

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALFONSO CANTU,

Claimant,

v.

QWEST CORP,

Employer,

and

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,

Surety/Defendants.

IC 2010-006754

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

FILED

JUL 21 2021

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing via Zoom on October 7, 2020. Claimant, Alfonso Cantu, represented himself *pro se*. Rachel O'Bar of Boise represented Defendants, Qwest Corp. and Insurance Company of the State of Pennsylvania. The parties presented oral and documentary evidence and took a post-hearing deposition. The matter came under advisement on March 17, 2021 and is ready for decision.

ISSUE

The sole issue to be decided is whether, and to what extent, Claimant is entitled to additional medical care subsequent to the lump sum settlement approved by the Industrial Commission by Order dated December 17, 2012.

CONTENTIONS OF THE PARTIES

Claimant contends that Defendants' expert, Dr. Stromberg, is biased and that Dr. Frizzell's and Dr. Bates' opinions should be accepted.

Defendants contend Claimant has not proven his entitlement to medical care for his L5/S1 lumbar surgery by way of medical evidence. All of Claimant's indemnity claims were settled by the December 17, 2012 lump sum settlement.

Claimant responds that Dr. Frizzell's and Dr. Bates' opinions meet his burden of proof, and that Dr. Hajjar and Dr. Stromberg are biased.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Joint Exhibits (JE) 1-11;
3. The testimony of Claimant, Alfonso Cantu, taken at hearing;
4. The post-hearing deposition of Lynn Stromberg, MD, taken by Defendants.

All outstanding objections are overruled.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. The following facts were stipulated to by the parties within the lump sum settlement dated December 17, 2012, appearing as joint exhibit one (JE 1).

2. Claimant was injured on March 10, 2010, when he slipped and fell twice on ice, first falling backward onto his back, and second falling forward onto his knees. JE 1:2. Dr. Stagg noted Claimant had hit "his med [sic - mid] and upper back and neck area." *Id.*

3. Claimant went to see Dr. Stagg on March 29, 2010, with complaints of back pain after doing lawn work two days prior and was diagnosed with re-aggravation of his low back strain.

JE 1:2.

4. Claimant returned to Dr. Stagg on May 3, 2010, with low back pain after he had been moving patio furniture two days earlier. JE 1:2. Claimant was diagnosed with a second re-aggravation and Dr. Stagg ordered an MRI, which was conducted on May 13, 2010. *Id.* The

MRI revealed:

congenitally short pedicles at multiple levels without significant spinal stenosis, mild multilevel disc degeneration from L2 to S1, chronic bilateral L5 pars defects with normal alignment, and a small focal herniation in the right paracentral area with slight superior migration at L5-S1 with no impingement upon the dural sac or significant narrowing of the lateral recess or foramen.

JE 1:2. Claimant was referred to Dr. Verst who, on May 18, 2010, diagnosed degenerative disc disease, facet syndrome, and herniated nucleus pulposus. *Id.* Dr. Verst started Claimant on physical therapy, and Claimant was off work from May 17 until July 12. *Id.*

5. Defendants requested an IME with Dr. Brian Johns. *Id.* at 3. Dr. Johns opined that Claimant's back symptoms were industrially related. *Id.* Claimant went on to have lumbar surgery, described in ¶ 7 below, which Claimant claimed was related to the accident, and Defendants denied. *Id.* The lump sum settled Claimant's claim "finally and forever" except for future medical benefits related to the accident. *Id.* at 5. The lump sum was signed by Claimant on December 6, 2012 and approved by the Commission on December 17, 2012. *Id.* at 6-7.

6. There are no medical records in evidence, however, both Lynn Stromberg, MD, and James Bates, MD, reviewed a limited selection of treatment records and issued expert reports. The following timeline is gleaned from their summaries.

7. On May 23, 2011, Claimant underwent a microdiscectomy and foraminotomy at L2-L3 to treat his disk herniation and radiculopathy, performed by R. Tyler Frizzell, MD. JE 5:30. Dr. Frizzell released Claimant to work with a 20-pound lifting restriction. *Id.*

8. On June 6, and June 13, 2013, Claimant saw David Jensen, DO, for back pain; Dr. Jensen prescribed a steroid pack and anti-inflammatories. *Id.* at 30-31.

