

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JASON WELLS,

Claimant,

v.

SWIFT TRANSPORTATION,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Surety,

Defendants.

**IC 2016-004292**

**ORDER DENYING DEFENDANTS'  
MOTION FOR RECONSIDERATION**

FILED

DEC 14 2020

INDUSTRIAL COMMISSION

Defendants filed a timely motion for reconsideration of the Commission's Findings of Fact, Conclusions of Law, and Recommendation ("Decision") dated October 23, 2020, arguing that the Commission's award of Temporary Total Disability (TTD) benefits is not supported by medical evidence of record, and that the award of attorney fees is likewise based on a false medical premise. Claimant filed a timely response and asked the Commission to reconsider its decision not to award attorney's fees on income benefits payable to Claimant during his recovery from hip surgery, and to also consider an award of attorney's fees on Defendants' Motion for Reconsideration. As developed below, the Commission denies the motions for reconsideration and grants an award of attorney fees under Idaho Code § 72-804 for what we deem to be a challenge to the underlying decision without reasonable grounds.

**DISCUSSION**

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. On a motion for reconsideration, the moving 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 a reconsideration. *Davidson v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

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.

**I. Claimant’s period of recovery and entitlement to TTD benefits**

In its Decision the Commission concluded that Claimant is entitled to an award of TTD benefits under Idaho Code § 72-408 “from the time of his February 5, 2016 accident until February 8, 2019 ...” Decision at p. 28. The Commission further found that Claimant was entitled to an award of attorney fees under Idaho Code § 72-804 for Defendants’ neglect in revisiting Claimant’s

entitlement to TTD benefits following the revelation that Claimant's initial diagnosis of left inguinal hernia was actually the correct explanation for his persistent left groin symptoms. Although the Commission found that Claimant was entitled to time loss benefits during the period of his recovery from left hip surgery, it concluded that Defendant's refusal to pay time loss benefits for this period (September 12, 2016 until April 26, 2017) was not unreasonable. Accordingly, attorney fees on this period of entitlement were not appropriate.

In their motion Defendants first argue that it was error for the Commission to award TTD benefits commencing February 5, 2016, the day of the accident. Defendants assert that Claimant worked, and was paid for, a full day's work on February 5, 2016. Therefore, his entitlement to time loss benefits could commence no sooner than February 6, 2016. However, it was not until February 7, 2016 that Claimant was given restrictions by NP-C Todd Carpenter. The fact that Carpenter did not give Claimant restrictions until February 7, 2016 derives only from the fact that Claimant was first seen on that date. We find no basis to conclude that the need to impose restrictions to protect Claimant from further injury in the presence of a left inguinal hernia did not exist prior to his examination by Carpenter. NP-C Carpenter diagnosed Claimant with a left inguinal hernia, related it to the subject accident and ordered restrictions referable to the condition. It follows that those restrictions were in place as of the date of the accident. Had Claimant broken his arm on February 5, 2016, no one would argue that restrictions against use of the arm, though given on February 7, did not relate back to the moment of injury. As to the argument that the Commission erroneously granted Claimant TTD benefits for February 5, 2016, a day for which he was purportedly paid his usual wages, the Commission's order specifies that Claimant is entitled to time loss benefits "from the time of his February 5, 2016 industrial accident" forward. Order at

p. 1. If Claimant suffered no time loss for February 5, 2016, then no benefits are payable for that date.

Defendants acknowledge that after several wrong paths had been explored by Claimant's treaters and evaluators, Dr. Ludwig correctly diagnosed Claimant as suffering from a left inguinal hernia, causally related to the accident of February 5, 2016. However, they appear to argue that NP-C Carpenter's identical diagnosis and similar restrictions warrant no consideration after Dr. Thorne concluded that Claimant suffered only a groin strain as a result of the subject accident, and that his ongoing complaints were referable to his pre-existing left hip condition. The Defendants argue that absent explicit testimony or writings from a medical expert which affirm that the hernia which was repaired in 2019 was extant in 2016 and warranted restrictions from February 5, 2016 forward, there is no basis to find that Claimant was in a period of recovery and entitled to TTD benefits from February 5, 2016 forward. For example, per this line of reasoning, the evidence before the Commission admits the possibility that Claimant's hernia became quiescent for a period following February of 2016, only to flare up shortly before Dr. Ludwig saw Claimant for evaluation in August of 2018. Defendants assert that the fact that Claimant was proven to have a hernia at the time of surgery, and the fact that it has been related to the subject accident, is insufficient to meet Claimant's burden of demonstrating that he had restrictions at all times subsequent to the date of the subject accident. Medical testimony establishing that the restrictions established by Dr. Ludwig are retroactive is needed before Claimant can be said to be entitled to TTD benefits from February 5, 2016 forward.

