BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARRETT W. BROOKS,

Claimant,

v.

MOUNTAIN COMPANIES, LLC,

Employer,

and

BENCHMARK INSURANCE CO.,

Surety,

Defendants.

IC 2022-007264

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

FILED
MAY 24 2024
INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Boise, Idaho, on December 21, 2023. Ms. Taylor Mossman-Fletcher represented Claimant at the hearing. Mr. H. Chad Walker represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. No post-hearing depositions were taken. The matter came under advisement on April 23, 2024.

ISSUES

The issues for resolution in this bifurcated hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident; and
2. Whether and to what extent Claimant is entitled to medical care.

Remaining issues, including, but not necessarily limited to, permanent partial impairment, permanent disability in excess of impairment, and attorney fees were reserved.

CONTENTIONS OF THE PARTIES

Claimant undisputedly injured his left knee on March 9, 2022, while in the course and scope of his duties with Employer. Eventually, surgery was performed on his left knee Claimant asserts that at the time of the initial accident he also hurt his right knee, but it was not nearly as painful as his left knee. Treatment prior to and through surgery focused on his left knee. However, after his left knee surgery Claimant told his provider that his right knee was painful and was getting worse. A subsequent MRI showed a complex medial meniscus tear and a completely torn ACL. Claimant is entitled to surgery on his right knee, but Defendants have refused to authorize such surgery.

Defendants acknowledge the dispute concerns whether they are obligated to pay for medical treatment, including surgery, from a previously unreported right knee claim which supposedly occurred at the same time as Claimant's reported, and accepted, left knee claim. Defendants assert that when the totality of the record is examined, between Claimant's lack of complaints regarding his right knee, failure to report his right knee when he reported his left knee, his inconsistent statements since the date of the accident forward, and a lack of a medical opinion to a "reasonable medical probability" standard, Claimant has failed to carry his burden of proof on the issue of causation and his case fails to establish a right to further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony at hearing; and
2. Joint exhibits (JE) 1-31 admitted at hearing.

FINDINGS OF FACT

1. At the time of hearing Claimant was 24 years old. He is a graduate of Meridian High School, class of 2017.

2. While in high school, Claimant injured his right knee while playing football. In December 2016, he underwent arthroscopic reconstruction surgery with allograft to repair his torn anterior cruciate ligament (ACL). After surgery, Claimant attended physical therapy, but was discharged in late March, 2017, for "continued blatant disregard in attending his appointments." JE 22, p. 574. (The record indicates Claimant missed four sessions prior to his administrative discharge.) Claimant acknowledged his failure to consistently attend physical therapy "negatively affected" his recovery. Tr. p. 45. However, he testified that his right knee was "perfectly fine", and he had no problems with it by the time he graduated in 2017. *Id.* at p. 20. Claimant felt his knee was "strong and healthy" after physical therapy and a regimen of home exercises. *Id.* At p. 45.

3. After high school, Claimant began working, first as a carpet and duct technician for System Clean, then for Knife River, a construction company. He was a pipe layer for Knife River. When some Knife River executives spun off and formed a new company, Mountain Companies (Employer), Claimant went to work for Employer as a pipe layer in early 2021.

4. On March 9, 2022, Claimant was engaged in work activities for Employer when he fell into a seepage bed hole, ditch, or trench. The exact distance he fell is subject to a bit of ambiguity, but the height was sufficient to cause indisputable injury to his left knee in the form of torn ACL, torn medial meniscus, grade 2 MCL sprain, marrow edema, joint effusion, and mild chondrosis. The parties dispute whether the accident also injured Claimant's right knee.

5. Ultimately, on July 27, 2022, Claimant underwent surgery on his left knee to address his full thickness tear of his left ACL and medial meniscus.

6. The day after Claimant's left knee surgery, Claimant mentioned to a PA working with Roman Schwartsman, M.D., Claimant's surgeon, that his right knee also was painful and getting worse. Claimant told the PA that at the time of the work accident he felt some minor pain in his right knee, but because his left knee was much more painful, Claimant focused on his left knee during the pre-surgery treatment. Claimant noted with time the right knee pain grew worse, with periodic catching and locking.

7. While Claimant's left knee improved with therapy and time after the surgery, Claimant expressed increasing complaints with his right knee. He attributed his right knee pain to the industrial accident in question.