9. Claimant returned to Dr. Jensen on June 3, 2015 and complained of low back pain; Dr. Jensen prescribed physical therapy and diclofenac. *Id.* at 31. Claimant returned on July 30th and reported physical therapy was not helping, and Dr. Jensen referred Claimant to Dr. Frizzell. JE 5:31.

10. Claimant saw Dr. Frizzell on December 4, 2015. *Id.* at 30. Dr. Frizzell noted Claimant continued to have L2 radicular symptoms related to his injury; a follow-up MRI dated November 12, 2015 showed a disc osteophyte complex, which “marginates the right L2 complex, but does not compress it.” *Id.* Dr. Frizzell recommended a series of L2-L3 ESI shots, which were performed by Dr. Jensen on January 15, 2016, January 29, 2016, and February 19, 2016. *Id.* at 31. Claimant reported no relief from these shots. *Id.* at 32.

11. Dr. Stromberg examined Claimant and issued a report at Defendant’s request on June 23, 2016, with an addendum dated July 11, 2016. JE 3. The Commission is familiar with Dr. Stromberg’s qualifications, and he is qualified to testify as an expert in this matter. Dr. Stromberg reviewed the records of Dr. Stagg, Dr. Verst, Dr. Frizzell, Dr. Jensen, the IME report of Dr. Johns, physical therapy notes, and imaging, performed a physical exam, and took a history from Claimant. JE 3.

12. Claimant described right groin and upper thigh pain and aching and burning in his low back; Dr. Stromberg recorded his impression that there was “obvious” symptom

magnification. *Id.* at 15-16. Dr. Stromberg was unable to explain why Claimant had right leg pain based on the imaging and physical exam, however, he ordered an EMG to validate Claimant's complaints and wanted to review the most recent MRI imaging before he finalized his report. *Id.* at 17. Claimant underwent an EMG, which revealed a slight slowing of the right peroneal nerve, which Dr. Stromberg opined was structurally unrelated to Claimant's complaint. *Id.* Dr. Stromberg wrote that any future care Claimant needed would be related to degenerative change and that he did not need any treatment related to the industrial accident. *Id.* Dr. Stromberg rated Claimant at 0% impairment under the sixth *AMA Guides to the Evaluation of Impairment* for soft tissue and non-specific complaints and issued no work restrictions. JE 3.

13. In November of 2016, Claimant underwent lumbar fusion surgery at L5-S1 with Dr. Hajjar. JE 5:23. No records for this procedure or any related treatment were admitted.¹ Claimant came under the care of Dr. Hajjar by way of referral from Dr. Frizzell. JE 2:12. Claimant relayed at hearing and by way of letter that Dr. Hajjar did not relate the L5-S1 fusion surgery to his worker's compensation injury. JE 7:57; Tr. 43:3-20.

14. On July 17, 2017, Dr. Frizzell authored the following letter:

To Whom It May Concern:

Mr. Alfonso Cantu was under my care in 2016 for lumbar radiculopathy resulting from a work injury that occurred on March 9, 2010. When I saw Mr. Cantu on June 2, 2016, I referred him to my colleague, Dr. Michael Hajjar, for consideration of lumbar decompression and fusion.

It is my medical opinion that Mr. Cantu's subsequent lumbar decompression and fusion was due to the work injury that he experienced on March 9, 2010.

¹ Claimant refused to produce records related to this procedure; Claimant repeatedly insisted that Defendants already had access to these records, apparently operating under the misguided assumption that because they paid for the procedure under his occupational health insurance, they were able to access his medical records about the procedure. See JE 9; Tr. 19:10-22; Clt Reply Brief, p. 2, 4. Despite repeatedly being instructed that Claimant was responsible to prove his case via medical evidence, Claimant refused or failed to introduce records for the procedure he is seeking compensation for. *See*, Industrial Commission Legal File.

JE 2:12.

