

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WESLEY J. FELBER,)
)
 Claimant,)
)
 v.)
)
 MOTIVE POWER,)
)
 Employer,)
)
 and)
)
 ZURICH NORTH AMERICAN)
 INSURANCE COMPANY,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

IC 2003-014732

**ORDER DENYING
RECONSIDERATION**

Filed April 26, 2007

On February 20, 2007, Claimant filed a Motion for Reconsideration of the Commission’s January 26, 2007, decision in the above-referenced case. Claimant contends he had inadequate representation by his attorney and a personality conflict with the Referee. He argues that he was not given the same courtesies at hearing as the other parties. Defendants Employer and Surety respond that not only is Claimant’s motion untimely, but also that it lacks any legal argument warranting reconsideration. Defendants also contend that the Commission’s decision was based on substantial and competent evidence and, therefore, Claimant’s motion should be denied. Defendant ISIF joins in Employer/Surety’s response.

Idaho Code § 72-718 states that a decision of the Commission shall be final unless a motion for reconsideration or rehearing is made within twenty (20) days from the date of filing

of the decision. Although Claimant's motion did not reach the Commission to be filed until February 20, 2007, the postmark stamp on the envelope is dated February 14. Defendants argue that Claimant's motion is untimely because it should have been filed with the Commission no later than February 15. The Idaho Supreme Court addressed this very issue in *Wright v. Willer*.

[Wright] argues that despite the language which states that the motions to set aside the award and to reconsider must be *made* within 20 days; these motions are not valid unless they have been *filed* within 20 days. In other words, 'move' and 'made' are synonymous with 'file.' We disagree. Other statutes within the Idaho Code specifically refer to the terms 'file' and 'move' as separate concepts. [] Applying this rule to I.C. § 72-718, we hold that the terms 'file' and 'make' as used therein have different meanings. In the present case, Willer placed the document in the mail on February 19, twenty days after the commission's decision. At that time, the motion was 'made.'

111 Idaho 474, 476, 725 P.2d 179, 181 (1986). In accordance with *Wright*, Claimant's motion was "made" on the date of the February 14 postmark. Therefore, Claimant's motion is timely.

The first issue Claimant cites for reconsideration is inadequate representation by his attorney. Such matters are handled through a complaint process with the Idaho State Bar and, as such, are outside the Commission's jurisdiction. Therefore, the Commission cannot consider Claimant's argument regarding this matter.

Next, Claimant asserts a personality conflict with the Referee. However, Claimant fails to offer evidence of how a perceived personality conflict with the Referee negatively affected the outcome of his case beyond the unsupported assertion that the Referee's "attitude toward opposing counsel was much friendlier and cooperative than it was toward my counsel and myself." The Commission carefully examined and weighed the evidence and arguments presented by the parties before rendering its original decision in this matter. The Commission's decision is fully supported by the record.

Finally, Claimant alleges that, during the hearing, other witnesses who testified were “frequently allowed to refer back to their notes, instead of being expected to recite their testimony, I was allowed no such courtesy.” Claimant does not cite to an instance in the record where he was directed against using notes and the Commission is unable to locate such an event. Therefore, the Commission finds Claimant’s allegations regarding this matter without merit.

Accordingly, Claimant’s Motion for Reconsideration should be, and is hereby, DENIED.

DATED this 26th day of April, 2007.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2007, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States mail upon each of the following persons:

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/s/ _____