8. An MRI of Claimant's right knee showed a possible complex medial meniscus tear and a completely torn ACL.

9. In office notes dated 1/17/2023, Dr. Schwartsman opined the MRI findings "are consistent with the mechanism of injury reported by the patient for the reported industrial event of 03/10/2022 [sic, accident was 03/09/22]. Appearance on MRI is consistent with a subacute injury correlating well with the reported date of injury…. JE 27, p. 735.

10. Dr. Schwartsman recommended surgery for Claimant's right knee conditions.

11. At Claimant's February 8, 2023 appointment, Dr. Schwartsman wrote in his notes, "[c]ausation is felt to be reasonably attributable to the industrial event based on mechanisms described." Dr. Schwartsman again recommended surgery. *Id.* at 744.

12. Defendants have denied authorization for this surgery under Claimant's worker's compensation claim for his accident of March 9, 2022.

DISCUSSION AND FURTHER FINDINGS

13. 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 immediately after an injury and for a reasonable time thereafter.

14. Claimant must prove not only that he was injured, but also that his condition was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). 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). However, magic words are not necessary to show a doctor's opinion is 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).

15. Defendants are only obligated to provide such reasonable and necessary medical treatment if it is necessitated by the industrial accident. 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).

16. Claimant's argument in favor of causation for the recommended right knee surgery is simple and straightforward. Claimant fell into a hole, experienced significant pain in his left knee and initially minor pain in his right knee, treated his left knee surgically, and now wants surgery to correct the objective injuries in his right knee which stem from the accident in question. His surgeon, Dr. Schwartsman, opined that the mechanism of injury as described by Claimant is consistent with MRI findings in his right knee, the timing of his injury correlates with MRI findings, and Dr. Schwartsman specifically opined that causation was reasonably attributable to the work accident. His opinion stands uncontroverted by any other medical evidence in the record. Claimant has met his burden of proof on entitlement to medical benefits associated with his surgical treatment for his right knee.

17. Defendants' arguments against coverage are more circuitous and require a more detailed analysis. They base their denial on 'the totality of the medical record, conflicting Claimant statements, and "the transparency of medical reasoning." Absent is any reference to medical opinions or testimony supporting Defendants' position, as they have none. Instead, part of their argument is that Claimant has failed to produce medical testimony that supports a claim for compensation to a reasonable degree of medical probability, as they argue Dr. Schwartsman's opinion does not reach this applicable standard.

18. Defendants note that prior to July 28, 2022, some 144 days after the accident in question, the medical records "are devoid of evidence Claimant suffered any pain, discomfort, or restricted function in his right knee…."[1] Def. Brief, p. 2. They further point out the First Report of Injury only references a left knee injury.

19. Defendants point out that Claimant had right knee surgery in late 2016, tweaked the knee in February 2017, causing mild soreness, was discharged from therapy for chronic absences in March, and about that same time, his surgeon cleared him for full recovery without any permanent restrictions. However, Defendants note there was no follow-up MRI taken post surgery, nor any opinion from any physician formally declaring Claimant at MMI. They argue on these facts that there remains a question whether the ACL graft fully healed.

20. Defendants' next argument centers on the fact that Claimant initially lied about how he injured his left knee. He admitted at hearing that he first claimed he had twisted his knee stepping into a pothole instead of landing in a seepage ditch. He explained his reasoning

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[1] Positive arguments, that is arguments which affirmatively point to medical records or other documents in the record to support an argument, made without citing where in the record such supporting statement is located, will not be considered. JRP 11C. specifically addresses this topic, noting that [w]henever a party refers to evidence reflected in an exhibit, such reference must include a citation to the number and page of the exhibit. *** Whenever a brief does not contain the … support required by this rule it … may be stricken by the Commission on its own motion." Defendants also, when citing to an exhibit, cite only to the page number, and not the exhibit number. In the future, counsel is advised to cite to *both* the exhibit number or label, *and* the page number.

for fabricating this falsehood was to avoid the potential for getting in trouble and perhaps fired, for being in what he termed an "illegal" hole under OSHA regulations.[2]

21. Defendants cite to medical records from March 17, 2022, showing Claimant's right knee range of motion, flexion at 135 degrees compared to 89 degrees left, and extension 0 degrees right and -10 degrees left. Defendants also argue that in the dozen visits to physical therapy prior to his left knee surgery, Claimant made no complaints about his right knee, as evidenced by lack of notation in the records.