15. Dr. Bates issued a report at Claimant's request on March 13, 2018. JE 5:22. The Commission is familiar with Dr. Bates' qualifications, and he is qualified to testify as an expert in this matter. Dr. Bates reviewed the records of Dr. Stagg, Dr. Verst, Dr. Frizzell, Dr. Jensen, the IME reports of Dr. Johns and Dr. Stromberg, physical therapy notes, and imaging, performed a physical exam, and took a history from Claimant. JE 5.

16. Claimant reported the L5-S1 fusion performed by Dr. Hajjar resolved his buttock pain and the pain down the back of his legs, but that he continued to have pain that wrapped around his low back and radiated into his groin. JE 5 at 23. Dr. Bates opined that Claimant's low back pain was related to his industrial injury. *Id.* at 34. Dr. Bates focused on the 2010 MRIs and noted Claimant's radicular symptoms were consistent with the L2 distribution and that Claimant got "fairly good improvement" of symptoms following surgery, but still had pain in the right hip and groin region. *Id.* Dr. Bates rated Claimant at 8% whole person impairment for his L2-L3 disk herniation. *Id.* at 34-35. Dr. Bates concluded with his opinion that because of the injury and "the subsequent surgery," he would recommend restrictions including: no lifting above 50 pounds, no twisting while lifting, and frequent change of position every two hours. *Id.* at 35. Dr. Bates recommended further physical therapy for Claimant's pain complaints. *Id.*

17. Dr. Stromberg was deposed on December 3, 2020. Dr. Stromberg explained that the slowed peroneal nerve finding on the EMG did not correlate with any of Claimant's complaints and was unrelated to his industrial injury. Stromberg Dep. 11:16-12:9. Dr. Stromberg confirmed he had not reviewed any medical records from Dr. Hajjar. *Id.* at 16:2-8. Nevertheless, Dr. Stromberg did opine that any surgery at L5-S1 was not related to the industrial injury because Claimant's original complaints were about the upper back and neck and Claimant had a normal

lumbar exam the day after the incident; further, the imaging showed a chronic degenerative condition and no evidence of acute injury. *Id.* at 22:15-23; 23:3-6.

18. **Credibility.** In general, Claimant testified credibly.

DISCUSSION AND FURTHER FINDINGS

19. The provisions of the 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937).

20. Claimant carries the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (quoting *Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (quoting *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put another way, the "claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (quoting *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404,

406, 901 P.2d 511, 513 (1995)). “In this regard, ‘probable’ is defined as ‘having more evidence for than against.’” *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (quoting *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). “The Commission may not decide causation without opinion evidence from a medical expert.” *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting *Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

21. It is for the physician, not the Commission, to decide whether the treatment is required; the only review the Commission is entitled to make is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

22. Claimant has failed to prove his L5-S1 fusion performed by Dr. Hajjar in November of 2016 was causally related to his March 10, 2010 industrial accident. Claimant’s medical evidence is inadequate to carry his burden of proof.

23. Dr. Bates’ IME report does not contain a causation opinion relating Claimant’s L5-S1 fusion to the industrial accident. Dr. Bates’ opinions are all related to Claimant’s L2-L3 injury and the surgery performed in 2011, as follows:

The MRI of the lumbar spine, obtained in May 2010, was not read as having a disk herniation or protrusion on the right L2-3, but the MRI obtained on 11/18/2021, did show foraminal disk protrusion on the right at L2-3. Both these MRIs were reviewed by Dr. Frizzell, as well as the neuroradiologist and the foraminal disk protrusion was present on the MRI of May 2010. **Mr. Cantu’s symptoms were consistent with the radicular components in the L2 distribution.** Mr. Cantu

obtained fairly good improvement of the symptoms following **the surgery**, but still had some symptoms in the right pelvis, hip and groin region. This history of intervertebral disc involvement, surgery and persistent symptoms is a ratable condition and appropriate for rating and also appropriate for restrictions attributable to that injury.

