRI. Although the surety eventually provided the MRI, the delay was prejudicial to Claimant. Defendants contest the motion.

The Commission denies the motion to reconsider for the reasons discussed herein.

FACTUAL HISTORY

1. The Commission adopts and incorporates the findings of fact as previously presented in the March 4, 2024, *Findings of Fact, Conclusions of Law, and Recommendation* and its accompanying *Order*. To briefly restate relevant portions, Claimant was injured on October 28, 2019, when he twisted his right ankle moving drywall sheets up a stairway. FOF ¶ 3. The injury required an extensive repair of Claimant's peroneus brevis and peroneus longus tendons on May 28, 2020. FOF ¶ 8. Claimant improved post-surgery, with his pain dropping from a 10/10 to a 4/10 after three months. FOF ¶ 9. Claimant stopped working for employer prior to the surgery. FOF ¶ 50. After the surgery, Claimant began working for "a lot" of different companies. FOF ¶ 42. His post-surgical employment included jobs such as driving, leaf blowing, property cleaning, and operating street sweepers. FOF ¶ 50.

2. About five months post-surgery, in October, Claimant had good days and bad days, but had no pain with movement to the areas painful prior to surgery. FOF ¶ 10. Over December 2020 to February 2021 Claimant's ankle remained stable but, unfortunately, Claimant continued to experience pain and discomfort in his ankle joint as his pain started to increase. FOF ¶ 10-14; 50.

3. Defendants' physician Dr. George Nanos opined Claimant was at maximum medical improvement ("MMI") with a 3% PPI rating in January of 2021. FOF ¶ 12. Claimant's physician Dr. Nixon, on the other hand, requested an MRI arthrogram to evaluate the situation. The request was made on February 16, 2021. FOF ¶ 11-14. Relying on Dr. Nanos' opinion that Claimant was at MMI, the surety refused to approve the MRI. FOF ¶ 15. After legal proceedings had been initiated and some effort expended towards calendaring a hearing – which will be discussed in detail in the procedural history below – the surety authorized the MRI which was carried out on August 4, 2022. FOF ¶ 16.

4. Claimant was diagnosed with a peroneal tendon tear, distal tibial spur, and mild ankle joint arthritis in his right ankle. FOF ¶ 18-19. The PA described this as a "recurrent tear," which specifically consisted of displaced fibers in Claimant's right peroneal brevis. FOF ¶ 18. Dr. Hirose opined surgical repair was warranted. FOF ¶ 20. Defendants' physician disagreed with the assessment, and stated the MRI was improved compared to Claimant's condition pre-surgery. FOF ¶ 21.

5. Dr. Hirose provided a medical opinion on Claimant's behalf stating that after Claimant's initial surgery, he suffered a new tear in the peroneal brevis tendon. FOF ¶ 31. He testified that this tear was a *different* injury.

> Specifically, he stated, "[s]o long as Dr. Nixon had a very good repair of that tendon, then we don't normally see this. But sometimes the tendon re-tears, and so that's why I say it's a different injury, because I know for a fact that Dr. Nixon is a very good surgeon, and he's [a] very thorough, careful surgeon." Hirose Depo. p. 18. Dr. Hirose repeatedly ruled out the idea that Claimant's current torn tendon was the result of Dr. Nixon's surgery. He called such a notion "highly unlikely." *Id* at p. 20.

FOF ¶ 32. To retear the tendon after the surgery, there must have been weight on the tendon due to activity or external force impacting the ankle. FOF ¶ 43. Whether Claimant had experienced pain at any given point was non-conclusive and did not establish an acute injury. Claimant "absolutely" could have experienced pain simply from post-surgical symptoms. FOF ¶ 40. Claimant's initial tear did put him at a heightened risk of a re-tear. FOF ¶ 48.

6. Dr. Hirose found that the Claimant's injury was more likely than not "related to the injury that caused the tear." FOF ¶ 34. Aside from that explanation being somewhat circular, Dr. Hirose also stated that "[w]hether or not it was on-the-job injury or not, [sic] I'm not 100 percent clear on." FOF ¶ 34. Dr. Hirose was asked if the recurrent tear was caused by the industrial accident in 2019, and he answered "[n]o, that wouldn't be the recurrent tear. That would be the initial tear that occurred in 2019." FOF ¶ 46. Dr. Hirose did agree with Counsel that *assuming* Claimant had

suffered an injury at work tearing the tendon, the subsequent tear would be related to that injury. FOF ¶ 35. However, the tendon would not begin fraying on its own accord. FOF ¶ 76. Dr. Hirose stated: "I think it probably took at least one injury after his surgery that caused the recurrent tear, and it's up to, not me, but somebody to figure out where he was when that happened." FOF ¶ 45. There was no testimony from Claimant or Dr. Hirose which established a possible date or event for the acute injury which resulted in the second tear to Claimant's tendon. FOF ¶ 41-43.