22. Also, in a medical record dated April 11, 2022, apparently Claimant's left and right knees were examined, with Claimant's left knee being "comparable to his right knee," with no pain at the time of examination, no swelling, and no loss of strength apparently in either knee. When Claimant saw Dr. Schwartsman for the first time on May 31, 2022, the doctor noted that Claimant's left knee showed a "soft endpoint with over 1 cm of excursion," while his right knee showed a "half cm of excursion with a firm endpoint." JE 27, p. 700. Dr. Schwartsman also found other differences between Claimant's knees on that visit, including left sided bruising, ecchymosis, swelling, tenderness and warmth to touch, whereas on Claimant's right knee no such conditions were present. Claimant also had a full range of motion for his right knee at that visit, in contrast to his left knee which was painful with a decreased ROM. Claimant's right knee was stable, left was not. *Id.*

23. Defendants acknowledge Claimant complained of right knee pain to Dr. Schwartsman after his left knee surgery on July 27, 2022, was complete. Dr. Schwartsman noted in his records of August 18, 2022, that it was likely that Claimant's right knee complaints were due to favoring his left leg, using a crutch which altered Claimant's body mechanics

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[2] Whether Claimant fell or jumped into the ditch, whether the ditch was 4 feet deep or 12 feet deep, or somewhere in between, and whether the ditch was or was not "illegal" is not material. Claimant was admittedly injured to some degree while in the course and scope of his job duties when he landed at the bottom of a hole of some depth.

on the right, leading to pain in the hamstring muscles. On that visit, Claimant was released to sedentary work duties.[3]

24. Defendants also highlight a notation in Surety's notes from October 21, 2022, where the adjuster noted that an employee at Dr. Schwartsman's office left the Surety a voice mail claiming the employee had spoken with Dr. Schwartsman about Claimant's right knee claim and supposedly Dr. Schwartsman told the employee that at that time he could not relate [Claimant's] right knee injury to the original date of injury.

25. After that double hearsay message was recorded in Surety's records, Claimant returned to Dr. Schwartsman on October 25, 2022, where Claimant continued to complain of tenderness in his right knee. Dr. Schwartsman's records record Claimant's history as having "twisted his knee while walking." JE 27, p. 720. Date of onset was date of industrial accident. However, Defendants note that by Claimant's visit on December 15 with Dr. Schwartsman, his history now included a new mechanism of injury – Claimant twisted his knee at work when he stumbled and fell; the fall being a "backward twisting fall" witnessed by several other co-workers. Dr. Schwartsman noted Claimant's worker's compensation claim did not include his right knee, and only his left knee was included in the claim. Claimant responded that his left knee hurt much more than his right knee initially but with the left knee approaching resolution, the right knee was more noticeable.

26. The MRI taken after this office visit included findings that were indicative of either a complex medial meniscus tear or the sequela of the prior partial meniscectomy, along with marrow edema and a torn ACL graft. Dr. Schwartsman now found Claimant's anterior

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[3] According to adjuster notes found at JE 2, p. 27, Claimant apparently tried unsuccessfully to get Dr. Schwartsman to revoke the sedentary work restrictions, and implement off work restrictions, as hunting season was fast approaching, and Claimant needed to get his license. Perhaps the implication was that Claimant would rather go hunting than go back to sedentary work. Or perhaps the insinuation is that Claimant was feeling well enough to go hunting, although what type of hunting was not developed.

drawer with a soft end point and over one centimeter excursion.

27. Defendants try to establish that the hole into which Claimant fell was not illegal. However, to do so they attempt to introduce what they call "rebuttal evidence" in the form of a certified plat of the subdivision where the accident occurred, including the seepage pit. Claimant objected to the exhibit's introduction and that objection is sustained. Defendants' Exhibit A to their brief will not be admitted or considered herein. The argument stemming from the Exhibit is stricken.

28. Defendants' arguments can be summarized as follows;

a. Claimant did not report right knee injury because Claimant did not injure his right knee in the accident. Medical records show Claimant's knee was stable, pain free, without bruising, instability, or other defect prior to Claimant's left knee surgery.

b. Claimant cannot be trusted, as he admittedly lied about the accident. Also, his story regarding the duration and severity of his right knee pain does not correlate with medical records. Medical records do not lie, but Claimant does.

c. Dr. Schwartsman based his opinions on Claimant's statements, incorrectly assuming them to be true. His medical records show Claimant did not demonstrate restricted movement in his right knee until early October, just after Surety declined to accept the right knee as part of his prior claim, and insisted he file a new claim, with a new investigation by Surety.

d. There is no reason for Claimant to report one injured knee and receive benefits for the injury while simultaneously not reporting a concurrent injury to anyone and seeking no medical treatment for months thereafter. Defendants argue this behavior is best explained by the fact that Claimant's right knee was not injured in the work accident, as proven by medical records showing that Claimant had full knee function without pain, swelling, loss of function, or any other symptoms.

e. At most, Claimant has demonstrated a mere "possibility" and not a "probability" of causation.

