

A motion for reconsideration must be properly supported by a recitation of the factual findings or legal conclusions with which the moving party takes issue. On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

I

IDAHO CODE §§ 72-318 AND 72-602

Claimant first contends that the Commission erred by failing to make findings of fact and conclusions of law on issues noticed for hearing: specifically, on Defendants' alleged violations of Idaho Code §§ 72-318 and 72-602. According to Claimant, these issues were "clearly ... before the Industrial Commission at all stages" of the proceeding, and were listed in the Amended Notice of Hearing, filed September 23, 2008. Defendants respond that no findings of fact and conclusions of law are necessary with regard to Idaho Code § 72-318, as it has no application in this case, and that Idaho Code § 72-602 ceased to be relevant when Defendants withdrew their notice defense at hearing.

Idaho Code § 72-318 prohibits an agreement, contract, or device designed to relieve an employer of its liability under Idaho's workers' compensation law. Idaho Code § 72-602(1) requires an employer to file a notice of injury with the Commission within ten days of the occurrence of a workplace injury. Failure to comply with either section is potentially a misdemeanor.

In the Amended Notice of Hearing, there were five issues listed. These were:

1. Whether the notice limitations set forth in Idaho Code § 72-701 through § 72-706 have

been met, and whether these limitations are tolled pursuant to Idaho Code § 72-604, including more specifically:

- a. Whether Employer failed to file a notice of injury and related reports (Idaho Code § 72-602);
 - b. Whether Employer failed to file the reports required to toll the statute of limitations (Idaho Code § 72-604);
 - c. Whether Employer had notice of the claim as indicated by the reports and records prepared and submitted by Employer to the disability carrier, MetLife, as shown by the exhibits attached to the complaint filed November 21, 2006 (Idaho Code §§ 72-601, 72-602, and 72-604);
 - d. Whether Employer had notice but chose to treat this claim as non-industrial and failed to file required notice with the Industrial Commission or pay medical and temporary income benefits (Idaho Code §§ 72-318, 72-701); and
 - e. Whether Employer terminated Claimant from her employment on October 11, 2006 and then had Claimant fill out the ATK CCI/Speer Illness/Injury Report on October 19, 2006 (Idaho Code § 72-318);
2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;
 3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
 4. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);

- c. Permanent partial impairment (PPI);
 - d. Retraining;
 - e. Permanent partial disability (PPD); and
 - f. Attorney fees; and
5. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

At hearing on October 15, 2008, the parties modified the issues. Asked by the Referee if the issues in the Amended Notice of Hearing were correct, Claimant's attorney replied, "They're correct as far as I know. Unless there's — Mr. Stromberg had indicated to me earlier he might stipulate to some things. But I'll let him recite that." Tr. 9-10. Defense counsel then said, "Actually, we're withdrawing our notice defense ... we're not going to claim that she didn't give us timely notice. We're not going to claim that there's a statute of limitations issue." Tr. 10. Claimant's attorney confirmed the withdrawal and said, "With that ... the recitation and the amended notice of hearing cover the issues." Tr. 10. Claimant's attorney failed to preserve the subparts of the notice issue as separate issues, either expressly to the Referee, or by implication in opening and closing statements. (Neither attorney gave opening or closing statements at hearing.) Claimant also failed to list the issues in her post-hearing opening brief: rather than conduct an issue-by-issue analysis of the case, Claimant summarized the evidence presented.

Defendants did list the issues agreed upon at hearing in their post-hearing brief; neither the notice issue nor its subparts were included. Claimant responded by listing the issues in her reply brief, including the withdrawn notice issue. Claimant argued that Defendants violated Idaho Code § 72-318 by filing Claimant's injury claim under her short-term disability policy rather than workers' compensation, and that Defendants violated Idaho Code § 72-602 by failing

to timely file the notice of injury with the Commission.¹ Claimant insists that the Commission make findings on these issues, and that Defendants be charged with misdemeanors.²

It is the obligation of the parties to indicate what the disputed issues are for hearing. *See Phinney v. Shoshone Medical Center*, 131 Idaho 529, 532, 960 P.2d 1258, 1261 (1998). The Commission cannot decide issues that are not before it. At hearing in this case, the parties indicated that the notice issue was being withdrawn. Claimant did nothing to preserve the subparts of the notice issue, either at hearing or in her opening brief. To the extent that she argued Idaho Code §§ 72-318 and 72-602 in her opening brief, it was in relation to attorney fees. Claimant may not argue new issues in her reply brief, after Defendants no longer have the opportunity to respond. The reply brief affords Claimant the opportunity to rebut Defendants' arguments, not to proffer new — or withdrawn — issues.