PROCEDURAL HISTORY

7. The Commission takes judicial notice of the legal file in this matter. Claimant filed a complaint on March 30, 2021. A request for calendaring was submitted by Claimant on July 28, 2021, which requested a single day hearing be set after October 31, 2021, on seven issues. These issues were identified as follows:

(a) Whether Claimant's conditions were caused by an accident arising out of and in the course of employment as defined by I.C. § 72-102(17)?
(b) Whether the Claimant is entitled to additional TTD benefits?
(c) Whether Claimant is entitled to additional medical benefits?
(d) Whether Claimant is entitled to permanent partial impairment or permanent disability as a result of the claimed accident?
(e) Whether, and to what extent, Claimant is entitled to disability in excess of impairment?
(f) Whether the Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise?
(g) Whether Claimant is entitled to attorney's fees?

Claimant's Request for Calendaring and Telephone Status Conference 7/28/21. The notice requested a one-day hearing to be held after October 31, 2021, and a status conference to discuss delayed discovery responses from Defendants. *Id.* There was no specific indication of a need for an MRI or diagnostic imaging.

8. Defendants objected to setting the hearing. Discovery had not yet been completed and Claimant had just provided updated medical records requiring input from a medical expert. Defendants anticipated that the results of that review could potentially lead to additional medical

imaging or care, and setting a hearing was premature. *Response to Request for Calendaring and Telephone Status Conference 7/28/21.* On August 4, 2021, Defendants filed an updated response, explaining that total permanent disability was at issue and additional investigation was needed regarding Claimant's pre-existing condition in his back, and pertinent records were not yet provided. *Amended Response to Request for Calendaring and Telephone Status Conference 8/4/21.*

9. On September 13, 2021, a status conference was held to discuss the request for calendaring. The request was for the hearing to proceed on all issues in the notice, including permanent and total disability, not merely the MRI authorization. Although there is no audio recording of the conference, Claimant's counsel has stated that she explained that "whether the MRI ordered by Dr. Nixon must be timely and immediately authorized by Surety was a disputed issue requiring a hearing under I.C. § 72-712." *Declaration of Counsel In Support of Claimant's Motion for Reconsideration* ¶ 12.

10. The referee denied the request for calendaring. The issues were not yet ripe, and Claimant ought to seek calendaring when a medical opinion put Claimant at or near maximum medical improvement. *Order Denying Request for Calendaring 9/13/21.* No request for an emergency hearing or hearing on a limited issue such as Claimant's entitlement to the MRI was made.

11. On January 6, 2022, Claimant renewed his request for calendaring, listing identical issues as listed in the first request for calendaring. This time however, Claimant bifurcated the issues so that causation, temporary disability, and medical benefits would be decided immediately, and permanent impairment and disability issues were reserved for a later date. *Claimant's Renewed Request for Calendaring and Telephone Status Conference 1/6/22.* Defendants agreed to set a date. *Response to Claimant's Renewed Request for Calendaring and Telephone Status Conference*

1/31/22. Neither party mentioned a specific conflict over an MRI diagnostic test or any concern over immediate medical care requiring a separate hearing. *Id.*

12. After a telephone conference, a half day hearing was scheduled for May 3, 2022. *Notice of Bifurcated Hearing 2/17/22*. The notice and the subsequent amended notice both listed the following issues: (1) whether the condition for which Claimant seeks benefits was caused by the industrial accident (2) whether Claimant was medically stable and (3) whether and to what extent Claimant was entitled to medical care. *Id; Amended Notice of Bifurcated Hearing 3/10/22*. On April 28, 2022, the parties stipulated to vacate the hearing as the defendants had "authorized an MRI." *Stipulation to Vacate Hearing 4/28/22*.

13. The case ultimately came to hearing on April 20, 2023. The Commission held against Claimant, finding that Claimant had not met his burden of proof to show a connection between the industrial accident and the injuries to the right ankle.