CAUSATION ANALYSIS

29. The thrust of Defendants' argument appears to be an attempt to persuade the Commission that Claimant has not made a *prima facie* showing of causation. They do so by trying to impeach Claimant to the extent that his subjective statements cannot be believed by his physicians or the Commission. If what he told Dr. Schwartsman cannot be believed *and* if Dr. Schwartsman relied on Claimant's untrustworthy assertions, then, as argued by Defendants, Dr. Schwartsman's opinion may be so likewise flawed it cannot be used by Claimant to support his argument for causation. After all, "the Commission is free to determine the weight to be given to the testimony of physicians." *Fife v. Home Depot, Inc.*, 151 Idaho 509, 514, 260 P.3d 1180, 1185 (2011).

30. Since Claimant has the burden of proving causation by medical opinion, if the only medical opinion presented in this case carries no weight, or only can support the concept that Claimant *possibly* but not *probably* injured his right knee in the industrial accident, then Claimant will have failed to meet his burden of proof on causation and his request for benefits associated with his right knee would be properly denied.

31. Certain elements of Claimant's testimony are concerning. His admitted lie regarding the mechanism of injury, and the dubious reason for the lie is worth noting. While OSHA may disallow workers to conduct their work in trenches of certain dimensions without adequate shoring, if indeed Claimant involuntarily fell into the trench (assuming without finding that the ditch would have met OSHA's requirements for shoring) and immediately got back out of it, it is objectively difficult to see that event as one where Claimant would fear retaliation from Employer for his actions.

32. The story of how Claimant got into the ditch and why he needed to lie about it does not add up. However, it is beyond dispute in this case that Claimant somehow landed in the bottom of the ditch and injured himself in doing so. Whether he fell, he jumped, or he lost his balance and jumped to keep from falling, is of no importance, since unless he jumped in order to intentionally injure himself, and there is no evidence or argument he did, his injury, which occurred when he landed in the bottom of the ditch, would be covered by the Act. Furthermore, there is no evidence in the record to rebut Claimant's version of how he injured himself as testified to at hearing, so he cannot be impeached on that aspect of the claim, as it is not inherently improbable.

33. Claimant's lack of objective findings for his right knee soon after the accident is interesting. There is no good explanation or evidence in the record for why Claimant would or would not be symptomatic at any point in time after he completely tore his ACL. No medical testimony exists to explain what Claimant should, or should not, have been feeling in the time leading up to his left knee surgery. Whether Claimant should have, or would have, had symptoms of a given nature at a given point in time after his right knee was injured might have been explained by a knowledgeable physician in deposition, but no depositions were taken. Claimant notes that even his admittedly injured left knee was often pain free, or minimally uncomfortable, after the accident and before his surgery. *See* JE 24, p. 599. Even his right knee, known to have a completely torn ACL and potentially a complex tear of his medial meniscus, only produced 2/10 discomfort. *See* JE 27, p. 733. Lack of subjective complaints does not rule out Claimant's assertion that he injured his right knee at the same time as he injured his left knee. Medical records do not impeach Claimant.

34. However, even assuming *arguendo* that Defendants' arguments of no early right knee symptoms, Claimant's inconsistent description of the accident, his loss of function occurring only after Surety denied his claim, and his "illogical" explanation for delayed notification of his right knee injury are taken as true, Dr. Schwartsman's opinion on causation

could only be discredited if, in forming his opinion on causation, he relied solely on Claimant's subjective history. But that did not happen here. Instead, Dr. Schwartsman relied on three factors when reaching his conclusion on causation. First, he found the mechanism of injury – landing from height on one's feet, with knees buckling on impact – could result in the type of injuries found on MRI. Second, the MRI did objectively show injury to Claimant's ACL (complete tear) and possibly a complex tear to his medial meniscus. Third, the injuries found on the MRI scan were subacute, appearing to be of an age consistent with the time frame in which Claimant's industrial accident occurred. Two of those three factors needed no input from Claimant. The one factor needing Claimant's input was not controverted. The MRI findings speak for themselves, and support Dr. Schwartsman's opinion that Claimant's industrial accident caused the findings shown on the MRI.

