BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NATHAN L. BURTON, Claimant, v. BECK CABINET COMPANY, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 02-522585** **IC 03-505022** **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** Filed May 11, 2006

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay. He conducted a hearing on September 11, 2003 in Coeur d'Alene, Idaho. The Commission issued its Findings of Fact, Conclusions of Law, and Order on November 21, 2003. The Order required Defendants to pay for Claimant's cervical MRI. Following the MRI, Claimant sought additional medical testing which was denied by Defendants.

The issue of additional medical testing and treatment was scheduled for hearing before Referee Barclay. Thereafter, Referee Barclay retired and the case was re-assigned to the Commissioners. On October 4, 2005, Commissioners James F. Kile and R.D. Maynard

conducted a hearing in Coeur d'Alene, Idaho. Claimant was present and represented by Richard Wallace of Coeur d'Alene. James Magnuson, also of Coeur d'Alene, represented Defendants Employer and Surety. Oral and documentary evidence was presented. The parties took one post-hearing deposition and submitted post-hearing briefs. The matter is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as a result of the second hearing are:

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

2. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;

3. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof; and,

4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

Claimant contends that he suffers numbness and pain as a result of his industrial accident, and that he is entitled to reasonable medical care for his ailments. Claimant states that he is in need of a nerve conduction study as requested by Royce Van Gerpen, M.D., an occupational physician.

Defendants contend that Claimant has received all reasonable and necessary medical care as recommended by his treating physician, Kirk Hjeltness, M.D. Additionally, Claimant

saw Ronald L. Vincent, M.D., on March 19, 2004. Dr. Vincent opined that Claimant was not in need of any further medical treatment and that he was fixed and stable with no ratable impairment from the work-related injuries.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The record upon which the Commission's November 21, 2003 Order was based.

2. Oral testimony at hearing on October 4, 2005 by Claimant and Deborah Burton (Claimant's wife);

3. Claimant's Exhibit 1 admitted at the second hearing;

4. Defendants' Exhibits D12-D17 admitted at the second hearing; and

5. The post-hearing deposition of Ronald L. Vincent, M.D., taken by Defendants on October 28, 2005.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions, and order.

FINDINGS OF FACT

1. At the time of the second hearing Claimant was 56 years old. Claimant suffered an industrial accident and compensable industrial injury on October 14, 2002 when a wardrobe cabinet fell off a dolly and struck his head and upper back. Defendants provided medical treatment to Claimant, including a cervical MRI recommended by Dr. Hjeltness, Claimant's treating physician.

2. Following the cervical MRI on January 19, 2004, Dr. Hjeltness diagnosed a cervical strain. Dr. Hjeltness reported that Claimant had no limitations and needed to return to him only as needed. Defendants' Exhibit D-13. Dr. Hjeltness also suggested the MRI be reviewed by a neurosurgeon and noted that a nerve conduction study may be indicated.

3. On March 19, 2004, Dr. Vincent, a neurosurgeon, conducted an IME requested by Defendants. Dr. Vincent noted that Claimant had straining injuries to his lumbar spine and cervical spine but that Claimant was not currently in any treatment. Dr. Vincent indicated Claimant was in need of no further medical treatment as a consequence of his industrial injuries. Dr. Vincent also found no ratable impairment for the back and the cervical injuries suffered by Claimant as a result of the industrial accident. Ronald L. Vincent, M.D., Depo., p. 41.

4. On June 6, 2005, Dr. Van Gerpen, an occupational physician, examined Claimant and diagnosed cervical degeneration disc disease, lumbar degeneration disc disease showing some degree of progression over the last nine years, atherosclerotic heart disease with ongoing medical management, history of Raynaud's disease, history of peripheral neuropathy in the lower extremities, and hypertension. Dr. Van Gerpen went on to request nerve conduction testing on Claimant's upper extremities and recommended six visits at one time per week to teach a home self care stretching and strengthening program. Claimant's Exhibit 1.

5. Dr. Van Gerpen also authored a letter on September 2, 2005 within which he rated Claimant's permanent partial impairment at 5% of the whole person for his cervical impairment. Dr. Van Gerpen based the impairment rating on Claimant's constellation of history, physical and imaging abnormalities. Claimant's Exhibit 1.

6. On September 22, 2005, Dr. Vincent reviewed and disagreed with Dr. Van Gerpen's report. Dr. Vincent stated that Dr. Van Gerpen based his opinion on the MRI findings primarily for the pre-existing degenerative disc disease, pre-existing lumbar injuries and also cervical spondylosis. Defendants' Exhibit D-16. Dr. Vincent felt that the primary

finding related to the progressive spondylosis of Claimant's cervical and lumbar area, which is a natural process, was not caused by the injuries of record and not aggravated by the injuries of record. Ronald L. Vincent, M.D., Depo., p. 15. Dr. Vincent felt that Claimant still had no objective findings for a straining injury, such as this industrial injury.

7. At the time of the hearing, the EMG/nerve conduction study of Claimant's upper extremities recommended by Dr. Van Gerpen had neither been performed nor scheduled.