ARGUMENTS OF THE PARTIES

14. Claimant raises two issues for reconsideration. First, Claimant alleges the Commission failed to provide a timely hearing under I.C. § 72-712 and constitutional due process. *See Ayala v. Robert J. Meyers Farms Inc.*, 165 Idaho 355, 362, 445 P.3d 164, 171 (2019). Specifically, Claimant argues that the referee's September 13, 2021, decision to deny calendaring a hearing denied Claimant a hearing on the discrete issue of whether Claimant was entitled to the MRI requested by Dr. Nixon on February 18, 2021.

15. Second, Claimant argues that the Commission applied an incorrect legal standard when it held that Claimant failed to prove his second tendon tear was caused by the work accident. Per Claimant's argument, *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (Idaho 2022) entitled Claimant to a presumption that the tear to Claimant's right ankle is a compensable consequence of

the work accident. The Commission incorrectly applied a tort analysis of a subsequent intervening cause.

16. Defendants contest Claimant's arguments. First, Claimant requested a hearing on seven issues without asking whether the Surety should authorize the subject MRI. It would have been impossible to deduce the specific issue Claimant now raises. Denying calendaring on the requested issues was proper given the case was only three months old, discovery was ongoing, Claimant's deposition was not scheduled, and no experts had been disclosed.

17. Second, the Commission's decision did not use traditional tort superseding intervening cause analysis, and *Sharp* is not applicable. Claimant failed to provide the Commission with adequate evidence to support a finding that the current ankle injury is causally connected to the accepted peroneal tendon injury. The "retear" is neither an aggravation nor a secondary injury, making *Sharp* distinguishable. Even if *Sharp*'s presumption applied, the evidence would support a finding that the presumption was overcome. Holding sureties liable for remote subsequent injuries such as Claimant's would also have negative consequences for worker's compensation.

18. Claimant did not file a reply brief.

DISCUSSION

19. The Commission does not find Claimant's arguments persuasive and will not disturb the findings of fact or conclusions of law decided in the March 4, 2024, Decision and Order.

I. The Commission Complied With I.C. § 72-712 And Requirements To Provide A Timely Hearing.

20. Claimant argues that by denying Claimant's first request to calendar a hearing, the Commission failed to meet its obligation to provide a timely hearing on the issue of whether Defendants were obliged to provide a diagnostic MRI. The Commission does not find this argument persuasive, as Claimant failed to request a hearing on that issue.

21. The Commission has the responsibility to determine disputed worker's compensation matters pursuant to I.C. § 72-712.

> **Upon application of any party** to the proceeding, or when ordered by the commission or a member thereof or a hearing officer, referee or examiner, and when issues in a case cannot be resolved by pre-hearing conferences or otherwise, **a hearing shall be held for the purpose of determining the issues**.

Id. (emphasis added). Claimant has also cited due process concerns:

> A hearing is not a mere formality—it is an integral component of due process because it provides a claimant with an opportunity to be heard in a meaningful time and in a meaningful manner. . . . However, due process is not a rigid concept—"the protections and safeguards necessary vary according to the situation." . . . . we set forth the U.S. Supreme Court's balancing test that determines the adequacy of a particular process:
>
> Due process ... is not a technical conception with a fixed content unrelated to time, place and circumstances .... Due process is flexible and calls for such procedural protections as the particular situation demands .... Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Ayala v. Robert J. Meyers Farms, Inc., 165 Idaho 355, 445 P.3d 164 (Idaho 2019). As Claimant has pointed out, constitutional issues are outside the Commission's jurisdiction and due process will not be analyzed here.

22. Per the plain language of the statute, the Commission's responsibility to conduct a hearing does not begin until the "application of any party" when the issues cannot be "otherwise resolved." A hearing must be held on "the issues." Therefore, the question is whether Claimant (1) applied for a hearing (2) to determine whether the MRI should be authorized and (3) the issue could not be otherwise resolved.

23. Claimant filed two hearing applications prior to Defendants' approval of the MRI. The first request was on July 28, 2021, which was denied, and the second on January 6, 2022,

which was granted. Claimant argues that the denial of the first request, and possibly not scheduling a hearing sooner after the second, violated the Commission's obligation to provide a timely fair hearing on the issue of whether the MRI should have been authorized. However, Claimant never requested that the Commission determine whether Defendants should provide the MRI requested by Dr. Nixon or identified it as a discrete issue requiring an independent hearing.

24. Claimant's first request for calendaring listed seven issues that encompassed the totality of a worker's compensation case, from causation of the injury to total permanent disability. This included a general identification of the issue of entitlement to medical benefits. Broad phrasing such as "medical benefits" may be sufficient to litigate an MRI denial as part of a larger hearing, but is not reasonably interpreted as a request to hold an immediate or emergency hearing on entitlement to a diagnostic MRI. Claimant's contention that the "primary purpose" of the calendaring request was to determine entitlement to the disputed MRI is not supported.