35. As previously noted, the fact that Claimant landed in the bottom of a ditch on his feet, wherein his knees buckled is undisputed. Claimant's right knee injuries are consistent with what might be expected as the result of this undisputed event, as evidenced by Claimant's left knee injuries and the medical testimony of Dr. Schwartsman. Since the remaining factors on causation did not require Claimant's input, Dr. Schwartsman's opinion was not based on impeached witness testimony, even assuming Claimant had been impeached.

36. As noted above, Claimant must provide medical testimony that supports his claim for compensation to a reasonable degree of medical probability. Dr. Schwartsman's opinion on causation is sufficient to establish a *prima facie* case for causation and Claimant has met his burden of proof on causation.

37. Once Claimant has established a *prima facie* case on the issue of causation, Defendants bear the burden of disproving that case with admissible evidence of sufficient weight to overcome Claimant's showing. *See generally, Jordan v. Walmart Associates, Inc.*, 173 Idaho 115, 539 P.3d 593 (2023). In the present case, Defendants have no medical expert testimony and

did not depose Dr. Schwartsman. Instead, they chose to attempt to discredit and impeach Claimant to the extent that Dr. Schwartsman's alleged reliance on untrustworthy information from Claimant would so taint the doctor's opinion that the Commission would afford such opinion no weight. In such case, Claimant would be left unable to carry his burden of proof on causation using medical evidence, as required by the Act and supporting cases.

38. Defendants' attempt at impeachment of Dr. Schwartsman's opinion failed, and his opinion was afforded weight. No alternative causes for Claimant's right knee condition were established. Defendants' only argument is an insinuation that because Claimant never obtained a post-surgical MRI of his right knee, maybe it never healed. Of course, such a theory would undermine Defendants' argument that if Claimant hurt his right knee in the work accident in question, he would have necessarily been symptomatic. In any event, there is no admissible evidence to support Defendants' vague arguments and inuendo.

39. While Defendants' arguments set out a string of talking points critical of Claimant, they have failed to present a cohesive basis for denying Claimant the medical treatment he seeks. They have no medical testimony to put into play against the weight of Dr. Schwartsman's opinions; his opinion stands unopposed after Defendants' efforts to discredit it failed. Defendants' other speculative and uncorroborated criticisms of Claimant's testimony and argument cannot overcome the validity of Dr. Schwartsman's opinion on causation.

40. When the record as a whole is examined, as required by cases such as *Chavez v. Stokes,* 158 Idaho 793, 353 P.3d 414 (2015), the weight of the evidence supports Claimant's claim on causation and the entitlement of additional medical care associated with his industrially-related right knee.

41. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence that the condition for which he seeks medical benefits was caused by his industrial accident of March 9, 2022.

42. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence his entitlement to ongoing medical treatment for his right knee as a result of his industrial accident of March 9, 2022.

43. Issues including, but not necessarily limited to, permanent partial impairment, permanent disability in excess of impairment, and attorney fees are hereby reserved.

CONCLUSIONS OF LAW

1. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence that the right knee condition for which he seeks medical benefits was caused by his industrial accident of March 9, 2022.

2. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence his entitlement to ongoing medical treatment for his right knee as a result of his industrial accident of March 9, 2022.

3. Issues including, but not necessarily limited to, permanent partial impairment, permanent disability in excess of impairment, and attorney fees are hereby reserved.

RECOMMENDATION

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

DATED this 14th day of May, 2024.

INDUSTRIAL COMMISSION

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

TAYLOR MOSSMAN-FLETCHER
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARRETT W. BROOKS,

Claimant,

v.

MOUNTAIN COMPANIES, LLC,

Employer,

and

BENCHMARK INSURANCE CO.,

Surety,

Defendants.

IC 2022-007264

ORDER

FILED
MAY 24 2024
INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence that the right knee condition for which he seeks medical benefits was caused by his industrial accident of March 9, 2022.

2. When the totality of the admissible evidence is considered, Claimant has established by a preponderance of the evidence his entitlement to ongoing medical treatment for his right knee as a result of his industrial accident of March 9, 2022.

3. Issues including, but not necessarily limited to, permanent partial impairment, permanent disability in excess of impairment, and attorney fees are hereby reserved.

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

DATED this the 24th day of May, 2024.

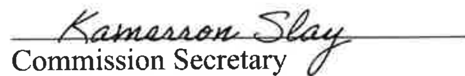
INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:



Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2024, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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