

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

LYNNARD W. BITTICK, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 JESS HENNIS, INC., )  
 Employer, )  
 )  
 and )  
 )  
 )  
 STATE INSURANCE FUND, )  
 Surety, )  
 )  
 and )  
 )  
 STATE OF IDAHO, INDUSTRIAL )  
 SPECIAL INDEMNITY FUND, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2005-524817**

**ORDER DENYING  
RECONSIDERATION**

filed September 23, 2010

On July 27, 2010, Defendant Industrial Special Indemnity Fund (hereinafter, "ISIF") filed a motion for reconsideration of the Commission's Order dated July 7, 2010. Defendants timely filed a response to ISIF's motion on August 5, 2010. Claimant did not respond to the motion for reconsideration. ISIF did not file a reply brief in support of its motion for reconsideration.

The ISIF requests that the Commission reconsider its decision to retain jurisdiction over this matter for the purpose of receiving additional evidence on the issue of *Carey* apportionment. In the underlying case, the Commission found that Claimant was totally and permanently disabled. However, the Commission retained jurisdiction to consider further evidence relating to apportionment under the *Carey* formula, because the parties did not present sufficient evidence on the matter. The ISIF argues that the Commission's decision to retain jurisdiction does not

promote judicial economy, as apportionment under the *Carey* formula was a noticed issue at hearing, and is an “unrequested bifurcation” of the issues. Further, ISIF argues that parties are expected and required to be prepared at hearing to support their positions. In this case, the ISIF contends that it does not have the burden of proof on liability as the apportionment of liability with the Employer/Surety. As such, the ISIF finds that the Commission’s decision permits Employer/Surety to fail to produce impairment ratings at the time of hearing, as required for a *Carey* apportionment, and then subsequently litigate the matter. ISIF argues that this approach is contrary to the Commission’s investigatory authority under Idaho Code § 72-714(3) and *Hartman v. Double L. Mfg*, 144 Idaho 456, 111 P.3d 141 (2005).

In response, Employer/Surety contend that the Commission’s retention of jurisdiction to determine the *Carey* apportionment is in accordance with *Hartman v. Double L. Mfg*, 144 Idaho 456, 111 P.3d 141 (2005), and the Commission’s authority to enhance the likelihood of equitable and just results. Employer/Surety contends that all Defendants in this case, including the ISIF, argued at the hearing that Claimant was totally and permanently disabled solely as a result of preexisting conditions prior to the industrial accident of October 31, 2005. However, Employer/Surety presents that Claimant successfully argued that he was totally and permanently disabled as a result of the 2005 industrial accident *combined with* his preexisting impairments. Thus, it is appropriate for the Commission to request this additional information regarding Claimant’s preexisting impairments. Employer requests that the ISIF’s motion for reconsideration be denied.

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.

In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration. J.R.P. 3(f) states that a motion to reconsider “shall be supported by a brief filed with the motion.” Generally, greater leniency is afforded to *pro se* claimants. However, “it is axiomatic that a claimant 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. Davison 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)).

In this case, the Commission agrees with the ISIF’s contention that this proceeding has not lent itself to judicial economy and efficiency. The Commission concurs with ISIF’s position on the importance of conserving judicial resources and promoting prompt resolutions to litigation. Further, the Commission urges parties to provide the appropriate evidence at hearing to support their cases. Unfortunately, the parties in this case did not assist the Commission in adducing evidence that would have allowed expeditious resolution of this matter. Had the Commission been persuaded by the ISIF’s and Employer/Surety’s argument that Claimant was totally and permanently disabled due to his industrial accident alone, it would have been

unnecessary to utilize the *Carey* formula for apportionment. Unfortunately, the parties were not prepared for the Commission to accept Claimant's argument that Claimant was totally and permanently disabled due to his industrial accident combined with his preexisting impairments with specific impairment ratings on the preexisting impairment ratings for potential *Carey* apportionment.

The circumstances of this case warrant a closer inspection by the Commission. The Court's decision in *Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005) supports this outcome. In *Hartman*, the Court reminded the parties of the Commission's inherent authority to make inquiries and investigations as may be necessary, particularly to enhance the likelihood of equitable and just results. *Id.* First, the Commission was persuaded by Claimant's arguments that he was totally and permanently disabled as a result of the 2005 accident *and* his preexisting impairments. Second, the parties agree that the Commission's conclusion on Claimant's total and permanent disability as a result of the 2005 accident and his preexisting impairments warrant *Carey* formula analysis. Employer/Surety and the ISIF did not prepare for the contingency that the Commission would be persuaded by Claimant's arguments and did not prepare specific impairment ratings for Claimant's preexisting conditions. This is unfortunate for Defendants because the Commission finds that the preexisting conditions do matter in this case. It may also be said that Claimant did not fully prepare for the possibility that the Commission would accept his arguments, because neither did he submit specific impairment ratings for his preexisting conditions. However, it is acknowledged that the Commission does not have enough information in the record concerning Claimant's preexisting conditions. In the specific context of this case, the Commission finds it inappropriate to simply ignore the *Carey*

apportionment issue when it has determined that there is ISIF liability in the matter, because the parties did not provide adequate evidence on the matter.

The Commission is likewise disenchanted with the prospect of prolonging the litigation of these matters. The appropriate remedy in this case is for the parties to promptly submit information regarding preexisting impairments for the *Carey* formula, rather than accept Claimant's argument for ISIF liability without calculating the *Carey* formula. Such an approach would make Claimant's victory a pyrrhic one and would not resolve how the ISIF and Employer should share responsibility for Claimant's total and permanent disability.

The ISIF is understandably disappointed that the Commission was not persuaded by their arguments at hearing. The Commission's conclusion means that the ISIF has responsibility for compensating Claimant for her total and permanent disability. It behooves the parties to identify the preexisting impairment amounts to determine how Employer and the ISIF share responsibility in this matter.

Based upon the foregoing reasons, ISIF's Motion for Reconsideration should be, and is hereby, **DENIED**.

IT IS SO ORDERED.

DATED this 23rd day of September, 2010.

INDUSTRIAL COMMISSION

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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 this \_\_23rd\_\_ day of \_September\_\_\_\_2010, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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cs-m/cjh

\_\_\_\_\_/s/\_\_\_\_\_