25. Claimant's request was indistinguishable from a standard calendaring request to litigate a worker's compensation case in its entirety. It made no mention whatsoever of a contested MRI denial. At the status conference, Claimant may have argued in support of the request by explaining an MRI denial would be contested within the noticed issues, but Claimant did not make – and does not allege – any attempt to bifurcate the proceedings or obtain a hearing on that discrete issue. Defense counsel's comments similarly did not convey any need for a hearing to determine if an MRI should be authorized. Defendants merely pointed out the size of a total permanent disability case and argued that an expert opinion was expected or needed. One of the possible results of that opinion was further diagnostic imaging.

26. If Claimant had truly felt it necessary to have a prompt hearing on the issue of the MRI denial, the Referee had explicitly informed the parties that a hearing could almost always be

scheduled within the next thirty days. *Declaration of Counsel in Support of Claimant's Motion for Reconsideration Exhibit A.* The referee's denial of the first request for calendaring was directly predicated on the need for MMI (maximum medical improvement) to resolve the permanent disability issues submitted in Claimant's calendaring request. Claimant could have easily filed a motion for a limited hearing to determine whether Claimant was entitled to the MRI as diagnostic care. Yet Claimant made no attempt to schedule a hearing on the limited issue of the MRI denial. When Claimant did bifurcate the issues such that MMI was no longer an obstacle, a hearing was scheduled. Claimant again however, did not request a limited hearing on the MRI authorization to be held promptly, but broader issues of medical benefits and temporary disability as a whole.

27. Undoubtedly the denial of the MRI was a driving factor behind Claimant's strategical decision to proceed to hearing. However, Claimant chose to proceed on larger portions of a worker's compensation case and did not request specific treatment of the MRI denial. The referee reasonably denied Claimant's first request for calendaring on the grounds that the noticed issues were unripe. A hearing was scheduled at a median time frame in response to Claimant's second request. In neither request was there any indication that the MRI denial was an independent issue requiring immediate attention. In conclusion, the Commission did not violate I.C. § 72-712. The Commission will not reopen the case.

II. Claimant Failed to Prove The 2022 Right Ankle Tendon Tear Is A Compensable Consequence Of The 2019 Work Accident

28. Claimant's second argument on reconsideration is that the Commission applied an incorrect burden of proof regarding medical causation. Specifically, Claimant argues that the Commission utilized a traditional tort concept of "superseding intervening cause" analysis, rather than principles of worker's compensation law. Claimant argues that the Commission's decision failed to apply the "required presumption favoring compensability whenever there is a

'contributory connection'" between an industrial injury and a consequence from that injury under *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (Idaho 2022).

29. As discussed below, the Commission's decision found that Claimant failed to prove *any* causal connection between the right ankle tear observed in the 2022 MRI and the work accident. The "required presumption" analysis Claimant refers to under *Sharp* is inapplicable because Claimant failed to make the prerequisite showing that the 2019 work accident had a causal connection to the 2022 right ankle injury.

30. The Commission applied the following legal standards in its decision:

> While Idaho Code § 72- 432(1) mandates that an employer provide for an injured employee such reasonable medical, surgical or other treatment as may be reasonably required by the employee's physician, Defendants are not responsible for medical treatment, even if reasonable and necessary, not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). Proof of a possible causal link is not sufficient to satisfy Claimant's burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). 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, 785, 890 P.2d 732,736 (1995) (Emphasis added). The Commission may not decide causation without opinion evidence from a medical expert. *Anderson v. Harper's Inc.*, 743 Idaho 193, 141 P.3d 1062 (2006).

FOF ¶ 25, 26.

31. Claimant relies on *Sharp v. Thomas Brothers Plumbing*, 510 P.3d 1136 (Idaho 2022), to argue that the Commission incorrectly required Claimant to prove that the second tear was related to the work accident, when per law Claimant was entitled to a presumption of causation. The Commission did not discuss the case of *Sharp*.