JE 5:34 (emphasis supplied). Dr. Bates does not refer to Claimant's L5-S1 region whatsoever within his Summary, Impairment, Justification of the Impairment, Restrictions, or Further Treatment sections; Dr. Bates only references his L2 or L3 lumbar segments. Dr. Bates was aware Claimant had undergone two lumbar surgeries when he authored his opinion, one in May of 2011 at his L2-L3 and another at his L5-S1 in November of 2016, but refers to "the surgery," not "surgeries" within his opinion. Dr. Bates' sole mention of the L5-S1 surgery was under History of Present Illness as follows:

He was seen by Dr. Jensen. Injections were performed and physical therapy. He was referred for an IME. Then, at this point, the return of symptoms were not considered part of his previous injury. He reports following up with Dr. Frizzell, who recommended that he be seen by Dr. Hajjar and in November 2016, Mr. Cantu underwent an L5-S1 fusion.

JE 5:23.² In sum, Dr. Bates' opinion is irrelevant and unpersuasive regarding Claimant's L5-S1 fusion surgery.

24. Dr. Frizzell's opinion is quoted in its entirety at ¶ 14. Dr. Frizzell does specifically relate the "subsequent lumbar decompression and fusion" to Claimant's "March 9 [sic], 2010" injury. However, Dr. Frizzell's opinion is fatally flawed and well rebutted by Dr. Stromberg's observations.

25. Dr. Frizzell was treating Claimant for his L2-L3 area in December of 2015 through June of 2016; he ordered an MRI for that area, recorded findings related to that area, and prescribed

² Claimant is not arguing for, nor entitled to, an 8% permanent partial impairment rating or permanent disability based on his restrictions; these issues were resolved via the lump sum settlement dated December 17, 2012. Likewise, Claimant is not arguing for the physical therapy that Dr. Bates recommended to treat his ongoing groin/pelvis/thigh pain.

ESI shots at that level. Dr. Jensen, the referring doctor, was also treating Claimant at this level. There is no evidence in record showing that Dr. Frizzell was aware of or understood that Claimant's "subsequent lumbar decompression and fusion" was at a different level than the one he had previously operated on and was treating Claimant for just prior to his referral to Dr. Hajjar. Further, there is no evidence that Dr. Frizzell consulted with or had Dr. Hajjar's records when issuing his opinion letter in 2017. Even if Dr. Frizzell was aware the fusion was at a different level than the one he had been treating, Dr. Frizzell does not explain his rationale for why Claimant's 2010 injury at L2-L3 was related to his 2016 surgery at L5-S1.

26. Dr. Stromberg opined that any surgery Claimant had at his L5-S1 would be unrelated to his industrial injury because: 1) his initial report to Dr. Stagg was that he hit his upper back and neck area; 2) Claimant had a normal lumbar exam the day after the accident; 3) Claimant's imaging showed a degenerative condition and no evidence of acute injury to that area. Nothing in Dr. Frizzell's (or Dr. Bates') opinion rebuts or addresses this evidence regarding Claimant's L5-S1 area.

27. Claimant has not met his burden to show there is more evidence for the proposition that his L5-S1 surgery was related to his industrial accident than evidence that it is not. Claimant's only evidence that the surgery was related is a letter by the referring physician without detail or explanation. In contrast, Defendants' expert explained what records he relied on in reaching his opinion and his rationale for why the L5-S1 surgery could not be related to the industrial injury.

CONCLUSIONS OF LAW

1. Claimant has failed to prove his L5-S1 surgery was caused by his March 10, 2010 industrial accident;
2. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 20th day of July, 2021.

INDUSTRIAL COMMISSION


John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

ALFONSO CANTU



RACHAEL O'BAR
PO BOX 1007
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALFONSO CANTU,

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v.

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INSURANCE COMPANY OF THE STATE OF
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IC 2010-006754

ORDER

FILED

JUL 21 2021
INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John Hummel submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant has failed to prove his L5-S1 surgery was caused by his March 10, 2010 industrial accident.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 20th day of July, 2021.

INDUSTRIAL COMMISSION



Aaron White, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

ALFONSO CANTU



RACHAEL O'BAR
PO BOX 1007
BOISE ID 83701-1007

SC