As a starting point, it is helpful to examine the findings of NP-C Carpenter, and Dr. Ludwig, separated though they are by a period of years. Claimant was seen by NP-C Carpenter on February 7, 2016, who examined Claimant and made the following findings:

HERNIA, INGUINAL – New. Ultrasound verified [sic] Inguinal Hernia. Given that this is causing him pain that his usual Hydrocodone is not covering, I then recommend no lifting more than 10lbs until this is evaluated by surgery. That referral is made.

Additionally, hip pain, acute gouty arthropathy, elevated bp w/o htn dx, and long-term (current) use of other medications have all been reviewed and are stable.

Ex. 2 at p. 63.

As explained in the Decision, this diagnosis was questioned, and later rejected, by Dr. Thorne, who determined that the real source of Claimant's problems was his left hip, and that he was released to return to work for his "groin muscle strain." Defendants assert that Dr. Thorne's identification of Claimant's pre-existing hip condition as the likely pain generator, and his failure to confirm the presence of a left inguinal hernia, somehow denigrates the ongoing validity of NP-C Carpenter's diagnosis and restrictions. The problem with this assertion is that the medical evidence demonstrates that Dr. Thorne missed the diagnosis of the hernia. After other erroneous diagnoses were entertained by other experts, Claimant was finally evaluated by Dr. Larson, who suggested that the source of Claimant's pain lay someplace other than in his hip or his back. He recommended further evaluation. Defendants arranged for evaluation by Dr. Ludwig, who saw Claimant for the first time on August 24, 2018. Among his findings are the following:

Industrially related diagnosis: (due to the claimed injury of 2/5/16 on a more likely than not basis)

1. Left reducible Inguinal hernia. Physical examination on 2/7/16 suggested a hernia defect, and ultrasound at the time confirmed the diagnosis. His current examination does not reveal an Incarcerated hernia, but symptoms persist and are typical and customary for this diagnosis. CT scan did not show an ongoing defect, thus surgery may not be indicated at this time.

...

[Claimant's] presentation has been complex. Due to his morbid obesity and prior trauma to the hip and pelvis, examination findings have been Inconsistent. What has been consistent is his localization of pain to the left inguinal crease and

radiation to the left testicle. No reports of low back or flank pain have been documented or described.

Objective findings of a reducible hernia were noted on initial ultrasound, and this diagnosis would be consistent with his suspected mechanism of injury and distribution of symptoms. CT scan of the abdomen did not reveal anatomic hernia requiring surgery at time of exam.

2. Are Claimant's subjective complaints supported by the objective evidence?

The objective findings of a left inguinal hernia on ultrasound was noted, but not substantiated on CT scan.

3. Has Claimant reached MMI for his industrial injury?

No. The following recommendation is made:

- repeat left inguinal hernia ultrasound with Valsalva, if hernia is present at this time with increased abdominal pressure, further consideration of repair is recommended. If no defect is noted, then per AMA Guides 6th edition, this is a Class 0 impairment with no physical findings.

In my opinion, his current symptoms are not of lumbar origin on a more likely than not basis.

4. If MMI has not been reached, what additional treatment is needed to bring Claimant to MMI? Please be specific as to type, frequency, and duration of treatment, including any prescription medications, and state when you anticipate Claimant will reach MMI.

See above for recommendation of further diagnostics for hernia.

5. If MMI has been reached, what is Claimant's impairment rating pursuant to the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment? What amount, if any, should be apportioned to pre-existing conditions?

Rating will be applied upon completion of repeat inguinal ultrasound.

6. What are Claimant's restrictions, if any, attributable to his injury? Please state if these are temporary or permanent in nature. If temporary, please indicate the anticipated duration.

Temporary restrictions to include lifting up to a maximum of 20# occasional until the ultrasound can be performed. If the ultrasound fails to show hernia, these restrictions can be lifted.

Ex. 19 at p. 9-11.

A repeat ultrasound of December 20, 2018 demonstrated a left inguinal hernia, increased in Valsalva. Dr. Adam Bell subsequently confirmed the existence of the suspected left inguinal hernia and performed surgical repair of the same. He released Claimant from his care on February 8, 2019. Claimant was again seen by Dr. Ludwig on March 22, 2019. Dr. Ludwig made the following findings on exam:

Industrially related diagnosis: (due to the claimed injury of 2/5/16 on a more likely than not basis)

1. Left reducible inguinal hernia, now s/p herniorrhaphy – at MMI

...