32. In *Sharp*, the Idaho Supreme Court held that "the consequences flowing from a compensable injury are also compensable unless they result from an employee's conduct that is undertaken with rash or deliberate disregard of a material risk that the harm will occur." *Id.* at 1150. The facts of *Sharp* centered on a worker's spinal injury that was aggravated by weight gain

that occurred between the injury and the date of hearing when disability was evaluated. Doctors had warned the worker that the weight gain was problematic and advised against it. The Commission relied on these warnings to deny compensability for weight loss treatment and additional disability related to the aggravated spinal problems, reasoning that Claimant's weight gain was not work related, and Claimant was at fault for the additional injury. On appeal, the Idaho Supreme Court reversed and remanded the case for consideration under a different legal standard. All parties involved had treated the injury as an aggravation of a compensable injury, and it was not a "situation involving a separate, subsequent injury." *Id.* at 1148. The Court stated: "For the aggravation of a compensable injury to also be compensable, it is not necessary that the cause of aggravation arise out of employment." *Id.* at 1149. Tort concepts and fault do not translate into worker's compensation. Although the Court primarily discussed aggravation and compensable consequences, the Court also emphasized that the "essential precondition of liability under the workers' compensation law is a causal connection to an injury sustained in the course of covered employment." *Id.* at 1146.

33. In the present case, the Commission did not discuss the "compensable consequences" of *Sharp* not because it relied on intervening cause tort principles, but because Claimant did not show the "essential precondition" of a causal connection between the work accident and the injury for which benefits were sought. *Id.* The presumption of compensability Claimant draws from *Sharp* deals with the aggravation of a compensable injury, not the initial need to prove a causal connection.

34. Claimant failed to prove the new tear found in the August 4, 2022, MRI was in any way the result of the work accident in 2019. Most importantly the tear was a new injury. FOF ¶ 62. Dr. Hirose had not opined, as Claimant argued, that the recurrent tear was the result of the

work accident. Dr. Hirose found the recurrent tear was caused by post-surgical activity or a blow to Claimant's ankle. FOF ¶ 62. Dr. Hirose stated: "I think it probably took at least one injury after his surgery that caused the recurrent tear, and it's up to, not me, but somebody to figure out where he was when that happened." FOF ¶ 45. Neither Claimant nor Dr. Hirose established a possible date or event for the acute injury which resulted in the second tear to Claimant's tendon. FOF ¶ 41-43.

35. When it came down to confirming whether the 2019 work accident caused Claimant's injury, Dr. Hirose's opinion was ambiguous; his opinion ultimately was not given to the standard of reasonable medical probability. FOF ¶ 72-75. Dr. Hirose did not establish that the new tear was caused even "to some degree" by the work accident. FOF ¶ 75. Dr. Hirose did opine that Claimant's post-surgery ankle would be susceptible to tearing, but he did not say that the subsequent fraying which in fact occurred was due to the work injury or that the work injury had contributed to it.

36. Claimant likely expected that Dr. Hirose would connect Claimant's work accident and current diagnosis at his deposition. The lack of an identifiable incident or accident to cause the second injury, the location and similarity of both injuries, and Claimant's susceptibility from the work accident and surgery invited such a conclusion. Unexpectedly however, Dr. Hirose's testimony did not cover the necessary causal element. It did not show how in some way, to some degree, the recurrent tear was the result of the work accident.

37. To bridge the gap between Dr. Hirose's testimony and proving causation, the Referee or Commission would have been required to speculate that the weakness of Claimant's ankle, made susceptible by the work accident, was a causal component of the new acute injury identified by Dr. Hirose. FOF ¶ 77. It may be tempting to do so, but the Commission cannot fill in

missing elements of Claimant's case with self-generated medical opinions. FOF ¶ 81. *See Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759 (2013) (finder of fact may not use their own expertise to render unqualified medical opinions). Claimant is not entitled to any presumption that *Sharp* provides because the preliminary requisite showing of a causal connection has not been made.

38. Although *Sharp* disavowed tort concepts in workers' compensation, it did not eliminate Claimant's burden to provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *See Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732,736 (1995). It is only after Claimant presents medical evidence showing a causal connection between the work accident and the subsequent injury that *Sharp* applies. The evidence did not demonstrate that connection here. Per the testimony of Claimant's physician, the second tear was the result of a new acute injury. Although the Commission's analysis may have in some way resembled a discussion of intervening cause in that it discussed the occurrence of events post-injury, the context is that of a new injury requiring a connection to Claimant's work. Not aggravation. The Commission reaffirms its reasoning in the March 4, 2024, Decision and Order.

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant's motion for reconsideration is denied.

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

DATED this __7th_____ day of ___May_____, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Attest:

Kamerron Slay
Commission Secretary

Claire Sharp
Claire Sharp, Commissioner

Aaron White, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on May 8th, 2024 a true and correct copy of the foregoing **ORDER DENYING MOTION FOR RECONSIDERATION** was served by email upon each of the following:

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