Work History

8. Claimant's industrial injury occurred on October 14, 2002 and Claimant continued working for Employer until January 27, 2003. Tr., p. 35.

9. In July of 2003, Claimant began working for Huntwood Cabinets preparing individual cabinet parts. Specifically, Claimant drove holes using a gang drill, ran parts through a rabbet machine, and ran a vertical router. Claimant worked 40 hours per work for Huntwood Cabinets from July 2003 to March 2004. Tr., pp. 26, 30. This job required Claimant to be on his feet most of the time. Claimant has not worked since leaving that job in March of 2004. Tr., p. 26.

DISCUSSION AND CONCLUSIONS

10. The provisions of the Workers' Compensation Law are to be liberally construed *in favor* of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1966). 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).

Medical Treatment

11. A 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). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). A physician's testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

12. Claimant contends that he suffers numbness and pain as a result of his industrial accident, and that he is entitled to a nerve conduction study as requested by Dr. Van Gerpen, an occupational physician. Defendants do not dispute that Claimant suffered an industrial accident, but they argue that Claimant has received all reasonable and necessary medical treatment for his injury.

13. Dr. Hjeltness, Claimant's treating physician, found Claimant had no limitations and noted that Claimant could return as needed. Dr. Hjeltness recommended that a neurosurgeon review the MRI.

14. Dr. Vincent, a neurosurgeon, examined Claimant and indicated he was in need of no further medical treatment as a consequence of his industrial injuries. Dr. Vincent felt that Claimant's primary ailments related to the progressive spondylosis of Claimant's cervical and lumbar area, which is a natural process, not caused by the injuries of record and not

aggravated by the injuries of record.

15. Dr. Van Gerpen later examined Claimant and recommended a nerve conduction study. Dr. Van Gerpen predominately reported Claimant's progressive spondylosis and degenerative condition in his neck and low back. Dr. Van Gerpen's report lists a variety of degenerative ailments and discusses the background behind Claimant's industrial injury, but Dr. Van Gerpen does not state that the nerve conduction study, or that any treatment, is necessary as treatment for Claimant's work injury.

16. The Commission has previously ordered that Claimant is entitled to a cervical MRI. Following the ordered MRI, Dr. Hjeltness suggested the MRI be reviewed by a neurosurgeon. Such a review was done by Dr. Vincent, and he concluded that Claimant was stable and needed no further treatment as a result of his industrial injury.

17. The Commission has not been presented with substantial evidence to award continuing medical treatment. Dr. Hjeltness released Claimant from his care with no limitation and to return only as needed. Dr. Vincent stated that Claimant was stable and needed no further treatment as a consequence of his industrial injury. Dr. Van Gerpen did not relate the recommended nerve conduction study to Claimant's industrial injury.

18. The Commission finds that Claimant did not prove to a reasonable degree of medical probability that he is entitled to additional medical treatment due to the industrial accident of October 14, 2002.

19. On January 19, 2004, Dr. Hjeltness reported that Claimant had no limitations and was to return to him only as needed. Defendants' Exhibit D-13. On March 19, 2004, Dr. Vincent indicated Claimant was not in need of further medical treatment, nor was he currently receiving any treatment as a consequence of his industrial injuries. Dr. Vincent also found

Claimant to be stable on his March 19, 2004 visit. Ronald L. Vincent, M.D., Depo., p. 41.

20. After being released by his treating doctor and being declared stable by Dr. Vincent, the Commission finds that Claimant reached maximum medical improvement on March 19, 2004.

Permanent Partial Impairment

21. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. An "evaluation of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

22. Dr. Van Gerpen assessed 5% whole person permanent partial impairment for Claimant's cervical impairment. Claimant's Exhibit 1. Yet, Dr. Van Gerpen does not state that the impairment rating is attributable to the industrial injury. Dr. Van Gerpen diagnosed Claimant with cervical and lumbar degenerative disc disease as well as other significant health disorders which are not related to the industrial accident.

23. Dr. Hjeltness, Claimant's treating physician, finds no limitations and does not assess impairment to Claimant's industrial injury. Dr. Vincent finds no ratable impairment. And Dr. Van Gerpen, the only doctor to find ratable impairment, does not attribute the

impairment to the industrial injury.

24. While the Commission is not bound by the opinions of the physicians in determining an impairment rating, the Commission may not award impairment when the record is devoid of evidence supporting such an award. The Commission finds Claimant suffered no permanent partial impairment as a result of his October 14, 2002 industrial accident.

Disability

25. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423.

26. A claimant can have impairment without disability, but there cannot be disability without impairment. Claimant was stable on March 19, 2004 with no permanent impairment and hence, no disability.

27. Additionally, because there is no disability, the issue of apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is moot.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant failed to prove he is entitled to additional medical treatment as a result of his industrial accident of October 14, 2002.

2. Claimant failed to prove he is entitled to permanent partial impairment benefits as a result of his industrial accident of October 14, 2002.

2. Claimant failed to prove he is entitled to disability benefits.

3. The issue of apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is moot.

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

DATED this _11th_ day of May, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
James F. Kile, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___11_ day of May, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

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