Whether Defendants violated Idaho Code § 72-318 was not an issue noticed *independent* of the notice issue. Neither was Defendants' alleged violation of Idaho Code § 72-602. The Commission does not have the obligation or the authority to decide issues that are not before it. We therefore decline to make the new findings of fact and conclusions of law that Claimant

¹ We disagree with Claimant's interpretation of Idaho Code § 72-318 in reference to this case. Defendants did not deny their obligation to provide workers' compensation benefits to entitled workers. They did not enter into an agreement or contract to circumvent workers' compensation law, or implement a design or scheme to avoid their responsibilities to injured workers. Directly following Claimant's accident, Defendants believed — based on representations made by Claimant herself — that Claimant's injury was related to a chronic condition unrelated to her work. Later on, Defendants contested Claimant's claim on the grounds that her condition was not work-related. Claimant's short-term disability policy was not intended to be a substitute for workers' compensation; Defendants have not tried to circumvent the system. The issue in this case is whether Claimant's condition falls under the purview of the Workers' Compensation Act; Defendants certainly have the right to contest that, given the conflicting evidence.

² Defendants argue that the Commission does not have the authority to either prosecute or adjudicate misdemeanors. We agree. The authority to prosecute misdemeanors arising under the workers' compensation act lies with the Idaho attorney general. Idaho Code § 72-518(2). The authority to adjudicate criminal matters rests with the district court. Idaho Code § 1-701. The Commission is limited in power and authority to that granted to it by the Legislature. *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 212, 998 P.2d 1122, 1125 (2000). The Legislature has not granted the Commission authority to hear and decide criminal matters.

requests.³

II

RETRAINING

Claimant objects to the Commission's finding that she abandoned the issue of retraining. She argues that she discussed the issue in her post-hearing briefs when she detailed a vocational report that mentioned, among other things, retraining. Claimant believes she is entitled to three months of clerical retraining. Defendants reply that Claimant's citations to the vocational report are not enough to carry Claimant's burden of proof. Defendants also argue that the issue of retraining was mooted by the Commission's finding that Claimant suffered no permanent impairment, and thus no permanent disability, as a result of her industrial injury.

Under Idaho Code § 72-450, the Commission may order retraining for a "permanently disabled employee" who is "receptive to and in need of retraining in another field ... in order to restore earning capacity." Thus, in order to qualify for retraining, a claimant must show: 1) that she is permanently disabled, 2) that she is receptive to retraining, 3) that she is in need of retraining, and 4) that such retraining would restore her earning capacity.

The record is bereft of such a showing. Claimant represented that she was "never referred ... for retraining" and that a vocational consultant suggested retraining. Such fleeting mentions of an issue do not rise to an attempt to carry the burden of proof. Claimant failed to show that she is receptive to retraining, that she needed retraining, or that retraining would restore her earning capacity.⁴ For that reason, the issue of retraining was properly deemed abandoned.

³ Because Claimant argued Idaho Code §§ 72-318 and 72-602 in the context of attorney fees, there were findings made in that regard. The decision explicitly noted that "Defendants withdrew their notice and statute of limitations defenses at the outset of the hearing. Findings on these issues are included only insofar as necessary to address the attorney fee issue." *Troutwine v. Alliant Techsystems, Inc.*, 2009 IIC 0248 (May 29, 2009). See Findings 37-43 and 67-69.

⁴ Defendants are correct that Claimant's failure to prove permanent disability rendered the issue of retraining moot.

III

ADDITIONAL ISSUES

Claimant challenges the Commission's findings and conclusions on the issues of permanent impairment, permanent disability, medical care, temporary income benefits, and attorney fees. Claimant's evidence and arguments on these issues have already been considered. The Commission conducted a thorough review of the record in this case both prior to the decision and again after Claimant's motion for reconsideration. The substantial, competent evidence supports the decision as it stands. For that reason, Claimant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this _27th day of November, 2009.

INDUSTRIAL COMMISSION

/s/ R.D. Maynard, Chairman

/s/ Thomas E. Limbaugh, Commissioner

/s/ Thomas P. Baskin, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of November, 2009, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

JOHN R TAIT
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eb/cjh

/s/ _____