2. Please explain the etiology for each diagnosis specifically as it relates to the 02/06/16 industrial injury.

Causation is assigned above. The industrially related diagnosis of left inguinal hernia is attributed to the injury date of 2/6/16.

3. Did the 02/06/16, industrial accident result in an aggravation of a pre-existing injury, condition, or illness? If so, was the aggravation temporary or permanent? If the aggravation was temporary, has he returned to his pre-injury status?

No. The diagnosis of left inguinal hernia was a new injury attributed to 2/6/16 event.

4. Has the medical care from the time of the injury to present been reasonable and necessary to treat the injuries caused by the accident of 02/06/16?

Yes.

5. What additional medical care, if any, is recommended to treat the injuries caused by the accident of 02/06/16? If continued treatment is medically necessary for the injuries sustained in the industrial accident, what is your recommended treatment plan? Please list frequency and duration and include any medication, diagnostics, or DME considered medically necessary.

No further medical treatment is indicated for the diagnoses attributed to the industrial injury of 2/6/16.

6. Can [Claimant] return to work with or without restrictions? If work is restricted, please indicate specific restrictions and duration.

There are no further temporary, or permanent restrictions assigned to the industrially related diagnosis of left inguinal hernia. For the diagnoses attributed to the 2/6/16 claim, he is appropriate for full duty capacity.

[Claimant] has other comorbid diagnoses, unrelated to the industrial claim, which limit his return to work capabilities.

7. Has [Claimant] reached maximum medical improvement from the injuries sustained in the accident of 02/06/16? If so, what is the date of maximum medical improvement?

[Claimant] has reached maximal medical improvement as of this examination 3/22/19.

8. Are there any underlying conditions of functional embellishment present that might be hindering [Claimant's] recovery?

Yes. The comorbid diagnoses listed above all impact his functionality and ability to return to his job of injury.

9. Does [Claimant] have any objective medical evidence of permanent impairment as a result of the 02/06/16, industrial injury?

Yes. Using the AMA Guides to the Evaluation of Permanent Impairment 6th edition, Chapter 6 for the diagnosis of hernia, table 6-10 is utilized for the diagnosis of hernia, now s/p hernia repair with resolution of symptoms. This is a Class 0 impairment with 0% WPI assigned.

Ex. 19 at p. 15-17.

From this recap, the following is established: Claimant suffered a left inguinal hernia as a result of the accident of February 5, 2016. He was in a period of recovery between February 5, 2016 and February 8, 2019<sup>1</sup> because the defect was unrepaired until Dr. Bell performed surgery on January 14, 2019. Restrictions to protect Claimant from further injury pending repair were established by NP-C Carpenter on February 7, 2016, and similar restrictions were established by Dr. Ludwig in August of 2018, against the likelihood that a second ultrasound would reveal the

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<sup>1</sup> Actually, Dr. Ludwig did not pronounce Claimant medically stable until March 22, 2019, but Claimant has only asserted entitlement to time loss benefits through February 8, 2019, the date of release by Dr. Bell.

existence of a hernia. Restrictions would be lifted if further evaluation failed to show a hernia. A left inguinal hernia was revealed by the ultrasound, so restrictions were appropriate. From Dr. Ludwig's comments, it is clear that an extant hernia makes such restrictions appropriate, and the evidence shows that Claimant has had a hernia since February 5, 2016.

Nevertheless, Defendants argue that this evidence is insufficient to show that Claimant had restrictions between the date of injury and the date of medical stability. While it is true that Dr. Ludwig did not specifically state that his restrictions for a suspected hernia would apply to the total period of time Claimant suffered from an unrepaired hernia, we think this is a fair inference, based on our gestalt of his writings, one that will withstand scrutiny under *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013). Restrictions are appropriate for an unrepaired hernia, and Claimant had one following the subject accident.

Pursuant to Idaho Code § 72-408, while in a period of recovery, and before reaching medical stability, if Claimant be temporarily totally or totally partially disabled, he "shall be paid" the TTD/TPD benefits as calculated in that section, and as further limited at Idaho Code § 72-409. Idaho Code § 72-408 defines the injured worker's default entitlement to income benefits during periods of temporary total/temporary partial disability, and Claimant bears the initial burden of proving entitlement to TTD benefits under this section.

Here, proof that Claimant was in a period of recovery, i.e. not at MMI, between February 5, 2016 and February 8, 2019 is established by the August 24, 2018 report of Defendant's own expert, Dr. Ludwig, from which we have quoted above. Next, as used in Idaho Code § 72-408, "disability" is a term of art and is defined at Idaho Code § 72-102(11) as follows:

(11) "Disability," for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical

impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

As developed above, we are satisfied that the evidence establishes that Claimant suffered a hernia on February 5, 2016 which warranted the imposition of activity restrictions. That hernia was unrepaired until January 18, 2019, and those restrictions, or similar restrictions, were extant from February 5, 2016 until Claimant was released by Dr. Bell on February 8, 2019. These restrictions diminished Claimant's wage-earning capacity and entitled him to TTD benefits during his period of recovery. The right to those benefits continues until Defendants can meet their burden of proving facts necessary to curtail time loss benefits under Idaho Code § 72-403.

As discussed in the Decision, there has been no showing by Defendants that Claimant refused, unreasonably failed or neglected to work at a suitable job that had been offered or procured for him during his period of recovery. Nor has there been sufficient proof that Claimant has refused or unreasonably failed to seek mentally and physically suitable work, i.e. work that is within his physical restrictions and for which he is otherwise suited, during his period of recovery. The report of Nancy Collins establishes, at most, that there may have been some suitable work available to Claimant during his period of recovery, not that he refused or unreasonably failed to search for such work.

Defendants arguments are without merit. We decline to revisit our determination that Claimant has established entitlement to time loss benefits from the time of his injury of February 5, 2016 through February 8, 2019.

## **II. Attorney Fees**

Based on their interpretation of the evidence, Defendants also ask the Commission to reconsider the award of attorney fees made in the Decision. They assert that it was reasonable for them to rely on Dr. Thorne's opinion that Claimant's symptoms were mediated by a pre-existing

left hip condition and that he did not have a hernia. We agree that it was reasonable for Defendants to rely on Dr. Thorne's opinion as the predicate for their denial of benefits, but only up to a point. No later than the date of the surgical confirmation of Claimant's left inguinal hernia, Defendants should have abandoned the theories underlying their previous denials, and initiated payment of TTD benefits retroactive to February 5, 2016. The surgical confirmation of injury, coupled with other medical evidence establishing that Claimant suffered the hernia on February 5, 2016, and that an unrepaired hernia requires significant activity restrictions, should have caused Defendants to concede that payment of income benefits was owed retroactive to February 5, 2016. (As explained in the Decision, the award of attorney's fees excepts the period of time Claimant was in a period of recovery following his hip surgery). The failure of Defendants to revisit their prior decision making on this claim warrants the payment of an award of attorney's fees under at least two of the tranches of Idaho Code § 72-804; by failing to revisit the denial in the face of new evidence, Defendants neglected or refused to pay the TTD benefits provided by law. In the alternative, Defendants' failure to act amounts to the contest of a claim for compensation without reasonable grounds. While their decision may have initially found support in the opinion of Dr. Thorne, it later became untenable, and as we pointed out in the Decision, defendants have an ongoing obligation to revisit past adjusting decisions. Decision at p. 25, ¶75; *Zielinski v. U.S. Crisis Inc.*, 2011 WL 2199791 at 5-6 (Idaho Ind. Com. May 16, 2011).

In its Decision, the Commission declined to make an award of attorney fees for Defendants' denial of time loss benefits during Claimant's period of recovery from hip surgery. In his response brief to the Motion for Reconsideration, Claimant invites us to reconsider this ruling and order the payment of attorney fees for this period of denial as well. This request comes too late under Idaho Code § 72-718, and the Commission will not entertain it.

Finally, Claimant asserts that an award of attorney fees under Idaho Code § 72-804 is appropriate as a sanction for Defendants' meritless motion for reconsideration. Unlike the attorney fee request discussed in the preceding paragraph, this request could not have been brought until Defendants filed their Motion for Reconsideration. Claimant asserts that by this device, Defendants do nothing more than further contest the claim for compensation without reasonable grounds. We agree. In addition to the award previously made, Claimant is entitled to an award of attorney fees for the additional delay and expense occasioned by the Idaho Code § 72-718 motion.

Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of this Order, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with responding to this Motion for Reconsideration, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

#### **ORDER**

Based on the foregoing reasons, Defendants Motion for Reconsideration is DENIED. Claimant is awarded attorney fees on this motion as described above. **IT IS SO ORDERED.**

DATED this 11th day of December 2020.

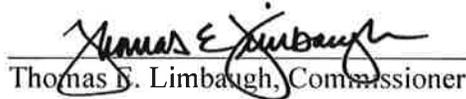
INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman



Aaron White, Commissioner



Thomas S. Limbaugh, Commissioner

ATTEST:

  
Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of December 2020, a true and correct copy of the foregoing **ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

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